Recognition of Lesbian Couples: An Inalienable Right

Irène Demczuk
Michèle Caron
Ruth Rose
Lyne Bouchard

The research for and publication of this study have been funded by the Policy Research Fund of Status of Women Canada. This document contains the opinions of its authors and does not necessarily reflect the official policy of Status of Women Canada or the Government of Canada.

January 2002

Status of Women Canada is committed to ensuring that all research produced through the Policy Research Fund adheres to high methodological, ethical and professional standards. Specialists in the field anonymously review each paper and provide comments on:

- the accuracy, completeness and timeliness of the information presented;
- the extent to which the methodology used and the data collected support the analysis and recommendations; and
- the original contribution the report would make to existing work on this subject, and its usefulness to equality-seeking organizations, advocacy communities, government policy makers, researchers and other target audiences.

Status of Women Canada thanks those who contribute to this peer-review process.

Canadian Cataloguing in Publication Data

Main entry under title : Recognition of lesbian couples [computer file]: an inalienable right

Issued also in French under title: La reconnaissance des couples de lesbiennes.

Includes bibliographical references.
Issued also in print format.
Mode of access: WWW site of Status of Women Canada.

ISBN 0-662-31281-3
Cat. No. SW21-86/2001E

1. Lesbians – Legal status, laws, etc. – Canada.
2. Homosexuality – Legal status, laws, etc. – Canada.
3. Social security – Canada.
4. Women – Canada – Economic conditions.

I. Demczuk, Irène.
II. Status of Women Canada.

KE4399.R42 2001 346.' 7101' 3 C2001-980343-5

Project Manager: Vesna Radulovic, Status of Women Canada
Publishing Co-ordinator: Mary Trafford and Cathy Hallessey, Status of Women Canada
Editing and Layout: PMF Editorial Services Inc. / PMF Services de rédaction inc.
Translation: John Price
Comparative Read: Jacqueline Elton
Translation Co-ordinator: Monique Lefebvre, Status of Women Canada
Translation Quality Control: Ruth Rose

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

Research Director and Researcher

Irène Demczuk, Sociologist – Independent Researcher (Montréal)

Researchers

Michèle Caron, Professor of Law, University of Moncton

Ruth Rose, Professor of Economics, University of Quebec at Montréal

Administrative Director and Person in Charge of Consultations

Lyne Bouchard, Community Worker and Educator at the Coopérative Convergence, Ottawa

Research Assistant

Annick Gariépy, Law Student, Faculty of Law, University of Montréal

Linguistic Revision

Denise Veilleux

Formatting

Marie-Josée Prince

BIOGRAPHICAL NOTES

Lyne Bouchard works with la Coopérative Convergence, a consulting firm involved in education, research and community and social action. She has devoted the last 15 years to Francophone Ontario by helping found the Collective lesbienne de l'Ontario, the Table féministe francophone de concertation provinciale and la Coopérative Convergence among other organizations. Lyne was responsible for the administrative direction of this research project and was jointly responsible for the consultations conducted with lesbian organizations.

Michèle L. Caron is a professor in the Faculty of Law at the University of Moncton. She has been a member of the National Legal Committee of the Women's Legal Education and Action Fund since 1995. Michèle was married for more than 20 years, has no children and for the last nine years has lived in a conjugal relationship with Noëlla Richard, one of the first lesbian activists. Michèle was responsible for the legal research for this publication. She drafted most of the sections on private family law, the right to equality and the critical analysis of models for the legal recognition of same-sex couples.

Sociologist **Irène Demczuk** is also a consultant and teacher with the Quebec Department of Health and Social Services. She directed the publication of the collection *Des droits à reconnaître: les lesbiennes face à la discrimination* published by éditions du remue-ménage (honourable mention for the Laura Jamieson Prize, CRIAW, 1998). With Frank W. Remiggi, she co-edited *Sortir de l'ombre: histoires des communautés lesbienne et gaie de Montréal* (VLB éditeur, 1998). She is a co-founder and director of the Coalition québécoise pour la reconnaissance des conjoints et conjointes de même sexe, where she represents the Fédération des femmes du Québec. Irene directed the research for this publication and also did a large part of the sections on the consultations, models for the legal recognition of same-sex couples elsewhere in the western world, and the feminist critique of the inclusion of these couples in family law.

Ruth Rose is a professor of Economics at the University of Quebec in Montréal. She is a founding member of Relais-femmes and has devoted most of her professional life to research and action with and for women's groups. In 1999, she was awarded the Idola St-Jean Prize by the Fédération des femmes du Québec for [TRANSLATION] "her outstanding contribution to the cause of women". For this publication, Ruth wrote the chapter and sections on the economic effects of including lesbian couples and their families in Canadian income-security and tax programs as well as the feminist critique of these issues.

ABSTRACT

This report provides a critical analysis of incrementalist strategy and the formal equality approach as applied to the legal recognition of same-sex couples in Canada. This analysis is based on an examination of the evolution of Canadian law, an overview of the various models for the legal recognition of same-sex couples adopted elsewhere in the world as well as a survey of the expectations and needs expressed by lesbian groups in Quebec and Francophone Ontario. The study also attempts to determine the financial impact, whether positive or negative, of including lesbian couples in Canada's income-security and tax programs. Starting from a feminist and multidisciplinary point of view, the research draws its methodology from the three disciplines of law, economics and sociology. The study concludes by suggesting principles and approaches for reform that go beyond merely extending to same-sex couples the rights and obligations associated with marriage and "common-law" or *de facto* relationships. It proposes a complete rethinking of conjugal regimes – in both private and public law – so that they can be adjusted to reflect the diversity of domestic relationships and the fluidity of conjugal and family realities that mark Canadian society today.

TABLE OF CONTENTS

LIST OF ABBREVIATIONS AND ACRONYMS

CDPQ	Commission des droits de la personne du Québec
CPP	Canada Pension Plan
CRIAW	Canadian Research Institute for the Advancement of Women
CSFQ	Conseil du statut de la femme du Québec
EGALE	Equality for Gays and Lesbians Everywhere
GIS	Guaranteed Income Supplement
GST	Goods and Services Tax
LEAF	Women's Legal Education and Action Fund
NCW	National Council of Welfare
OASP	Old Age Security Pension
PWA	Parental Wage Assistance (APPORT ou Aide aux parents pour leurs revenus du travail)
QPP	Quebec Pension Plan
QST	Quebec Sales Tax
RPP	Registered Pension Plan
RRSP	Registered Retirement Savings Plan
SA	Spouse's allowance

GLOSSARY

Gay: describes a man who has feelings of affection and attraction, both emotionally and physically, toward other men.
(Source: Government of Canada, *The Journey Begins: so exactly what is gender and sexual identity?* Ottawa, Health Canada, May 1998, p. 5)

Heterosexism: heterosexism is an ideology that attempts to promote, through social institutions, the superiority of heterosexuality as a relational model. Heterosexist discourse and practices create the illusion that everyone is heterosexual by suppressing the actual reality of sexual orientations. Heterosexism assumes that it is more normal, moral or acceptable to be heterosexual than to be gay, lesbian or bisexual. Like racism or sexism and other forms of oppression, heterosexism gives privileges to the dominant group (heterosexuals) and tends to deprive sexual minorities of the most fundamental human rights.
(Source: definition based on Irène Demczuk. "Introduction", *Des droits à reconnaître : les lesbiennes face à la discrimination*, Montréal, les Éditions du remue-ménage, 1998.)

Heterosexual: describes a person who has feelings of affection and attraction, both emotionally and physically, toward people of the opposite gender.
(Source: Government of Canada, *The Journey Begins: so exactly what is gender and sexual identity?* Ottawa, Health Canada, May 1998, p. 5)

Homophobia: homophobia refers to a feeling of fear expressed toward homosexuals and more generally persons whose appearance or conduct departs from the norms of femininity and virility. Contempt, disgust, prejudice and hatred targeting homosexuals grow out of this fear. Homophobia is to some extent an aggressive reaction of rejection caused by this fear of emotional relations between men or between women, whether they are sexual or not.
(Source: definition based on the following two documents: Irène Demczuk. "Introduction", *Des droits à reconnaître : les lesbiennes face à la discrimination*, Montréal, les Éditions du remue-ménage, 1998; and Daniel Walzer-Lang, "*L'homophobie: la face cachée du masculin*" in D. Walzer-Lang, P. Dutey and M. Dorais (eds.), *La peur de l'autre en soi: du sexisme à l'homophobie*, Montréal, VLB éditeur, 1994)

Homosexual: describes a person who has feelings of affection and attraction, both emotionally and physically, toward people or persons of the same gender.
(Source: Government of Canada, *The Journey Begins: so exactly what is gender and sexual identity?* Ottawa, Health Canada, May 1998, p. 5)

Lesbian: describes a woman who has feelings of affection and attraction, both emotionally and physically, toward women.
(Source: Government du Canada, *The Journey Begins: so exactly what is gender and sexual identity?* Ottawa, Health Canada, May 1998, p. 5)

Sexual orientation: is defined in terms of the gender (or genders) of the people we have feelings of attraction and affection toward, both emotionally and physically. This is an important part of our total self-identity, how we see ourselves and how others see us. (Source: definition based on Government of Canada, *The Journey Begins: so exactly what is gender and sexual identity?* Ottawa, Health Canada, May 1998, p. 4)

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 *The Impact of Relationship Recognition on Lesbian Women in Canada: Still Separate and Only Somewhat "Equivalent"* by Kathleen A. Lahey.

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

ACKNOWLEDGMENTS

We would like to thank Status of Women Canada for choosing this research topic and funding this study. We are well aware that, even today, such choices can cause public controversy. Special thanks to Annick Gariépy, student in the Faculty of Law at the University of Montréal, for her painstaking compilation of material and her bubbling enthusiasm. We also wish to express our thanks to Denise Veilleux, translator, for her linguistic revision of the document and her exemplary patience as well as to Marie-Josée Prince for the energy she devoted to inputting the corrections and formatting the document. Finally, we wish to express our warm thanks to those who took part in the consultations in Quebec and in Francophone Ontario. Thank you for sharing your inspiring thoughts, your doubts and your hopes with us.

EXECUTIVE SUMMARY

Over the last 40 years, the right to equality for lesbians has witnessed a number of remarkable developments in Canada. The last four decades have in fact been marked first by the decriminalization of sexual practices associated with homosexuality, then by the inclusion of sexual orientation as a prohibited ground of discrimination in human rights legislation and, finally, by the enactment of legislation designed to give legal status to same-sex couples in some provinces and at the federal level.

Without wishing to minimize the importance of these breakthroughs, we must observe that they have for the most part been the result of legal challenges rather than the expression of any political will on the part of the federal and provincial governments to systematically eliminate discrimination. Even today, lesbian couples and their families have to contend with situations of stigmatization and differences in treatment in both private and public law in all the provinces. In this regard, lesbians remain one of the last groups of Canadian women who do not enjoy legal equality.

Starting from this observation, our research report has two objectives. First, it offers a critical analysis of the incrementalist strategy and the formal equality approach as they are applied to the legal recognition of same-sex couples in Canada. This analysis is based on an examination of the development of Canadian law as well as on the expectations and needs expressed by lesbian groups in Quebec and Francophone Ontario. The consultations with lesbian rights advocacy organizations in both provinces brought out very clearly the gap that exists between the attainment of equality rights for same-sex couples and the possibility of exercising these rights concretely without any risk of prejudice. A declaration of one's status as a couple does not have the same resonance or the same consequences for same-sex couples as it does for opposite-sex couples. To this day, most lesbian couples still hide their sexual orientation and their conjugal situation, especially in the workplace, in order to protect themselves against the negative reactions of those around them. In order to achieve substantive equality, it is therefore important to be concerned with the barriers that prevent lesbians and gays from fully enjoying the rights and freedoms conferred on all the citizens of this country.

A typology of the various laws that offer legal recognition to same-sex couples elsewhere in the world completes this analysis. Ten countries to date either have implemented formulas for the voluntary registration of same-sex couples or give automatic recognition to their common-law partnerships. The report describes these different models of registered partnership, some of which give same-sex couples rights and obligations equivalent to those conferred on married persons, and others of which provide a different form of legal status. The research offers an analysis of the approaches to equality that have influenced the development of these models as well as their underlying principles. This analysis contributes to the reflection on how to eliminate the discrimination that persists against same-sex couples and their families in Canada.

Recognition of spousal status has not only legal consequences but also economic ones. The second objective of this report is therefore to assess the financial impact, both positive and

negative, of including lesbian couples in Canada's income-security and tax programs. Because they are women and more likely to bear the financial costs associated with the presence of children, lesbians depend on public income-security programs to a greater extent than gays. Will the choice to seek legal recognition as a couple be influenced by the balance of monetary gains and losses resulting from participation in these programs? How can these programs be revised to ensure that they meet the need for financial autonomy on the part of lesbians as well as of all women? In addition to assessing the main economic effects of legal recognition of spousal status, the study also takes a critical look at the discrepancy between the stated objectives of these programs and their concrete results. It also questions the use of conjugality as a criterion for eligibility for these programs and offers suggestions for reform that will ensure that a decision to create a relationship is based on an emotional and moral commitment between partners rather than on economic considerations.

At the end of this study, the authors make 13 recommendations that call for a three-step strategy on the part of federal and provincial governments. These recommendations are based on principles such as the equality of the sexes and of persons with different sexual orientations, equity among couples and households, as well as a better redistribution of collective wealth from the standpoint of social solidarity. In order to resolve the problems of discrimination faced by lesbian couples, it is important first of all to eliminate from Canadian laws any distinction based on the sex of the partners in determining eligibility for existing forms of conjugal status and the provisions relating to filiation. Once this step has been taken, the report calls for a reform of the legal framework of conjugality outside marriage, whether heterosexual or homosexual, a reform which would respect freedom of choice as well as the autonomy of the partners and the protection of vulnerable persons. To this purpose, the report recommends the establishment of a Commission of Inquiry with a mandate to conduct an in-depth analysis of the objectives of the income-security and tax programs as well as the way in which the reforms will treat conjugality.

The attainment of real equality for same-sex couples cannot be separated from an overall revamping of both private and public family law in order to adapt them to the diversity of domestic relationships and the fluidity of conjugal and family status that mark Canadian society today.

INTRODUCTION

In 1967, over 30 years ago now, Alice B. Toklas, the lifelong companion of the American author Gertrude Stein, died in Paris in extreme poverty. However, several decades earlier, she and Gertrude had been described as the "most famous lesbian couple in the world" (Russel, 1995, p. 29). Outstanding hostess and "companion and collaborator" of Gertrude Stein, Alice acted in turn as secretary, cook and organizer of one of the most glittering literary salons of the day held in the couple's apartment in the rue de Fleurus in Paris. Nonetheless, Gertrude still did not have the courage to use her nimble pen to express her true wishes in her will. Despite her love for Alice, with whom she shared 34 years of conjugal life, she was not able to find the words to describe their relationship. There were tradition, convention and the necessary confrontation with her family, to which Gertrude had always been resigned. She had succeeded in making her name as an author but had not been able to come out as a lesbian to her family. After the funeral, the family descended on the pictures Gertrude had collected: fabulous Picassos, priceless Matisses, dozens of the most avant-garde canvases. They did not even spare the couple's common property that might have provided Alice with a comfortable retirement. Instead, Alice had to perform menial chores in order to earn a living until her death 21 years later.

Lesbians of the present generation are very familiar with this story or similar ones that, in the manner of a fairy tale, always have the same ending: a headstrong loving relationship followed by life as a committed couple, albeit lived out in a context of shadows and light, of chiaroscuro. Then comes the break-up or the lover dies and, in the last scene, the common property is removed by the family. For many, this is the story of our grandmothers, a past that casts dramatic light on the consequences of the lack of legal protection for same-sex couples. Whatever the media might say, there are in Canada today still many Alices and Gertrudes, who, despite the appearance of strong and assertive personalities, tremble at the thought of being publicly recognized as lesbians. These are the women of whom we were thinking as we wrote our report.

However, it is also true that the situation has changed. The lesbian and gay rights movement, which started in the 1960s, has had a major impact, so much so that it would now be impossible to return to the oppressive secrecy that characterized the era before the sexual revolution. By way of illustration, we note that in 1969, the federal government decriminalized sexual practices associated with homosexuality. Discrimination based on sexual orientation is now prohibited in all federal and provincial jurisdictions. The people of Canada display increasing tolerance of same-sex couples. In the last two years, several provinces have enacted legislation that gives same-sex couples the same rights and obligations as heterosexual couples in common-law relationships. The federal government recently approved a bill that seeks to achieve the same objectives. However, marriage is still off-limits for lesbian and gay couples.

Without denying the importance of these advances, we must observe that, by and large, they have been the result of legal challenges rather than an expression of political will on the part of the federal and provincial governments to eliminate provisions from Canadian laws that

discriminate against homosexuals, their couples and their families. Despite the intentions and statements of the various levels of government, often marked by equivocation, even today equality for lesbians is a goal that is far from being achieved. Lesbians remain one of the last groups of Canadian women who do not enjoy equal rights.

However, even if the provinces, territories, and the federal government were to amend all their laws to give same-sex couples the same rights and privileges enjoyed by opposite-sex couples, it would still be necessary to ask what changes are required to reflect the specific situation in which these couples find themselves. A declaration of their conjugal status does not have the same resonance or the same consequences for same-sex couples as for opposite-sex couples. Even today, most lesbian couples still conceal their sexual orientation and their conjugal situation, especially in the workplace, in order to protect themselves against negative reactions. This is especially true of lesbians living in rural or remote areas, those who are elderly or hold high-profile positions, those who come from ethnocultural or aboriginal communities, or those who live in a homophobic environment. Our study shows that there is still a substantial gap between attainment of equal rights for lesbian couples and the genuine possibility of exercising these rights without the risk of prejudice. It is accordingly important to take into account the obstacles that prevent lesbians and gays from fully enjoying the rights and freedoms conferred on all Canadians.

Other considerations influenced the writing of this report. In fact, the struggle for legal recognition of same-sex couples has been waged primarily by organizations in which a majority of the members are gay men and has not led to the same degree of mobilization among lesbians in either Canada or Europe (Schultz, 1998; Turcotte, 1998). It is true that, throughout the western world, the need to protect the intimate relationships between two persons of the same sex made its appearance at the same time as the AIDS epidemic in the 1980s (Pouliquen, 1997; Demczuk and Remmigi, 1998). AIDS, which has actually become a pandemic, has led at a disconcerting rate to the death of many gay men and has cast light on the vulnerability of their partners who generally had no legal protection. Do lesbians, who are often more critical of conjugality and marriage, which they view as institutions for the subjection of women, have the same collective interest in having their relationships as couples institutionalized? Is their concept of the couple and the legal recognition thereof part of the same vision of formal equality as that of many gay organizations in Canada? These are a few of the questions that our research has attempted to answer.

Furthermore, we know that the legal recognition of spousal status has an economic impact. What will the consequences of this recognition be for lesbian couples, whether or not they have children, in terms of their eligibility for tax and public income-security programs? Because of existing discrimination based on sex and sexual orientation in the labour market, as well as the financial burdens associated with the presence of children, lesbians depend more than gays on public income-security programs. While the elimination of discrimination against same-sex couples in the tax system and in social insurance and private plans can produce undeniable benefits, this is not true, as we shall see, of income-tested programs, including those that are administered through the tax system. Although universal schemes

by their very nature do not discriminate, and while all people are eligible regardless of their family status, sexual orientation or sex, governments in Canada have opted to replace a large number of these plans with selective programs. In these programs, the level of benefits is generally calculated on the basis of family income and it is disadvantageous to gain legal recognition as spouses. Will a couple's choice to be recognized as lesbian be influenced by the balance of pecuniary advantages and disadvantages of participating in these programs? Like many heterosexual women, will lesbians have to choose between social recognition of their couples and their financial interests as well as those of their children? How can the laws be changed to ensure that they meet the need of lesbians, and of women in general, for financial autonomy? These are all questions that we shall attempt to answer.

Our research has a twofold objective. First, it offers a critical analysis of the incremental strategy and the formal equality approach as they are applied to the legal recognition of same-sex couples in Canada. This analysis is based on an examination of the development of Canadian law and the expectations and needs expressed by lesbian groups in Quebec and Francophone Ontario. Starting from various formulas for the legal recognition of same-sex couples adopted elsewhere in the western world and taking into account the stigmatization of lesbians in society, our report suggests certain underlying principles and makes recommendations with the objective of attaining substantive equality. Second, our research seeks to determine the financial consequences, both positive and negative, of including lesbian couples in Canadian tax and income-security programs. It also posits certain principles and suggests possible reforms to tax legislation and public income-security programs in order to better respond to the socio-economic realities of lesbians and of all women.

Using a feminist and multidisciplinary perspective, our research draws its methodology from the three disciplines of law, economics and sociology. The social situation of lesbians was the starting point for our feminist analysis. This takes into account both the oppression linked to social gender relationships and heterosexism as components of patriarchal society. Obviously the realities experienced by lesbians differ widely. During the consultations that we held, we sought to take this diversity into consideration in terms of age, ethnicity, social class, family status, and rural or urban place of residence.

Our study focuses on family law and income-security programs in Canada as they are applied in Quebec and Ontario and considers those in other provinces only peripherally. The research was carried out between April 1999 and April 2000. In July 2000, Parliament passed Bill C-23, the *Modernization of Benefits and Obligations Act*, an omnibus bill that gives same-sex couples the same rights and obligations as heterosexual couples cohabiting in common-law partnerships under federal laws. When this report was being revised for publication, we made a number of additions to reflect this change in the legislation. However, a detailed analysis of the legal, economic and social effects of the Act still needs to be done.

Our report consists of six chapters. The first provides the historical background and traces the stages in the development of the right of lesbians and gays to equality in Canada. We first describe the legal context in which recognition was given to the right to equality of this minority and the main legal challenges that have marked the course. We then question the

incremental strategy adopted by the federal government and argue in favour of a more complex vision of equality than that advocated in the liberal strategy of formal equality. Because of recent changes imposed by the courts and the enactment of new legislation, it was important to describe the law as it now stands in Canada in terms of the legal recognition of same-sex couples and their families. That is the subject of the second chapter.

The third chapter deals with the financial consequences of including lesbian couples in family law, tax, and income-security programs in Canada. We begin by describing the programs and tax measures that take spousal status into account; we note those that provide recognition for lesbian couples and we discuss their financial impact on those couples. We then take a critical look at what underlies these various programs, their objectives and their ideological premises. We shall see, as a number of feminist researchers have already discovered, that there can be a substantial gap between their stated objectives and their concrete results. The contradictions thus created lead us to question the use of conjugality, whether heterosexual or homosexual, as a criterion for eligibility for these programs.

The symbolic, legal and financial consequences of recognizing same-sex spouses lie at the very heart of lesbians' concerns. However, few Canadian studies have attempted to assess the needs and preferences of lesbians with respect to the conditions under which lesbian couples are legally recognized. One of the objectives of our research was therefore to fill this gap. We held consultations with the main lesbian advocacy organizations in Quebec and Francophone Ontario and with a number of resource-persons in order to ascertain their views on the legal recognition of same-sex couples in Canada. Chapter 4 summarizes the consultations held with five discussion groups that brought together 75 participants from various backgrounds. The results confirm that, in order to ensure the right to equality, it will not be sufficient simply to extend the definition of spousal status currently applied to heterosexual unions to same-sex couples. It will be necessary to adopt a substantive equality approach that reflects more fully the real stigmatization to which lesbians are subject.

In Chapter 5, we discuss how other western countries have responded to the demands of gays and lesbians by offering legal recognition of lesbian and gay couples and families. Some ten countries as of June 2000 either have implemented formulas for the voluntary registration of same-sex couples or automatically recognize their conjugal cohabitation relationships. We describe these different registered partnership formulas, some of which give same-sex couples rights and obligations equivalent to those conferred by marriage, while others offer separate and distinct legal status. The second part of Chapter 5 describes the approaches to equality that have influenced the development of these models and their underpinnings. This analysis supports the reflections on the approach that should be taken to eliminate continuing discrimination against lesbian and gay couples in Canada. Finally, Chapter 6 brings together the principles and recommendations that emerged from our research.

We hope to make a contribution to discussions of the problem of legal recognition of same-sex couples and offer options for reform that will enable lesbians, their community organizations, and feminist organizations to continue to play an active role in defending and promoting the right of all women to equality. Our research is also addressed to the government authorities that

will have to make decisions on this issue. By casting light on the needs expressed by lesbians with respect to the ways in which their conjugal unions should be given legal recognition and by assessing the financial consequences of including them in tax and income-security programs, our research should help those responsible at the various levels of government to make enlightened decisions concerning the reforms that are required.

1: DEVELOPMENT OF THE RIGHT TO EQUALITY

In this chapter, we describe the main stages that have marked the development of the right to equality for lesbians and gays in Canada. The last forty years have been marked first by the decriminalization of homosexuality, next by the inclusion of sexual orientation as a prohibited ground of discrimination in the human rights legislation and later as a similar ground in the *Canadian Charter of Rights and Freedoms*, and finally by the enactment of legislative measures designed to give same-sex couples legal status. These advances are the result of sustained efforts by the gay and lesbian communities who have had to counter a barrage of resistance from the federal, provincial and territorial governments as well as the courts.

In this chapter we describe the legal background to the recognition of the right of the gay and lesbian minority to equality, and the main legal challenges that have marked the course. We then question some of the strategies adopted by governments and by the organizations involved in the defence of gay and lesbian rights.

1.1 Decriminalization of sexual practices associated with homosexuality

Viewed as immoral by the tenets of religion, as sexual pathology by psychology and medicine, and as criminal acts by the law of the state, intimate relationships between persons of the same sex became the subject of serious debate in the late 1960s. At that time, Canada was preparing to reform the *Criminal Code* in order to reflect changing sexual mores. Observing the utilitarian principle, the advocates of liberalization of homosexuality maintained that crime and sin were not synonymous. They argued that only sexual acts that were harmful to others could legitimately be subject to criminal prohibition. Consequently, any attempt to regulate sexual behaviour on any other grounds was viewed as a violation of the freedom of the individual.[1] Respect for individual freedom requires that a distinction be made between the private and public spheres, and this took concrete form in 1969 in the omnibus bill to reform the *Criminal Code*.[2]

The 1969 omnibus bill provided, among other things, that any act of sodomy, or what had previously been described as gross indecency, no longer constituted a criminal offence if it was performed in private between consenting adults who were 21 years of age or older (Kinsman, 1987, p. 168).[3] However, the 1969 Act retained a difference in age between heterosexuals and homosexuals in terms of the definition of consenting adult.[4] It did not represent [TRANSLATION] “a legalization of homosexuality”, but rather a partial decriminalization of certain sexual practices that were not limited to homosexuals but were often associated with them (Bertrand, 1988). Beyond these changes to the *Criminal Code*, violence, discrimination in employment, police harassment and distinctions in terms of conjugality continued to exist with impunity. It was only eight years later, in 1977, that the federal government abolished the prohibition that had been imposed on the immigration of homosexuals in 1952 (Girard, 1987).

1.2 Establishment of equality as a fundamental right

The concept of individual rights and its corollary, declarations of human rights, lie at the heart of liberal democracy. They make illegal any act by the government that unduly infringes on a so-called fundamental freedom such as freedom of religion, expression or association. To these fundamental freedoms may be added the right of everyone, without distinction, to receive the same protection and the same benefits under the law.

In Canada, these fundamental freedoms and rights were not enshrined in the statutory law until the 1960s. It was accordingly necessary to resort to judicial interpretation by invoking the amorphous concept of "natural justice". In 1959, the decision in *Roncarelli* v. *Duplessis*, in which the Supreme Court of Canada[5] struck down the "Padlock Act", clearly illustrates the extent to which this concept was a last resort at that time. With the adoption in the 1960s of the *Universal Declaration of Human Rights* by the United Nations, which the federal and provincial governments were obliged to respect, and with the growth of the role of the state, the need for proactive measures became more and more pressing. Note also that in the 1960s the emergence of feminist and anti-racist social movements, especially in the United States, further emphasized the urgency of such action.

After several years of feeling its way along, governments finally came to grips with the roots of discrimination. They enacted laws and comprehensive codes recognizing that the elimination of discrimination requires challenging certain attitudes and stereotypes deeply rooted in our culture, education and prevention programs, as well as effective mechanisms for dealing with complaints and imposing penalties. It was at this stage that commissions were created to promote human rights and provide speedy and more accessible remedies for anyone claiming to have suffered discrimination in employment, housing or services (Tarnopolsky and Pentney, 1994). However, it was not enough merely to promulgate these laws that are classified as quasi-constitutional in the sense that they take precedence[6] over ordinary laws. If they were to be effective, they also needed to be interpreted in a way that considered discrimination not as the act of a few persons but rather as a systemic reality. It had to be recognized that equality could not be achieved unless minorities, even the most unpopular ones, were given protection against the opinion of the majority.

The debates surrounding the enactment of human rights laws and codes certainly helped to popularize discussions of rights. However, it is the *Canadian Charter of Rights and Freedoms*[7] (hereinafter the *Canadian Charter*) more than anything else that deserves the credit for having initiated the movement to introduce legal issues into political and social debates. Previously, the scope of human rights codes and laws was limited by the political wishes of Parliament and the provincial legislatures, which were sensitive to the majority opinion of voters. With the adoption of the *Canadian Charter*, which our lawmakers may not ignore, many people saw the opportunity to force the hand of elected representatives by means of court challenges and to thus provide better protection for minorities.

The results of the legal challenges brought by gays and lesbians clearly show the scope and limits of the strategy of using the courts that was favoured outside Quebec. Gays and lesbians in Quebec, for their part, focused more on direct legislative reform, as is evidenced by the struggle to have discrimination on the basis of sexual orientation be prohibited by the *Charter of Human Rights and Freedoms* (Sivry, 1998; Smith, 1999). This strategy also led to the passage in 1999 of Bill 32,[8] which gave same-sex couples the same rights and obligations as heterosexual couples cohabiting in a conjugal relationship in Quebec (Demczuk, 1999; Demczuk and Gariépy, 1999).

1.2.1 Human rights legislation and the reluctance to include sexual orientation as a ground for illegal discrimination

The federal government and most of the provinces enacted their own human rights laws in the late 1960s and the early 1970s. However, it was not until 1977 that a province, in this case Quebec, included sexual orientation as a prohibited ground of discrimination in the *Charter of Human Rights and Freedoms*.[9] Nine years later, Ontario[10] followed Quebec's lead. Nevertheless, it was only after 21 years of bitter struggle and the decision in *Vriend*,[11] that lesbians and gays in all of Canada's provinces received protection against discrimination based on sexual orientation.[12] In some cases, it was necessary for the human rights commissions to issue ultimatums to the legislatures.[13] In other cases, the statute in question has not been changed despite the fact that the courts have already included this ground in the act by interpretation.[14]

Vriend is only one illustration among many of the obstinacy of the legislators. Delwin Vriend, a school laboratory co-ordinator, had to take his case all the way to the Supreme Court of Canada in order to obtain a ruling stating that he was protected by the Alberta Human Rights Act against dismissal from employment that was motivated by homophobia. As the Supreme Court of Canada explained in its decision handed down in April 1998, the repeated refusals of the Alberta government to act on the recommendations of its Human Rights Commission — which had requested since 1984 that sexual orientation be recognized as a prohibited ground of discrimination — indicated that it was not a question of oversight but rather a deliberate omission.[15] This intentional exclusion from an act, the purpose of which is to provide protection against discrimination, had a discriminatory effect since, as the Supreme Court of Canada explained:

> ... This is clearly an example of a distinction which demeans the individual and strengthens and perpetuates the view that gays and lesbians are less worthy of protection as individuals in Canada's society. The potential harm to the dignity and worth of gay and lesbian individuals constitutes a particularly cruel form of discrimination ... [E]ven if the discrimination is experienced at the hand of private individuals, it is the state that denies protection from that discrimination.[16]

Consequently, the Supreme Court of Canada ordered that the Alberta Act be interpreted in such a way as to include sexual orientation so that it would reflect most of the human rights laws currently in force in the other federal and provincial jurisdictions.

The demand that the ground of sexual orientation be included in the human rights laws also encountered a number of failures, especially at the federal level. Although it was promised by the Minister of Justice in 1986, it was only ten years later in June 1996,[17] after several bills had been rejected or died on the Order Paper, that the *Canadian Human Rights Act* was finally amended. This reluctance on the part of the federal government to prohibit discrimination based on sexual orientation became clear not merely in the case of the *Canadian Human Rights Act*.[18] A similar stubbornness could also be observed with respect to federal acts, some of which had an impact on the application of provincial statutes and policies. For example, the *Income Tax Act* provides an exemption from tax for certain pension plans that meet specific criteria. However, only those plans that restricted the benefits associated with spousal status to heterosexuals were included.[19] Although often a torchbearer in the field of social policy, the federal government has been slow to recognize gays and lesbians. Through its deliberate inaction, it has also held back the adoption of laws in those provinces in which gays and lesbians have succeeded in obtaining sufficient support to achieve reform.

The adoption of the *Canadian Charter*, however, marked a turning point for the right to equality of gays and lesbians, as it did for all minorities in Canada, although the impact was not felt immediately.

1.2.2 Adoption of the *Canadian Charter* and the rules governing its interpretation

The *Canadian Charter* came into force in 1982, but the application of section 15, which gives everyone the same protection and the same benefit of the law without discrimination, was delayed to April 1, 1985. The purpose of this three-year delay was to enable all jurisdictions, provincial and federal, to review and then amend their laws to ensure that they complied with the *Canadian Charter*. While human rights legislation makes it possible to obtain relief for discriminatory acts, the *Canadian Charter* has constitutional status. As such, it can be used to strike down not only discriminatory acts and practices but also enabling legislation, including the *Charter of Human Rights and Freedoms* passed in Quebec and provincial and federal human rights acts. Each legislature accordingly had to ensure that its laws were not discriminatory because, if they were, they would be declared unconstitutional, thus creating a legal vacuum in the area to which they applied.

Before describing the major stages in the legal recognition of lesbians and gays thanks to the adoption of the *Canadian Charter*, it is useful to briefly explain the main principles of interpretation and application relevant to equality. We shall accordingly look at: (a) the doctrine of analogous grounds, (b) the doctrine of substantive equality and (c) the impact of section 1 of the *Canadian Charter*. This brief presentation will provide a better understanding of the evolution of equality rights for lesbians and gays in the Canadian legal context over the last twenty years.

Unspecified analogous grounds

As we have noted, the equality rights are enshrined in section 15(1) of the *Canadian Charter*, which provides:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[20]

Sexual orientation is not explicitly included in the list of prohibited grounds of discrimination. However, a decision of the Supreme Court of Canada has made it possible to interpret the non-restrictive wording of section 15 in a way that allows it to add other prohibited grounds as analogous grounds.

Thus, four years after section 15 came into force, the Supreme Court of Canada had to determine whether the act governing admission to the British Columbia Bar, which required that candidates be Canadian citizens, violated the equality guarantees. Since the ground of citizenship does not appear in the list in section 15, this case provided an opportunity to determine whether, in the Court's view, this equality guarantee was capable of evolving so as to protect groups that were not specifically referred to. The Supreme Court of Canada sided with the complainant and stated that the grounds of discrimination listed in subsection 15(1) were not exclusive and that they also included analogous grounds.[21] In the words of Justice Wilson, which were taken up and repeated in later cases:

> … non-citizens fall into an analogous category to those specifically enumerated in s. 15. … I believe also that it is important to note that the range of discrete and insular minorities has changed and will continue to change with changing political and social circumstances. ... It can be anticipated that the discrete and insular minorities of tomorrow will include groups not recognized as such today.[22]

Some lower courts had reached this conclusion earlier. However, it was not until 1995 that the Supreme Court of Canada confirmed in *Egan*[23] that sexual orientation was an analogous ground.

Moving from formal equality to substantive equality

Even before the adoption of the *Canadian Charter*, after ten or so years of the application of human rights acts and codes, it had become clear that these acts and codes did not achieve the expected results and merely confirmed the *status quo*. In the view of many people, this phenomenon was attributable to the method of analysing discriminatory acts. This method required the complainant to show that the acts in question were based on a discriminatory intent. As the Supreme Court of Canada stated in 1985, however, this could be said to:

> ... place a virtually insuperable barrier in the way of a complainant seeking a remedy. It would be extremely difficult in most circumstances to prove motive and motive would be easy to cloak in the formation of rules which, though imposing equal standards, could create ..., injustice and discrimination by the equal treatment of those who are unequal.[24]

In order to eliminate discrimination, it is not sufficient to abandon the concept of intentional discrimination. It was also necessary — as the Supreme Court of Canada did in the same case — to recognize that direct discrimination and adverse-effect discrimination (also called systemic or indirect discrimination) violate the human rights programs. Direct discrimination occurs where, for example, a rule is imposed to the effect that: "We don't hire Sikhs here" or "We don't hire Catholics here". Indirect discrimination occurs when, for example, an employer adopts a rule that, despite its appearance of neutrality, has a different effect on persons belonging to a minority such as: "All employees must wear a protective hat". In the latter case, the standard has a harmful and thus discriminatory effect, especially for adherents of the Sikh religion, which prohibits the wearing of any headgear over the turban.

This development in case law concerning equality gave new hope to members of minorities because the state thus affirmed its willingness to achieve substantive or real equality. It justified the hope that the formal equality approach, which, to paraphrase Anatole France, prohibited rich and poor alike from sleeping under bridges,[25] would be superseded. By contrast, substantive equality is designed to be remedial and, to this end, states that the same treatment may sometimes impose an additional burden on persons whose characteristics or background are different. Consequently, a standard will be said to be discriminatory and thus unlawful if it has a more restrictive effect on the members of minorities that are protected by the human rights codes and laws.[26]

Different treatment may also be necessary to promote equality in certain cases.[27] However, a distinction must be made on the basis of whether it is designed to put an end to discrimination or whether it perpetuates discrimination. In *Moore,* counsel for the federal government attempted to justify the addition of a different status for same-sex partners rather than including them in the definition of "spouse" in employee benefit programs. The Federal Court Trial Division responded in the following terms:

> Such a compromise is reminiscent of the now-discredited "separate but equal doctrine", developed by the United States Supreme Court in Plessy v. Ferguson, 163 U.S. 537 (1896), which supported discrimination against African-Americans and other people of colour. That doctrine was widely condemned and was officially rejected in the landmark case of Brown v. Board of Education of Topeka, 347 U.S. 483 (1954). In this country, the separate but equal doctrine was rejected by the Supreme Court …, as a loathsome artifact of the similarly situated approach. One cannot avoid the conclusion that offering benefits to gay and lesbian partners under a different program from heterosexual partners is a version of the separate but equal doctrine. That appalling doctrine must not be resuscitated in Canada forty years after its much-heralded death in the United States.[28]

The Court continued by noting that, even though the distinction does not cause a material disadvantage, if it strengthens the distinction between homosexual and heterosexual couples for no valid reason, the provision will be considered discriminatory.[29] On this basis, it rejected

the government's argument that the adoption of a separate definition would have been more effective than eliminating the discriminatory definition:

> … [N]o evidence was presented suggesting that the method selected by the employer was more expeditious …. I am not persuaded that the need for administrative efficacy, even if it could be demonstrated, would render the scheme selected by the employer something other than "separate but equal" and thus, any less discriminatory.[30]

This effectiveness argument is tantamount to an attempt at justification authorized by section 1 of the *Canadian Charter*, as we shall now see.

Discrimination justified by collective interests

Although the object of the *Canadian Charter* is to protect the fundamental rights of individuals, it recognizes that these rights are not absolute and that government must sometimes violate them in the pursuit of collective social goals. Section 33 of the *Canadian Charter* permits legislatures to enact laws in which they expressly declare their intention to violate the individual rights for a maximum period of five years. Section 1 also permits the legislature to violate fundamental rights and freedoms provided that the provision does not violate them more than is necessary for the attainment of an important social objective. In other words, section 1 requires the courts that are asked to determine whether there is discrimination to take into account the social objectives justifying the discriminatory measure. Although it is up to the government to prove the existence of an important social objective and the need for discrimination in order to attain this object, the attitudes and values of the judges affect the degree of deference they display toward the choices made by the legislature. The case of *Egan*[31] provides an eloquent illustration of the role played by section 1 and the attitudes of the judges to its interpretation. In that case, the younger partner in a gay couple requested a spouse's allowance. This allowance is part of a program that provides assistance to persons between 60 and 64 years of age who live maritally with a person who is at least 65 years of age and who receive an old age security pension. In a decision of the Supreme Court of Canada, five of the nine judges held that section 2 of the *Old Age Security Act* violated the right to equality in section 15 of the *Canadian Charter*. However, only four of these five judges found that the discrimination was not justified under section 1.[32] Justice Sopinka, who wrote the opinion that ultimately decided the outcome of the case, shifted to the other camp. He asserted that the discriminatory measure was justified because it sought to attain an important social objective, namely the reduction of poverty among elderly spouses, especially women who remained outside the work force in order to care for their children. The measure was also justified because, in his judgment, the government must be able to progressively[33] include all those who need financial assistance.

As pointed out by Justice L'Heureux-Dubé who found that section 1 did not justify the discrimination against lesbian and gay couples, Justice Sopinka's reasoning favoured the *status quo*. She added: "To permit the novelty of the appellants' claim to be a basis for justifying discrimination in a free and democratic society undermines the very values which the Charter, including s. 1, seeks to protect."[34]

Despite the promulgation of section 15 of the *Canadian Charter*, experience has shown that the equality right is not at all automatic. We shall see in the next section that the courts in this country make use of rules governing the interpretation or application of the *Charter* to block or promote access to equality for lesbians and gays. Let us continue our chronology of events.

1.3 Lesbians and gays invoke the *Canadian Charter*

Faced with the slow pace at which Parliament and the provincial legislatures moved to eliminate discrimination based on sexual orientation, lesbians and gays viewed the *Canadian Charter* as a valuable means of obtaining respect and justice. In 1986, less than a year after section 15 came into force, the British Columbia Supreme Court was asked to determine whether the exclusion of same-sex partners from the provisions creating a right to alimony in family law was contrary to the *Canadian Charter*. Taking an attitude that can be explained as much by the novelty of section 15 as by heterosexism, the British Columbia Supreme Court limited itself to stating without further explanation and without examining section 15 that: "The answer is found in section 1 of the Charter".[35]

In 1988, before the Supreme Court of Canada had even determined that the protection provided by section 15 was not limited to the listed grounds, the Ontario Superior Court heard a case dealing with the exclusion of a lesbian couple from the health insurance plan. The Court admitted that lesbians and gays were an analogous group. However, it found that, since only heterosexual couples can procreate, the distinction was based on that ability and was not discriminatory. It added that, even if there were discrimination, it was justified under section 1.[36]

The decision of the Supreme Court of Canada in *Andrews* v. *Law Society of British Columbia*[37] in 1989 marked a turning point for all groups that had been historically disadvantaged, including lesbians and gays. The Court upheld the substantive equality approach and the prohibition on discrimination for analogous grounds. In fact, a few months later, the Federal Court in *Veysey* sided for the first time with a gay attempting to gain legal recognition of the relational aspect of his homosexuality. The Court felt that sexual orientation was an analogous ground and that the violation of the equality right was not justified by section 1.[38] However, the impact of this judgment was limited because, although the Court upheld the result on appeal, it based its decision on other grounds.[39]

The same year, a Human Rights Tribunal held that the federal government had discriminated against its employee Brian Mossop when it refused to grant him bereavement leave to attend the funeral of his partner's father. Since sexual orientation was not protected in the *Canadian Human Rights Act*, the Tribunal interpreted the family status ground in such a way as to include protection for same-sex partners.[40] The federal government appealed this decision which was reversed by the Supreme Court of Canada in 1993. We shall discuss this case in detail later.

Heartened by these semi-victories, lesbians and gays returned to the attack and confronted the prejudices of judges with briefs that were increasingly well documented in terms not only of equality but also of the sociology of the family. However, there was considerable resistance and the results were uneven,[41] as is evidenced by seven decisions issued during 1991 and 1992. Three of these decisions — *Knodel*, *Leshner* and *Haig* — favoured the recognition of opposite-sex couples, while the other four — *Layland*, *Vogel*, *Nielsen* and the Federal Court decision in *Mossop* — upheld the *status quo*.

In *Layland* [42] and *Vogel*,[43] the courts rejected the arguments of discrimination based on sexual orientation. In their view, the distinction was based on the fact that the claimants were not spouses, a status that they could obtain if they associated with a person of the opposite sex. Consequently, the distinction was not a result of discriminatory treatment by the state but rather the result of a choice made by the plaintiffs, who were responsible for the consequences of their choice. In the appeal from the decision in *Mossop*,[44] the Federal Court rejected the generous interpretation given by the Human Rights Tribunal to the ground of "family status" on the ground that, in doing so, the Tribunal had exceeded its jurisdiction. Arguing that this last finding had been appealed to the Supreme Court of Canada, the Human Rights Commission refused to hear the case of *Nielsen*,[45] a gay man who requested recognition of his same-sex couple for the purposes of a dental care plan.

Nevertheless, lesbians and gays could take heart from the fact that the negative decisions did not betoken unanimity among Canadian judges and that some courts seemed more receptive. Thus, in 1991, in the British Columbia case of *Knodel*, the Court found that sexual orientation was an analogous ground in section 15 of the *Canadian Charter*. It added that the provincial medical insurance legislation discriminated against same-sex couples. The Court rectified the situation by incorporating an inclusive definition of "spouse" into this legislation. Even though it was rendered by a lower court, the decision in *Leshner* was particularly encouraging. It ruled that the provisions of the federal *Income Tax Act*, the rules of which served as a pretext for refusing to extend recognition of conjugal status to lesbians and gays in registered retirement and insurance plans, were discriminatory. In addition to denouncing the fact that the province justified its inaction by claiming that the federal government was responsible, the Human Rights Tribunal forced the hand of the federal government by broadening the definition of "spouse" in the *Income Tax Act*.[46]

The federal government could always attempt to minimize the impact of the decision in *Leshner* by indicating that the decision of a Human Rights Tribunal did not set a precedent. However, this argument did not last long. A few weeks later, the prestigious Ontario Court of Appeal determined in *Haig*[47] that the fact that there was no ground of sexual orientation in the *Canadian Human Rights Act* was contrary to section 15 of the *Canadian Charter*. In order to remedy this discrimination, the Ontario Court of Appeal held that the *Canadian Human Rights Act* should be read, interpreted, applied and administered as if the ground of sexual orientation were explicitly included there. Although *Haig* did not directly involve the recognition of same-sex couples, it gave renewed hope to the gay and lesbian movements. The decision rendered showed that they could circumvent the Federal Court, which had to

that point systematically accepted the federal government's resistance, by applying to a more liberal forum, the Ontario Court of Appeal.

However, the joy was short-lived. A few months later, the Supreme Court of Canada rendered its decision in *Mossop*, which, we will recall, involved a federal public servant who was refused bereavement leave provided under the collective agreement in order to attend his partner's father's funeral. For reasons that are still obscure, the complainant in that case insisted on basing his arguments solely on the ground of "family status". He declined the explicit invitation of the Supreme Court to rely on the Ontario Court of Appeal decision in *Haig*. Had Mossop accepted the invitation, the Supreme Court would have been required to determine whether the refusal of bereavement leave violated the ban on discrimination on the ground of "sexual orientation". It would then have had to decide whether the *Canadian Human Rights Act* violated section 15 of the *Canadian Charter* by not prohibiting discrimination on the ground of sexual orientation. The majority in the Supreme Court of Canada (four judges out of seven) sheltered behind the wishes of the legislature:

> It is thus clear that when Parliament added the phrase "family status" to the English version of the CHRA [*Canadian Human Rights Act*] in 1983, it refused at the same time to prohibit discrimination based on sexual orientation in that Act.... I find it hard to see how Parliament can be deemed to have intended to cover the situation now before the Court in the CHRA when we know that it specifically excluded sexual orientation from the list of prohibited grounds of discrimination contained in the Act.[48]

Three of the seven judges accepted the arguments made by Mossop concerning the interpretation of the ground of family status and one of the four judges in the majority suggested that his conclusion would have been different if Mossop had invoked the analogous ground of sexual orientation under the *Canadian Charter*. It was possible to assume therefore that the equality of same-sex couples had only been put on hold.

It was not until two years later, in May 1995, that the Supreme Court of Canada stated in *Egan*[49] that sexual orientation was an analogous ground of discrimination. In the opinion of the Court, lesbians and gays were a disadvantaged group that it was necessary to protect because of the oppression to which they had been subject in the past and to which they continued to be subject. However, those who assumed that it was merely necessary to establish this analogous ground in order to achieve equality had not counted on the tenacity of the heterosexist concept of the family. After being refused a spouse's allowance under the *Old Age Security Act*,[50] Egan and Nesbit, his partner of 27 years, challenged the constitutionality of the Act. In a deeply divided decision, a majority of five judges to four stated that the impugned provision violated section 15 of the *Canadian Charter* since it created an unlawful distinction on the ground of sexual orientation. However, as we have already noted, one of these judges, Justice Sopinka, changed sides when he had to determine whether the discrimination was justified under section 1 of the *Canadian Charter*. This created a majority of five to four, which meant that Egan's appeal was dismissed. In the opinion of this majority, the *Old Age Security Act* had a valid and urgent purpose — namely the reduction of poverty among elderly spouses — but the fact that it

was granted solely to opposite-sex spouses violated the equality guarantees only minimally. The majority concluded that the legislature could not be required to take a proactive approach to the legal recognition of new forms of relationships in society, especially since the financial resources of the state were not inexhaustible. As far as the minority was concerned, it stated that, if the objective is to reduce poverty, the measure adopted by Parliament — namely the exclusion of same-sex partners — has no rational connection with this objective since it could be achieved even if these spouses were included. A degree of exasperation is apparent in the comments of the dissenting judge, Justice L'Heureux-Dubé, who sharply criticized the method of analysis used by the judges who found that there was no violation of section 15. Concerning section 15, she stated that:

> ... the impugned distinction is in an Act that plays an important role in a very important Canadian social institution. The interest at issue is a fundamental one — the right to a basic level of income for the elderly — and the non-recognition is complete, rather than partial. Although the claimants are not necessarily economically worse off …, the complete exclusion from the program of same-sex couples has a significant discriminatory impact in terms of perpetuating prejudice, stereotyping, and marginalization of same-sex couples, and homosexuals and lesbians individually.[51]

On the subject of savings in public funds, Justice L'Heureux-Dubé added the following:

> First, by the government's own account, these sums account for only between two and four percent of the total cost of the old age supplement program. Second, I have referred to these savings as "ostensible" because if the affected persons had been in heterosexual relationships instead of homosexual relationships, the government would have to have paid out this money anyway. Finally, I note that the majority of this Court recognized in *Schachter* v. *Canada*, [1992] 2 S.C.R. 679, at p. 709, that budgetary considerations should not be determinative of a s.1 analysis, and should more properly be considered when attempting to formulate an appropriate remedy. On this basis, I conclude that the deleterious effects of the impugned distinction outweigh its salutary effects.[52]

Despite the comforting comments in the dissent and the numerical weakness of the majority, those who had placed their hopes in the *Canadian Charter* and in the court challenges strategy found that they had to overcome yet another legal subterfuge. The refusal to recognize lesbians and gays as a group whose human rights required protection now gave way to a legitimization of their unequal status on the pretext of so-called superior interests. The activists had to accept the obvious: prejudices and stereotypes were not disappearing; they were merely becoming more subtle.

It was therefore with a great deal of apprehension that lesbians and gays awaited the decision of the Supreme Court of Canada in *Vriend*.[53] It will be recalled that this case involved the dismissal of a school laboratory co-ordinator because of his sexual orientation. The Supreme Court

decision would make it possible to determine whether heterosexist attitudes displayed in the field of family law also extended to question of discrimination in employment as well as eligibility for housing and services. The *Vriend* decision, rendered three years after the judgment in *Egan*, appeared to indicate a change in ways of thinking. As we have already indicated, the Supreme Court of Canada found that " ... the omission of sexual orientation … was deliberate and not the result of an oversight"[54] and that this omission was discriminatory. Furthermore, the Court rejected the arguments of the Government of Alberta, based on the statements of Justice Sopinka[55] in *Egan*, to the effect that the Supreme Court of Canada should not intervene because the legislature should be given an opportunity to integrate minority groups progressively. The Court responded to this argument as follows:

> …the need for government incrementalism was an inappropriate justification for Charter violations. … In my opinion, groups that have historically been the target of discrimination cannot be expected to wait patiently for the protection of their human dignity and equal rights while governments move toward reform one step at a time. If the infringement of the rights and freedoms of these groups is permitted to persist while governments fail to pursue equality diligently, then the guarantees of the Charter will be reduced to little more than empty words.[56]

With the decision in *Vriend*, the inclusion of sexual orientation in human rights legislation was given constitutional status after more than twenty years of struggle. It remained to be seen whether the Supreme Court of Canada would remember its statements concerning the right to equality and dignity when it was again asked to deal with claims reaching beyond the right to employment, housing and services, rights that are protected under human rights legislation. Would its new understanding of the mechanisms of oppressing lesbians and gays be sufficient to undermine the last bastion of heterosexual privilege: family law?

A year later in *M.* v. *H.*,[57] the Supreme Court of Canada had to determine whether the fact that Ontario law limited the right to alimony to opposite-sex spouses in the event of separation violated the *Canadian Charter*. In its judgment of June 1999, the Court ruled that the Ontario law made an unlawful distinction between same-sex and opposite-sex couples and that this distinction was not demonstrably justified under section 1 of the *Canadian Charter*. On that occasion, however, the Court made use of another evasive tactic: rather than requiring an inclusive reading of "spouse" in the Ontario legislation, it delayed the effective date of its declaration of unconstitutionality in order to allow the Ontario government to amend the *Family Law Act* itself. In defence of the Supreme Court of Canada, it should be admitted that such a postponement has certain advantages because:

> ... if left up to the courts, these issues could only be resolved on a case-by-case basis at great cost to private litigants and the public purse. Thus, I believe the legislature ought to be given some latitude in order to address these issues in a more comprehensive fashion[58]

However, since the Supreme Court of Canada itself had not completed a critical review of the judgments concerning discrimination based on sexual orientation, it was clearly not able to understand the basis or the magnitude of the hostility and resistance displayed by the lawmakers.

This profound resistance manifested itself eloquently when, only a few days before the deadline set by the Supreme Court of Canada in *M*. v. *H*., the Ontario government tabled its bill entitled *An Act to amend certain statutes because of the Supreme Court of Canada decision in M. v. H., 1999.*[59] Aside from the heavy-handed connotations of the bill's title and the comments made by the Attorney General[60] when the bill was tabled, the extent of the changes it made confirmed that the Supreme Court of Canada had been wrong to rely on the good faith of government. This forced a gay and lesbian rights advocacy group to take further action in the Supreme Court of Canada.[61] We should also note that, with the exception of British Columbia and Quebec, which had not waited for the decision in *M*. v. *H*., the other provinces were still dragging their feet in terms of reforming their family law legislation. It seems therefore that, against the wishes of the Supreme Court of Canada, recognition of same-sex couples will be achieved on a "case-by-case basis at great cost to private litigants and the public purse".[62]

One week after the decision in *M.* v. *H*., the Government of Quebec passed Bill 32.[63] It thus eliminated the distinctions made among *de facto* spouses on the basis of sexual orientation for the purposes of public programs such as the Quebec Pension Plan, automobile insurance, prescription drug insurance, assistance and compensation for the victims of crime, social assistance plans, financial assistance for students, legal aid, provision of low-cost housing, child benefits, financial assistance for child care, taxation, tax credits, contributions to spousal RRSPs, government and public sector employee retirement plans, supplementary pension plans, school board elections and health insurance as well as for the purpose of acts such as the *Act respecting industrial accidents and occupational diseases* and the *Labour Standards Act*. A total of 27 acts and 11 regulations were amended to include same-sex spouses. However, the *Civil Code of Quebec*, which governs family law, was not changed. We shall return to this issue in Chapter 2.

As we have seen, the struggles of the last 30 years to assert the fundamental right of lesbians and gays to equality has been marked by resistance on the part of the governments and the courts. This situation has led many people to question the court challenges strategy, the incremental approach and, more fundamentally, the patriarchal model on which the legal recognition of conjugal status is based.

1.4 Questions of strategy

As was to be expected, the analyses made by gay and lesbian activists often took up the very same issues as those tackled by the feminist and anti-racist movements, to name but these two. These debates concerned and still concern: (1) the validity of the rights discourse; (2) the legitimacy of the strategy of relying on the courts rather than on legislative reform; (3) the validity of incrementalism; (4) the reform strategy focusing on specificity; and (5) adherence

to primary patriarchal institutions, such as the couple and the family, that are based on the domination and exploitation of women by men.

1.4.1 The rights discourse

Critics[64] of the rights discourse deplore the fact, among others, that the demand for rights strengthens individualism, maintains the dichotomy between the individual and the community, impedes the development of organizations which promote solidarity and strengthens dependence on government. From this perspective, the rights discourse is also suspect because legal language tends to obfuscate the real issues by making use of abstract notions that conceal the political nature of the choices made. Consequently, the rights discourse is more likely to contribute to legitimizing the existing hegemonic structure than to radically transform it (Mandel, 1989). Other analysts, however, stress the symbolic value of rights, and the fact that the demand for a right by persons who do not have it is part of the process of building a collective identity and politicizes situations that have hitherto been regarded as normal (Williams, 1991, p. 146-153; Schneider, 1986).

Whichever side one takes in this debate, it must be noted that lesbians and gays have never been able to avoid the law. This was true prior to the 1970s when their meeting places were subject to police raids. It was still true in the 1990s when their spousal relationships created legal rights and obligations. Nor can it be denied that the rights discourse has been a cause around which gay and lesbian communities can mobilize in Canada and elsewhere. One has only to think of the many coalitions, ad hoc groups, and permanent organizations established to advocate the inclusion of sexual orientation as a prohibited ground of discrimination in human rights legislation. As Didi Herman (1990, 1994) suggests, although it is necessary to remain alert to the dangers of the rights discourse, it may be preferable to consider how the demand for rights is made. In addition, it is important not to confuse “rights discourse” with “use of the courts”. While the former may serve to mobilize and legitimize not only the demands but also the very existence of those who have been oppressed in the past (Williams, 1991, p. 152-154), the latter tends to focus resources and energies on court challenges. Often this approach impedes the establishment of broad-based organizations reflecting the diversity of gay and lesbian communities and relegates to a secondary level legislative reform and a commitment to different forms of activism such as community education for the members of these communities.

1.4.2 Court strategy or legislative reform?

At first glance, the strategy of using the courts seems to combine all the negative aspects of the rights discourse. As a rule, it involves a complaint made by an individual to the courts. The arguments that are made have usually not been debated democratically by the members of the minority group that will be affected by the ruling of the Court. The arguments and the frameworks of analysis are determined instead by lawyers and other experts as well as professionals in the movement (Herman, 1990, p. 809). Substantial financial resources are devoted to these actions to the detriment of more radical forms of action (Fudge, 1989, p. 457). Moreover, since judges are appointed and not elected, this strategy is anti-democratic in the

view of both left and right.[65] The partial and piecemeal nature of the solutions provided by the courts reinforces these arguments (Quebec, CSFQ, 1998, p. 81).

Without denying the relevance of all these criticisms, it must be admitted that the election of legislatures does not necessarily guarantee popular representation or diversity. Furthermore, and although the situation varies from one province to another, historical experience shows that elected representatives are not particularly receptive, and can even be hostile, to the demands of lesbians and gays, whose electoral impact is perceived as marginal. This resistance could be found even in Quebec where, despite the fact that sexual orientation was included in the *Charter of Human Rights and Freedoms* as long ago as 1977, the courts have been slow to acknowledge the demands of lesbians and gays. In fact, some 22 years elapsed before the Government of Quebec passed Bill 32,[66] which eliminates discrimination based on sexual orientation in legislation applying to unmarried cohabiting couples (Demczuk, 1999). This was the case despite the constant pressure exerted by the Quebec Human Rights Commission, which in 1993 organized public hearings on discrimination and violence against gays and lesbians (Quebec, CDPQ, 1993, 1994; Demczuk, 1998), and despite public opinion in Quebec in favour of granting legal recognition to same-sex couples by a margin of between 73 and 76 per cent.[67] The Government of Quebec limited this recognition to the legislative provisions governing unmarried couples. Thus, Bill 32 does not affect the privileged status that the *Civil Code of Quebec* gives to heterosexuals. However, despite certain shortcomings with respect to family law as governed by the *Civil Code*, the Quebec law nevertheless embodies a more inclusive and rational reform than those carried out recently by other governments.

Although legislative reform is preferable to court challenges, the attitude taken by elected representatives has often left lesbians with only one alternative: wait patiently until changes occur or force the lawmakers' hands in the hope that the courts will enforce respect for fundamental rights out of concern for their own legitimacy. It must also be admitted that the increasing presence of social activists[68] has made it possible to minimize certain negative aspects of the court challenges strategy since it contributes to a better understanding of what's at stake beyond the interests of the specific parties to the case. It should be noted that this involvement of social activists who are allies in the struggle for the right of lesbians and gays to equality can also be observed in Quebec, especially in the actions leading to the enactment of Bill 32.[69]

1.4.3 Incrementalism

As a rule, the strategy of using the courts is marked more by incrementalism than is legislative reform. There is no question that lesbian and gay activism has steadfastly adopted this strategy up until now, a choice dictated by the political and social context. One should not, however, be too critical of minorities that do what they can in the circumstances imposed upon them, especially since governments, with the support of the courts, justify their inaction by the need to proceed in stages and to await a favourable social consensus.[70]

Nevertheless, we need to be aware of the consequences of the incrementalist strategy. Initiated by governments and followed by lesbian and gay rights advocacy organizations, it has led to uncertainty and legal chaos. In fact, the adoption of partial measures means that lesbians and

gays are treated as heterosexual partners in certain statutes while their conjugality is not recognized in others (Cossman, 1994; Ryder, 1993). This situation strengthens the message that lesbians and gays do not deserve to have government make a sustained effort on their behalf, that they are unimportant and, in short, that they are second-class citizens (Lahey, 1999a, p. 283).

As we shall see in Chapter 4, the comments of the lesbians interviewed for our study clearly show the lack of consultation and genuine debate in the lesbian and gay communities that goes along with the incrementalist strategy. This situation can be attributed, at least in part, to a certain complacency on the part of government, as we have seen throughout this chapter, but also to the increasing professionalization of the gay and lesbian rights advocacy organizations. By focusing on the court challenges strategy and on incrementalism, these organizations have been transformed into veritable groups of experts. This specialization has, among other things, required them to appropriate the knowledge, logic, method and instruments of law and has consequently favoured a certain type of activist. It has also favoured a liberal discourse concerning the law that focuses on formal equality to the detriment of a more complex understanding of the issues and limits of including gays and lesbians in family law. In addition, because a strategy of incrementalism was adopted, the leitmotif of political action has become: [TRANSLATION] "We get what we can and not necessarily what we want", with the result that there is no serious debate about the "real solution" and little criticism of the existing family regime and the way it is connected to the patriarchal regime and the privatization of social programs. In this battle, these feminist analyses are overshadowed and marginalized.

1.4.4 The strategy of reform focusing on specificity

From 1986 to 1995,[71] given the slowness of the lawmakers in providing remedies against discrimination, gays and lesbians relied on the grounds already included in human rights acts: sex and marital status or family status.[72] Rather than demanding recognition of sexual orientation as an analogous ground, some activists thought it preferable to rely on the ground of "sex" in order to eliminate discrimination. Diana Majury clearly summarizes the reasons for this approach:

> The term sexual orientation is, from my perspective, problematic for a number of reasons. It has been narrowly interpreted by tribunals and courts and, in its gender neutrality, it promotes a gay male standard to which lesbians are assumed or expected to conform. The meaning of being a lesbian and the inequalities we experience as lesbians are not represented in the label sexual orientation. … I am in search of the most effective legal tools for addressing/redressing the inequalities experienced by us as lesbians and through which we will be able to express those experiences with integrity (Majury, 1994, p. 289, 296).

Use of the ground of "sex" was more likely, on the one hand, to challenge the construction of gender and patriarchy and, on the other hand, to ensure that lesbians would not be

overshadowed for the benefit of gays under the gender-neutral terminology of "sexual orientation" (Majury, 1994; LEAF, 1993, p. 21). On the basis of research carried out by Mary Eaton (1991), Majury (1994, p. 297) asserts that the expression "sexual orientation", as used by the courts until the 1990s, is derived from a stereotyped view of homosexuals as sexual predators. She expresses concern at the widespread use of this expression in the law. The erroneous association between homosexuality and sexual aggression is one of many manifestations of homophobia. Majury adds that, even in representing themselves as being similar to heterosexuals, lesbians and gays are not accepted to any greater extent. This rejection shows the importance given to the two-fold categorization of the human species on the basis of gender in a social scheme that is founded on the inequality of the sexes. If gays and lesbians really are similar to heterosexuals, it is not so much their sexuality that causes problems in light of the norm as the fact that their existence calls into question the differentiation on the basis of gender imposed by heterosexuality. This is why it is important to consider discrimination against lesbians as based on sex and gender rather than on sexuality. Majury's arguments on this point are as follows:

> Gender differentiation, premised on the subordination of women, is as essential to heterosexualism as it is to sexism. Lesbian inequalities are sex inequalities because they are rooted in a highly circumscribed definition of gender and gender roles, according to which women are seen only in relation to men. Women who define themselves, and who, in so doing, define themselves without any reference to men, are de-sexed; either they are seen as not women or their "sex", that is their lesbianism, is denied. Either way, this is sex discrimination at its most extreme (1994, p. 311).

However, the use made of the ground of sex was quickly rejected by the courts in 1992. In *Vogel* v. *Manitoba*, the Court interpreted "sex" restrictively on the pretext that it was necessary to defer to the legislature's refusal to protect gays and lesbians against discrimination.[73] Like the strategy of basing claims on the ground of sex, that of claiming the protection provided for family status, as in *Mossop,* also came up against the heterosexism of the courts. However, it should be noted that, although the complainants were not successful, the challenges based on these grounds brought the prejudices and stereotypes to light. These observations had the effect of making the need to include the ground of sexual orientation in human rights legislation even more obvious.

The challenges based on marital status were brought at a time when a large number of jurisdictions, including Ontario,[74] had already included sexual orientation in their legislation as prohibited grounds of discrimination. They also brought to light the fact that lesbians and gays were not respected but merely tolerated. According to Lahey (1999a, p. 16), the courts merely provided them with individual protection in activities such as hiring and eligibility for housing. However, they continued to deny the relational aspect of lesbian and gay identities.[75]

1.4.5 Uneasiness with adherence to the patriarchal family model

The rights discourse in general, and that concerning discrimination in particular, are based on a comparison of the treatment of one group with that of another that constitutes the norm.

Thus, discrimination occurs if it is shown that lesbian couples are similar to male-female couples as a normative group but they nevertheless continue to be denied the benefits of the law. This liberal paradigm of equality is the predominant discourse of organizations involved in defending the rights of gays and lesbians. It is likely to be increasingly adopted by the courts, as is evidenced by the Supreme Court of Canada decision in *M.* v. *H*. The liberal model on which the legal recognition of gay and lesbian couples is based has given rise to many disputes in the courts and also to debates in law reviews and among activists.

In an article entitled "Family Inside/Out", Brenda Cossman (1994) offers an excellent synthesis of the discontent and contradictions that permeate the liberal strategy of fighting for the legal recognition of gay and lesbian couples. On the one hand, lesbians and gays demand the same benefits and obligations as heterosexual couples under family laws and policies. They maintain that their exclusion from the laws, past and present, is discriminatory and violates the right to equality protected by the *Canadian Charter*. Their arguments are based on the idea that same-sex couples are similar to homosexual couples. Like the latter, the partners in a gay or lesbian couple share an intimate love relationship, live together, own property jointly and have formed a consensual union that presents a certain stability. Given the similarities between them, same-sex couples should be entitled to the same respect and the same protection under the law (Andrews, 1989; Friedman, 1987-1988).

Some are not afraid to say that this is an assimilationist position in terms of both the objectives to be attained and the arguments made. In their view, it is legitimate to defend this strategy because it reflects the essential need of gays and lesbians for their personal relationships to be recognized socially and publicly. According to Ann Robinson (1998, p. 26), regardless of what we as feminists might think of marriage, the fact remains that lesbians may, for financial, emotional or symbolic reasons, want to give a public character to their relationships by contracting marriage.

Others, who also share the liberal view, argue on the contrary that recognition of gays and lesbians as having the same conjugal status as heterosexuals, including marriage, is fundamentally subversive in nature. Although their position is also based on the premise of similarity, those who take this approach assert that the inclusion of same-sex couples in the concepts of conjugality, marriage and family would radically transform the very nature of these institutions. It would also subvert the traditional sexual roles and the two-fold categorization according to gender within those institutions. Writing along these lines, Nan Hunter (1991, p. 25) maintains that "[t]he legalization of lesbian and gay marriages has a fascinating potential for denaturalizing the gender structure of marriage for heterosexual couples [and] destabilizing the cultural meaning of marriage". However, she adds that vigilance is required with respect to the approach taken in this struggle:

> The social meaning of the legalization of lesbian and gay marriage, for example, would be enormously different if legalization resulted from political efforts framed as ending gendered roles between spouses rather than if it were

> the outcome of a campaign valorizing the institution of marriage, even if the ultimate “holding” is the same (Hunter, 1991, p. 27).

Moreover, lesbians and gays maintain that the liberal perspective of including same-sex couples in the statutes and family law merely increases the legitimacy of the heterosexual model by assimilating into it. Adherence to the heteropatriarchal model — even if only on a temporary basis, according to the incremental logic — could, according to Gavigan (1993), confirm the hegemony of this intrinsically inegalitarian model since it is based on the domination of women by men. According to this line of thinking, relationships between women and those between men are different from heterosexual relationships. The inclusion of these relationships in family law would simply detract from the subversive potential. The difference lies not so much in the characteristics of the partners in gay and lesbian couples, for example their expectations, the degree of support or commitment provided and the stability of their union. Rather it lies in the social relationship through which the couple is created. In fact, studies show that the relationships of lesbian and gay couples are marked by a lack of sexual and hierarchical division in their roles and duties. Although there are still few comparative studies in this area, there is a certain social logic behind this observation, as has been noted by Leonard (1990) and, more recently, Demczuk:

> [TRANSLATION]
> Not that lesbians are better than other people but because women are not socialized to feel superior, to be sexist or even violent, because women generally do not have economic privileges such as a higher salary because of their sex or a customary right to domestic services, because relationships between women are not governed by a sexual division of labour or by a body of legal provisions, intimate relationships between lesbians have a better chance of being relationships of sharing and mutual understanding between equals (Demczuk, 1996, p. 4).

This statement reflects the psychosocial or clinical studies that have looked at the conjugality of lesbians and gays. In a study that has become famous, Bell and Weinberg (1980) observed greater commitment in lesbian couples than in gay couples and found an absence of the sexual roles existing in same-sex couples. In a survey of some 1,000 Quebec lesbians, Bertrand (1984) observed that most of them asserted that they did not have any sexual roles or specific tasks built into their relationship. They also said that they enjoyed a fair and equal division of domestic labour. O’Brien and Weir (1995) showed in a comparison study that the conjugal relationships of lesbians and gays were more egalitarian than those between men and women, especially in the decision-making process. In another comparative study, Peplau (1991) showed that opposite-sex or same-sex couples displayed similarities in most aspects of their conjugal life (commitment, stability, etc.) with a few exceptions. She pointed out, in particular, that lesbian and gay couples observe an ethic of equality more frequently than male-female couples. However, Julien and Chartrand (1997, p. 76) argue in a review article that the variables associated with conjugal satisfaction are similar from one sexual orientation to another.

The greater degree of equity between the partners in a gay or lesbian union can be explained in part by the fact that they generally negotiate a division of duties based on their preferences, abilities and competencies, unlike the situation in heterosexual couples where sexual roles are a determining factor (O'Brien and Weir, 1995). Other factors also account for the greater equality in conjugal relations between persons of the same sex: these couples are less likely to be parents; in almost all cases both partners earn employment income and gays and lesbians are often marked by a high degree of material independence (O'Brien and Weir, 1995; Bertrand, 1984).

In short, the reservations expressed by feminist lesbian authors, among others, are linked to their analysis of the provisions of family law. They are especially concerned about the obstacles to be overcome in order to ensure that family law and policy reflect the model of egalitarian relationships between lesbians and gays. Ruthmann Robson (1992) maintains in this regard that heterosexual institutions (particularly private and public family law) could further colonize the conjugality of lesbians and force them to model their lives on those of heterosexual couples. Didi Herman (1990) also wonders whether, by appropriating the ideology of the family, lesbians and gays are not running the risk of putting their support behind institutional structures that create and perpetuate the oppression of women. This possibility has led Louise Turcotte (1998, p. 391) and, more generally, the supporters of radical lesbianism in Quebec to assert that [TRANSLATION] "the recognition of same-sex spouses does not reflect any real social change".

Barbara Findlay (1997), on the other hand, notes that lesbians tend to be more critical of the strategy of obtaining the right to marry while gays are more likely to demand this right. She feels that demanding the right to marry is in certain respects tantamount to asking government to become involved by means of a contract regulating various material aspects of an intimate relationship between two persons. If this strategy is successful, lesbians may well find themselves bound by laws made for and in the interest of heterosexual men. Findlay argues that lesbians should instead seek other legal means of ensuring respect for their own models of conjugal life.

Finally, other authors have argued that laws that confer status as a "spouse" or "family" should do so by acknowledging the diversity of intimate relationships and by regarding them as equal to one another (Ryder, 1993). In a study of lesbians in three Canadian provinces, LEAF (1993) expressed concern that legal recognition would be available solely to those lesbian couples who met the criteria for the definition of "spouse", that is, those in which the partners have cohabited for a certain time and shared a stable and monogamous intimate relationship. This definition excludes other kinds of intimate relationships that do not necessarily fit this framework, for example relationships where spouses do not live together because of their fear of ostracism or for reasons linked to their employment or the autonomy of the partners, or even relationships that are not necessarily based on sexual monogamy (LEAF, 1993).

Having said this, we cannot ignore the fact that some gay and lesbian couples, albeit only a minority, live in relationships that are unequal in terms of power or the sharing of wealth. Yet others have created a family without the more vulnerable member of the couple being able to

enjoy the protection offered by family law. Can the egalitarian ideal justify leaving these more vulnerable lesbians and gays without recourse, as Lahey has pointed out (1999a, p. 260-261)? Moreover, the current intervention of the state in terms of conjugality gives lesbian partners an opportunity to adopt more egalitarian models. They can validate these models by signing a contract setting out the expectations of each of the parties during and on termination of the relationship. However, it is to be regretted that this kind of solution is individual and that governments have done so little to examine these questions and to support the efforts of those seeking to create relationships based on equality and solidarity. Raising these questions is essential, not just because of the recent inclusion of same-sex couples in the concept of family, but also because of the anachronistic nature of the concepts themselves. This regime does not in fact reflect the many social changes which have occurred, including the erosion of the provider-housekeeper model, the increased participation of women in the workforce, and the increasingly complex and diversified links between conjugality and parental status.

1.5 Conclusion

The history of the fight to assert the fundamental rights of lesbians and gays shows evidence of a resistance on the part of governments and courts that is not unique. The battles against racism or sexism, to name only two, are other examples. However, the secrecy adopted to protect individuals against discrimination has had an impact that is still being felt and that limits the ability to bring lesbians and gays together in social movements that could hold the debates and consultations necessary for the formulation of demands that reflect the real needs and aspirations of gay and lesbian communities.

At the theoretical and legal levels, feminist critics of family law were for the most part pushed aside just as the debate on the legal recognition of same-sex couples was moving from the ranks of the gay and lesbian movements into the public arena. Gays and lesbians who took different positions with respect to the liberal model of formal equality censored themselves, at least in Ontario, when faced with the wave of court challenges and media coverage of the debates that helped to bring around public opinion (Herman, 1994). In Quebec and the rest of Canada, lesbians have not been very active in the political organizations dedicated to the defence of their rights and, when they were present, they usually played a minority role (Smith, 1999; Demczuk, 1998, p. 11; Demczuk and Remiggi, 1998).

During the 1980s, the rise of the incremental strategy and the use of the courts as well as the downplaying of more radical views helped to ensure that the liberal discourse on rights for gays and lesbians, a discourse that was led by lawyers whose interests were those of the white male middle class, would predominate (Smith, 1999, p. 104). Brenda Cossman provides an admirable description of the challenge offered by a more complex understanding of the rights of lesbians and gays:

> If we think of rights as conversations, then we must consider the construction of meaning within those conversations. If we think of rights as a form of political discourse, then we must consider the implications of that discourse for our politics. If we think of rights as a means of mobilizing for

> political action, then we must explore the social movement justifying the rights strategies. If we think of rights as complex and contradictory, then we must be able to think of all these and many other dimensions of rights at the same time. We need to recognize these contradictions as we struggle to make rights strategies accountable to a broader feminist social movement (Cossman, 1990, p. 235).

This challenge remains because, as we shall see in the next chapter, it cannot be said that lesbian couples and their children are yet treated as full citizens under Canadian law.

Notes to Chapter 1

[1] This argument is made in particular in the *Wolfenden Report*, which recommended the decriminalization of private "homosexual acts" between consenting adults. Commissioned by the British Parliament and submitted in 1957, it led to the Hart/Devlin debate on the relationship between law and morality. Although most students of jurisprudence are aware of this debate, it is ironic that many people are not aware of the Report. The more cynical might view this as further evidence of the extent to which gays and lesbians are hidden from sight. For more information on the Wolfenden Report and the Hart/Devlin debate, see Gary Kinsman,1987, p. 139-144; Kathleen A. Lahey,1999a, p. 6-7.

[2] This reform of the *Criminal Code* occurred in a particular political context. In order to gain the support of various social groups for his plan to expand the welfare state, Pierre Elliot Trudeau promised a "just society", one of the cornerstones of which was the liberalization of moral and sexual standards (Kinsman, 1987, p. 165; Waugh, 1998, p. 76). Demands for such liberalization were becoming increasingly clamorous and concerned not only homosexuality but also abortion, contraception, gambling and gun control. In this regard, see Bill C-150, which was passed on May 14, 1969.

[3] Kinsman refers to the parliamentary debates concerning the case of Everett Klippert, a gay man sentenced to imprisonment for having homosexual relations in private with consenting adults. He was also declared a dangerous offender on the basis of the opinions of psychiatrists to the effect that Klippert did not show any remorse for his sexual orientation. *R.* v. *Klippert*, [1967] S.C.R. 882. According to the Minister of Justice, the gross indecency provision had also applied since 1953 to sexual acts between women, which was not the case in England.

[4] In fact, the age limit of 21 was an exception to the norm, since the age of "criminal majority" was 18 and the age of consent 14. See in this regard Marie-Andrée Bertrand (1988).

[5] *Roncarelli* v. *Duplessis*, [1959] S.C.R. 121. In this case, the Quebec Premier, Maurice Duplessis, had revoked the liquor permit of Roncarelli's restaurant because Roncarelli had posted bail for Jehovah's Witnesses charged with distributing pamphlets contrary to a municipal by-law. According to the decision of the Supreme Court of Canada, even though the issuance of permits was a discretionary power of the Liquor Board, this power must be

exercised in good faith and not arbitrarily. Discrimination, in this case based on religious beliefs, was an unreasonable exercise of this power.

[6] *Insurance Corporation of British Columbia* v. *Heerspink*, [1982] 2 S.C.R. 145.

[7] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, Schedule B to the *Canada Act, 1982*, c. II (U.K.).

[8] *An Act to amend various legislative provisions concerning* de facto *spouses*, S.Q. 1999, c.14.

[9] R.S.Q. c. C-12.

[10] *Equality Rights Statute Law Amendment Act*, S.O. 1986, c. 64, subs. 18(5).

[11] *Vriend* v. *Alberta*, [1998] 1 S.C.R. 493.

[12] The provinces and the federal government included this prohibition of discrimination on the basis of sexual discrimination in their human rights laws in the following chronological order: Quebec, 1977; Ontario, 1986; Manitoba, 1987; Yukon, 1987; Nova Scotia, 1991; New Brunswick, 1992; Saskatchewan, 1993; Newfoundland, 1995; federal government, 1996; Alberta and Prince Edward Island, 1998 (following the *Vriend* decision, 1998, c-92, s. 1). The ground is still not expressly included in the Alberta law.

[13] This was the case in Nova Scotia (Elliott, 1990).

[14] This was the case at the federal level. The *Canadian Human Rights Act* was not amended until 1996, although the Ontario Court of Appeal had included the ground of sexual orientation by reference as long ago as 1992 in *Haig* v. *Canada* (1992), 9 O.R. (3^{d}) 495. Consequently, the actions of the federal government and companies subject to federal jurisdiction were bound in practice, especially since the federal government decided not to appeal.

[15] *Vriend*, *op. cit.*, par. 4. Note that the Alberta Human Rights Commission had even decided to investigate complaints of discrimination based on sexual orientation in 1992 without persuading the provincial government to change its policy.

[16] *Ibid*., par. 101-103.

[17] *An Act to amend the Canadian Human Rights Act*, 1996, S.C., c. 14. Note that this Act applies only to federal government agencies and companies subject to federal jurisdiction such as banks and interprovincial transportation and communications companies.

[18] *Haig* v. *Canada* (1992), 9 O.R. (3^{d}) 495 (Ont. C.A.). In that case, the prestigious Ontario Court of Appeal stated that despite the fact that the *Canadian Human Rights Act* omitted the ground of sexual orientation, the Act must be interpreted as if it included this ground. The federal government decided not to appeal this judicial declaration, although it did not then amend the Act, and this forced gays and lesbians to apply to the courts rather than to use the

more accessible complaints process of the Human Rights Commission. For more details on this case, see Appendix 1.

[19] In 1998, in *Rosenberg* v. *Canada (A.G.)* (1998), 38 O.R. (3d) 577 (C.A.), the Attorney General of Canada conceded following the decision in *Egan* that subsection 252(4) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) violated section 15 of the *Canadian Charter*. This subsection gave a tax exemption to pension plans that met certain criteria. However, only plans that limited the benefits associated with spousal status to heterosexuals qualified. The Attorney General of Canada argued that this violation was justified under section 1 of the *Canadian Charter*. The Ontario Court of Appeal rejected this argument. Section 141(2) of Bill C-23, now S.C. 2000, c. 12, *Modernization of Benefits and Obligations Act*, most of the provisions of which came into force on July 31, 2000, repealed section 252(4) and eliminated the discriminatory distinction.

[20] *Canadian Charter of Rights and Freedoms, op. cit.*

[21] *Andrews* v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143.

[22] *Ibid*., p. 152-153.

[23] *Egan* v. *Canada*, [1995] 2 S.C.R. 513.

[24] *Ontario Human Rights Commission* v. *Simpsons Sears*, [1985] 2 S.C.R. 536, p. 549.

[25] The Aristotelian or formal equality approach is often expressed as follows: persons who are in an identical situation must be treated identically and conversely, persons who are in different situations must be treated differently. Aristotle, *Nicomachean Ethics*, Book V.

[26] However, it must be recognized, as the Supreme Court of Canada did in 1999, that the distinction between direct discrimination and adverse-effect discrimination is artificial. "The distinction between a standard that is discriminatory on its face and a neutral standard that is discriminatory in its effect is difficult to justify simply because there are few cases that can be so neatly characterized. For example, a rule requiring all workers to appear at work on Fridays or face dismissal may plausibly be characterized as either directly discriminatory (because it means that no workers whose religious beliefs preclude working on Fridays may be employed there) or as a neutral rule that merely has a prejudicial effect on a few individuals (those same workers whose religious beliefs prevent them from working on Fridays). On the same reasoning, it could plausibly be argued that forcing employees to take a mandatory pregnancy test before commencing employment is a neutral rule because it is facially applied to all members of a workforce and its special effects on women are only incidental." *British Columbia (Public Service Employee Relations Commission)* v. *BCGSEU*, [1999] S.C.J. No. 46 (Q.L.).

[27] For example, even though a strip search of a detained woman by a man is prohibited because of the context of each of these sex groups, it does not follow that a search of a man by a woman must be prohibited. *Weatherall* v. *Canada (Attorney General)*, [1993] 2 S.C.R. 872.

[28] Linden, dissenting in *Egan* v. *Canada*, [1993] 3 F.C. 401, at p. 441 (F.C.A.), as quoted in *Canada (Attorney General)* v. *Moore*, [1998] F.C.J. No. 1128 at par. 64.

[29] *Moore*, *ibid*., par. 68.

[30] *Ibid*., par. 69.

[31] *Egan, op. cit.*

[32] Four judges (Gonthier, Lamer, Laforest and Major) held that section 15 had not been violated, while five judges (Sopinka, L'Heureux-Dubé, Cory, McLachlin and Iacobucci) were of the contrary view. Of the latter group only Justice Sopinka found that under section 1 of the *Canadian Charter,* the federal government was justified in discriminating against gays and lesbians.

[33] The judge stated: "Given the fact that equating same-sex couples with heterosexual spouses, either married or common-law, is still generally regarded as a novel concept, I am not prepared to say that by its inaction to date the government has disentitled itself to rely on s. 1 of the Charter." *Ibid*., par. 111.

[34] *Ibid*., par. 100.

[35] *Anderson* v. *Luoma*, [1986] B.C.J. N^{o} 3000 (B.C.S.C.). "Mr. Fraser's other proposition is that, if the legislation does not permit his interpretation of stepfather and stepparent to include the defendant, then the legislation ought to be struck down as being in violation of s. 15 of the *Charter of Rights and Freedoms, Constitution Act, 1982*. The answer is found in s. 1 of the Charter."

[36] *Andrews* v. *Ontario (Minister of Health)* (1988), 64 O.R.(2^{d}) 258 (Ont. Sup. Ct.).

[37] *Andrews* v. *Law Society of British Columbia, op. cit.*

[38] *Veysey* v. *Canada (Correctional Service)* (1989), 29 F.T.R. 74 (F.C.T.D.).

[39] *Veysey* v. *Canada (Correctional Service)* (1990), 109 N.R. 300 (F.C.A.). Although the Federal Court of Appeal upheld the trial decision, it did not confirm the analysis of section 15 of the *Canadian Charter,* but rather fell back on the ordinary rules of statutory interpretation.

[40] *Mossop* v. *Canada* (1989), 10 C.H.R.R. D/6064.

[41] According to the jurist Bruce Ryder (1990), these results are marked by the compassion/ condemnation dichotomy in which there is a conflict between, on the one hand, the majority support for a prohibition on discrimination on the basis of sexual orientation in the areas of employment, housing and services and, on the other hand, a desire to maintain a hierarchy that favours intimate relationships between persons of the opposite sex. According to a 1985 Gallup poll, 70 per cent of the people of Canada supported the inclusion of a prohibition on discrimination based on sexual orientation (cited in note 17 in Ryder).

[42] *Layland* v. *Ontario (Minister of Consumer and Commercial Relations)* (1993), 14 O.R. (3d) 658 (Gen. Div.). More information on this case may be found in Appendix 1.

[43] *Vogel* v. *Manitoba*, 16 C.H.R.R. D/242 (1992) (Man. Q.B.). More information on this case may be found in Appendix 1.

[44] *Mossop* v. *Canada*, [1991] 1 F.C. 18 (F.C.A.).

[45] *Nielsen* v. *Canada*, [1992] F.C.J. No 227 (F.C.T.D.). More information on this case may be found in Appendix 1.

[46] The federal government did not appeal this decision, even though it also did not amend the *Income Tax Act*. The Department of Revenue closed its eyes when a large number of insurance plans extended their definitions of "spouse" to include same-sex spouses. This observation was shared by the New Brunswick Minister of Finance. After announcing that the life and health insurance plans for provincial public servants had been extended to include same-sex couples, the New Brunswick Minister of Finance informed the legislative assembly that the federal Department of Revenue was no longer observing its own regulations. See on this subject "Decision Won't Cost Public Service: Maher", *Times and Transcript*, Moncton, May 5, 1993. In Ontario, however, things were not understood in the same way. In order to comply with both the rules of the Department of Revenue and the prescriptions in the *Leshner* decision, the managers of the province's unionized employees pension plan created a separate plan for same-sex couples. In December 1998, the trustees of the plan requested directions from the Court since they wished to merge the plans and the employer would not co-operate. The Court ordered the merger to take place (*Ontario Public Service Employees Union Pension Plan Trust Fund (Trustees of)* v. *Ontario*, [1998] O.J. No. 5075). However, the saga did not end there. In January 1999, the Government of Ontario (following the adoption of the *Amendments Because of the Supreme Court of Canada Decision in M. v. H. Act*) announced that it would appeal. On this subject, see the EGALE press release of January 12, 1999 <www.egale.ca/pressrel/990112.htm>, consulted on September 6, 2000.

[47] *Haig* v. *Canada* (1992), 9 O.R. (3d) 495.

[48] *Canada (Attorney General)* v. *Mossop*, [1993] 1 S.C.R. 554, p. 580.

[49] *Egan*, *op. cit.*

[50] *Old Age Security Act*, R.S.C. 1985, c. O-9.

[51] *Egan*, *op. cit.*, par. 98.

[52] *Ibid*., par. 99.

[53] *Vriend* v. *Alberta*, [1998] 1 S.C.R. 493.

[54] *Ibid*., par. 4.

[55] *Egan, op. cit.*, par. 108.

[56] *Vriend, op. cit.,* par. 122.

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

[58] *Ibid*., par. 147.

[59] The *Amendments Because of the Supreme Court of Canada Decision in M. v. H. Act* (Bill 5) received Royal Assent on October 29, 1999. See the critique of this Act in chapters 2 and 5.

[60] "This legislation is clearly not part of our agenda," the Attorney General said. "The only reason we are introducing this Bill is because of the Supreme Court of Canada decision. We would not introduce the legislation otherwise. Our proposed legislation complies with the decision while preserving the traditional values of the family by protecting the definition of spouse in Ontario law," he noted. Press release, *Ontario protects traditional definition of spouse in legislation necessary because of Supreme Court of Canada decision in M. v. H.*, Toronto, October 25, 1999, Ministry of the Attorney General website: <www.attorneygeneral.jus.gov.on.ca/legis.htm>, <www.newswire.ca/government/ ontario/english/releases/october1999/25/c7058.html>, consulted on March 3, 2001.

[61] *Ontario's "separate and unequal" regime to be challenged in Supreme Court of Canada*, EGALE press release, November 25, 1999 <http://www.egale.ca/pressrel/991125.htm>, consulted on September 6, 2000.

[62] *M.* v. *H., op. cit.,* par. 147.

[63] *An Act to amend various legislative provisions concerning* de facto *spouses*, S.Q. 1999, c.14 (adopted June 10, 1999, in force on June 16, 1999).

[64] For an overview of the views of these detractors, consult the work by Miriam Smith, 1999, p. 16-21.

[65] Among the left-wing analyses, mention should be made of that by Mandel (1989). As an illustration of how this argument was taken up by the right, reference should be made to the response of the Leader of the Reform Party of Canada (Reform Party: Preston Manning, Reply to the Throne Speech by the Leader of the Opposition, *Hansard*, October 13, 1999, 36th Parliament, 2nd Session, Title 1600).

[66] The Bill was tabled on May 5, 1999 and passed on June 10, 1999.

[67] An SOM survey in 1993 showed that 73 per cent of Quebeckers were in favour of equality between homosexual and heterosexual spouses with respect to insurance, pension funds and the benefits provided under collective agreements. See Pierre Gingras, 1993. Since then, there has been no decline in public support. Thus, in 1998, an Angus Reed survey showed that 76 per cent of Quebeckers felt that everyone, regardless of sexual orientation, should be equal before the law. More than seven people out of ten said that they were in favour of

equality between same-sex and opposite-sex spouses in terms of financial benefits such as insurance (78 per cent), pensions (77 per cent) tax (73 per cent) or inheritance without a will (81 per cent).

[68] For example, in *Vriend*, *op. cit.*, the following groups intervened to support the inclusion of the ground of sexual orientation: the Alberta Civil Liberties Association, Equality for Gays and Lesbians Everywhere (EGALE), the Women's Legal Education and Action Fund (LEAF), the Foundation for Equal Families, the Canadian Human Rights Commission, the Canadian Labour Congress, the Canadian Bar Association — Alberta Branch, The Canadian Association of Statutory Human Rights Agencies (CASHRA), the Canadian AIDS Society, the Alberta and Northwest Conference of the United Church of Canada and the Canadian Jewish Congress.

[69] The passing of Bill 32 was the result of work done by a large coalition of community and union organizations. The Coalition pour la reconnaissance des conjoints et conjointes de même sexe brings together the following 14 groups: Alliance des professeures et professeurs de Montréal, CEDEC Centre-Sud et Plateau Mont-Royal, Centrale de l'enseignement du Québec (CEQ), the Civil Liberties Union, Confédération des syndicats nationaux (CSN), Conseil central du Montréal métropolitain (CSN), Conseil des travailleurs et travailleuses du Montréal métropolitain (FTQ), Fédération des femmes du Québec (FFQ), Fédération du personnel de soutien (CEQ), Forum des gais et lesbiennes syndiqués du Québec, Table de concertation des lesbiennes et des gais du Grand Montréal, Réseau des lesbiennes du Québec (RLQ), the Canadian Union of Public Employees (Quebec Section) and the Canadian Union of Postal Workers (Quebec Section).

[70] In *Egan*, *op. cit.*, par. 108: "The Attorney General of Canada has taken the position in his factum that 'the measure chosen does not have to be necessarily the solution for all time. Rather, there may always be a possibility that more acceptable arrangements can be worked out over time'. Viewed in this light, the impugned legislation can be regarded as a substantial step in the progressive integration of all those who are shown to be in serious need of financial assistance on account of the retirement or death of a supporting spouse. It is therefore rationally connected to the objective…" and is consequently not unconstitutional [emphasis added].

[71] Beginning with *Anderson* v. *Luoma* (1986), 50 R.F.L. (2^d) 126 (B.C.S.C.).

[72] The expressions "marital status", "family status" and "marital situation" are used interchangeably here, although a distinction is made between them in some of the court decisions.

[73] The Manitoba Court of Queen's Bench rejected the argument of Vogel and North to the effect that it was because North was a man and not a woman that Vogel, his partner, could not receive the benefits related to North's employment. The Court interpreted "sex" restrictively on the pretext that it was respecting the legislature's refusal to protect gays and lesbians against discrimination. The Court stated: "the prohibited ground of discrimination … does not, in my opinion, create a third gender…". *Vogel* v. *Manitoba*, 16 C.H.R.R. D/242 (1992) (Man. Q.B.). See also, *Gay Alliance Toward Equality* v. *Vancouver Sun*, [1979] 2 S.C.R. 435.

[74] *Equality Rights Statute Law Amendment Act, op. cit.*

[75] The relational aspect was not recognized by the Supreme Court of Canada until 1995 in *Egan*: "sexual orientation is an analogous ground of discrimination in the context both of discrimination against homosexual individuals and of discrimination against homosexual couples" [emphasis added], *op. cit.*, par. 177.

2: LESBIAN COUPLES AND PRIVATE FAMILY LAW

In this Chapter, we present an overview of the state of private family law with respect to the recognition of lesbian couples. We limit our examination of this subject to the legal framework of the private economic rights and obligations that exist between spouses, on the one hand, and toward their children, on the other. Because of a lack of space, we do not consider questions that, while not a direct part of family law, are influenced by the legal recognition of conjugality (for example, eligibility for private auto insurance plans or sponsorship of a spouse for immigration purposes).

The distinction between private law and public law (dealt with in the following chapter) is problematic because it suggests that the law is not present in private relationships whereas those relationships are in fact extensively regulated by the state. This distinction also hides the fact that the recognition of certain private relationships has an impact on taxation and determines eligibility for social programs and benefits linked to employment.

The piecemeal reform that has marked the development of family law over the last fifty years has given rise to a regime that lacks coherence. This regime imposes heavier burdens on the members of some family units and confers privileges on others that do not withstand logical analysis in terms of either equality or the moral and economic foundations of the benefits. For example, in the case of married persons (hereinafter "spouses"), economic solidarity is imposed by the laws governing matrimonial and family property or by the *Civil Code of Quebec*, and this solidarity can then be used to justify the inclusion of family assets and income when determining eligibility for income-tested benefits. In the case of unmarried couples (hereinafter "partners", "common-law or de facto spouses"), solidarity is presumed for the purpose of public benefit plans but it is not recognized in private matrimonial law. Thus, unlike a married spouse, a *de facto* or "common-law" spouse who is refused government assistance cannot legally count on economic support from his or her partner. It is not merely because many private and public plans are interlinked that family policy in Canada lacks consistency. As we are about to see, asymmetry may even exist within a particular statute.

2.1 Marriage

In all of Canada's provinces, marriage recognized by the state remains out of reach for lesbians. Although the courts and some legislatures are prepared to concede that the relationships of lesbian and gay couples are analogous to those of heterosexual couples, marriage is still forbidden to them.

2.1.1 Eligibility for legal marital status

Under the *Constitution Act, 1867*, the federal government has exclusive jurisdiction over marriage[1] while the provinces have exclusive jurisdiction over the solemnization of marriage.[2] According to constitutional lawyers Chevrette and Marx (1982), this strange division of jurisdiction over a single subject between the federal government and the provinces can be explained by the fact that, at the time of Confederation, it was thought that jurisdiction over

marriage should be given to the federal government in order to ensure uniformity and recognition of marriages contracted elsewhere. Because Lower Canada feared that the federal government would use its power to legalize civil marriage and legislate against provincial customs, jurisdiction over the solemnization of marriage was given to the provinces (Chevrette and Marx, 1982, pp. 656-657). The federal government has done little in this area except to pass divorce legislation in 1968 and to define the degrees of consanguinity and filiation that constitute a bar to marriage.[3] Despite this lack of intervention, it has nevertheless not lost its power to legislate on the subject.

The distinction between marriage and its solemnization corresponds to the distinction between formalities and capacity. The provinces are authorized to regulate the formalities (e.g. qualifications of the celebrant, publication of bans, medical examination) and the federal government has exclusive power to regulate questions concerning a person's capacity to contract marriage.[4] Although the distinction between formality and capacity is not always obvious and some of the judicial decisions concerning the minimum age of the parties have tended to confuse formality and capacity (Hogg, 1985, pp. 535-536; Katz, 1975, Chevrette and Marx, 658), it would seem that the identity of the contracting parties relates to capacity rather than to formalities. Consequently, a law providing that marriage is available without distinction based on the sex or sexual orientation of the parties would be within the constitutional jurisdiction of the federal government. Intervention by the federal government would reflect the spirit of the Constitution of 1867 and ensure uniformity and recognition of marriages celebrated elsewhere. Consider, for example, the problem of two lesbians who had been married in a province or a country that permitted lesbian marriages but who separated or divorced when they were domiciled in a province in which such marriages were not recognized.

In Quebec, marriage is governed by the *Civil Code*. Article 365 of the Code expressly provides that marriage may be contracted only between a man and a woman. In 1998, Messrs. Hendricks and LeBoeuf brought a court challenge[5] alleging that this provision violated section 10 of the *Charter of Human Rights and Freedoms*[6] and was *ultra vires* the Quebec government because marriage falls within federal jurisdiction. The challenge was abandoned before being heard but was revived in 2000.

In the common-law provinces, the laws governing marriage do not prescribe the sexual identity of the parties and it is only as a result of the common law that these laws are interpreted to limit marriage to persons of the opposite sex. In 1993, Messrs. Layland and Beaulne asked the Court to review the refusal of the registrar to issue a marriage licence to them[7] on the ground that this refusal constituted discrimination under section 15 of the *Canadian Charter*. The Court confirmed that the common law limited marriage to a man and a woman. It determined that this was not discriminatory since, in the Court's judgment, it was always possible for the applicant to meet the requirements by marrying a woman:

> The law does not prohibit marriage by homosexuals provided it takes place between persons of the opposite sex. Some homosexuals do marry. The fact that homosexuals do not choose to marry, because they do not want unions

> with persons of the opposite sex, is the result of their own preferences, not a requirement of the law.[8]

Layland and Beaulne abandoned their appeal following the Supreme Court of Canada decision in *Egan* (McCarthy and Radbord, 1998, p. 114). Thus, marriage is still not possible for lesbians and gays in any of the Canadian provinces.

Until the early 1990s, the demands of the gay and lesbian movement were designed above all to obtain treatment equivalent to that given to *de facto* heterosexual relationships. The reluctance of the lawmakers to obey the directives imposed by the courts, however, has led some groups of gays and lesbians to conclude that recognition of the right to marry is the main stumbling block to the recognition of same-sex couples.[9]

The example of the Netherlands,[10] where marriage is now possible for gays and lesbians, is likely to be followed by South Africa, among others.[11] Canada will then be forced to recognize these marriages under the rules of private international law. Nevertheless, on June 8, 1999, by a vote of 216 to 55, Canada's Parliament adopted a resolution that may not have the force of law but is very indicative of the attitude of parliamentarians to the right of same-sex couples to marry. This resolution affirmed that Parliament would do everything in its power to ensure that marriage remains a union between a man and a woman to the exclusion of all others.[12] Two days later, however, the *Globe and Mail* published the results of an Angus Reid survey indicating that 53% of Canadians were in favour of allowing marriages between persons of the same sex.[13]

2.1.2 The legal effects of marriage

Under the *Civil Code of Quebec*, spouses may on marriage determine by contract the status of any property that is acquired before and during the marriage and may also define who will manage it and the division of such property at the end of the union. However, whatever the terms of the contract, the couple must constitute a "family patrimony" which includes the family residences, the furniture in these residences, the vehicles used by the family and the assets invested in various retirement plans.[14] In the absence of a contract, the spouses are subject to the matrimonial regime of the partnership of acquests. This regime is broader than the basic family patrimony because all goods acquired during the marriage, including earnings from work, are considered to be joint family property which will be divided equally at the time the marriage is terminated. Only each individual's private property (property owned by one of the spouses at the time of marriage and that acquired subsequently by inheritance or gift) is not subject to division.[15]

Despite the possibility of signing a contract to determine the treatment of common property, the *Civil Code* includes obligatory measures[16] concerning succour and assistance. It requires the spouses to "live together",[17] although this does not prevent them from having separate domiciles.[18] The spouses must exercise parental authority together, choose the family residence together[19] and contribute towards the expenses of the marriage in proportion to their respective means.[20] Neither spouse may, without the consent of the other, alienate or remove from the

family residence the movable property used by the household,[21] terminate the lease on the family residence or sell, mortgage or lease the property that serves as the family residence.[22]

Unlike the common-law regimes, the *Civil Code of Quebec* provides that, on the dissolution of the union, the family property ("patrimony") shall be divided equally and this equal division may not be renounced by marriage contract.[23] However, a spouse may renounce it by notarial act at the time the union is dissolved. At the time of the dissolution of a union, Article 427 of the Code provides for the possibility of an allowance in order to compensate for the contribution of one spouse to the enrichment of the other with goods or services during the marriage.[24] This allowance is designed to remedy the economic imbalance between the spouses and is in addition to possible alimony payments made under article 585 of the *Civil Code,* which applies to spouses and relatives in the direct line.

In all the other Canadian provinces, the rights and obligations of married persons are set out in a series of laws such as those governing matrimonial property, inheritance, the duty to support the family, adoption etc. As we show in the following pages, although these laws apply to unmarried couples as well, they generally treat married persons differently. The concessions made gradually over the years to unmarried partners, whether heterosexual or homosexual, are incomplete, especially with respect to the ownership and division of matrimonial property.

2.2 Common-law relationships

Not all conjugal relationships are solemnized by the ceremony of marriage. Marriage-like relationships or "free unions" (*"union libre"*) have become increasingly common, especially since the 1970s when most of the common-law provinces abolished the distinctions made with respect to children born out of wedlock. However, according to Monica Boyd (1988, p. 88), unmarried cohabitation is the choice primarily of young persons and is still a prelude to marriage. This comment is possibly less and less relevant today since, between 1981 and 1996, the percentage of heterosexual common-law partnerships doubled in Canada, increasing from 5.6 per cent to 12 per cent (Turcotte, 1999, p. 3). Furthermore, Quebec is clearly different in this regard: one couple in four lives in a common-law partnership, or *de facto* relationship (*"union de fait"),* whereas the figure in the rest of Canada is only one couple in ten (Turcotte, 1999, p. 4). Be that as it may, the legal framework has had to adjust to the change in practices and include certain marriage-like relationships in the legal definition of family. Originally called "free unions" ("unions libres") or "marriage-like relationships" with no legal definition, they have now become "common-law relationships" or "*de facto* unions", recognized and regulated by the state as long as they satisfy certain tests respecting the gender of the parties and the duration of the relationship. [25]

The inclusion of common-law partnerships occurred, however, only gradually and unequally. In Quebec, for example, *de facto* conjugality is recognized for the purposes of public plans whereas it has no status at all for the purpose of private family law governed by the *Civil Code*.[26] At the time of the last revision of the *Code*, the Conseil du statut de la femme, relying on the opinion of many women's groups, maintained that the state should refrain from determining a framework for a *de facto* union. Although the Conseil recognized the need for

the partners to be better informed about their rights and duties, it felt it was important to preserve freedom of choice for women. It also felt that the situations of *de facto* conjugality were too varied to be defined in the *Civil Code*. We should add that the coverage of common-law relationships is also uneven in the common-law provinces because it occurs only in certain statutes.

The concept of a "*de facto* spouse" in Quebec is defined differently depending on the act, regulation, collective agreement, insurance or assistance plan in which it is used. Consequently, the persons who form a couple are treated as though they were married in some cases, whereas in other cases the same persons are treated as though they were single. While the definition of "*de facto* spouse" varies according to the legislation in question, cohabitation is usually an essential criterion. The minimum duration of the cohabitation can vary from one plan to another. It is usually three years, although sometimes it can be one year or even five. In addition, the minimum duration of cohabitation is usually shorter when there is a child. In a single jurisdiction, this duration may also vary with the program.[27] Thus, for the purposes of entitlement to social assistance benefits, in Ontario for example, persons are considered to be spouses from the beginning of their cohabitation but for the purpose of alimony they are recognized as having this status only after three years. Several programs add the factors of public acknowledgment and mutual support to that of cohabitation.

The description of the rights and obligations of *de facto* spouses is important for our purposes because there is a growing trend that suggests that lesbians living in couples will in future be treated in the same way as heterosexual common-law spouses, with the exception of certain provisions concerning adoption and filiation. If they meet the definition for conjugal cohabitation, these couples will be subject to the same obligations and enjoy the same rights as heterosexual common-law spouses without having to express any intention to designate their relationship as such. At least this is the trend that appears to be emerging with the enactment in Quebec of the *Act to amend various legislative provisions concerning* de facto *spouses* (Bill 32),[28] specific acts in some provinces such as British Columbia, and a number of recent judicial decisions. We shall see in Chapter 4 that this *de facto* recognition of same-sex partners raises many questions and concerns among the lesbians who participated in our consultations.

2.2.1 Ownership of property

While the distinctions between the rights and obligations of married couples and couples who cohabit in a conjugal relationship have become blurred over the last twenty years, distinctions with respect to the division of matrimonial or family property[29] persist. In Quebec, as in the common-law provinces, the rules governing such division are set out in legislation for married persons, but *de facto* spouses must bring a legal action for unjust enrichment in order to obtain their share. Such legal claims are difficult to prove, entail substantial costs and, in most cases, result in an unequal division of the property, unlike the situation for married persons who are presumed to share equally in family property. We should note, however, that some distinctions between married spouses, on the one hand, and *de facto* or common-law spouses, on the other, were removed in the case of retirement pensions or plans, which are part of so-called

matrimonial property.[30] The rules applying to public and private pension plans are examined in Chapter 3.

Under the laws of some provinces, including Newfoundland[31] and British Columbia,[32] unmarried cohabiting couples may be subject to matrimonial property legislation and accordingly be treated as though they were married at the time of their separation. In 1997,[33] the Nova Scotia Law Reform Commission published a report on the state of the law governing family property. It recommended, among other things, that the law on matrimonial property be broadened to apply not only to married persons but also to cohabiting couples, whether they be heterosexual or homosexual. The Nova Scotia Law Reform Commission, like the Ontario Commission,[34] recommended automatic inclusion, with the possibility that a couple could opt out of the law. It did not follow the example of British Columbia[35] and Newfoundland, where cohabiting couples must take specific action in order to opt in to the legislation. We shall continue the discussion of the distinctions between opting in and opting out in Chapter 6.

Although the governments of Nova Scotia and Ontario have not accepted the recommendations of their respective commissions, the courts could well force them to do so. In July 1999, the Saskatchewan Court of Queen's Bench applied the analysis of the Supreme Court of Canada in *Miron* v. *Trudel*[36] and determined that the matrimonial property legislation in that province was discriminatory. The Court included cohabiting couples in the Act by reference.[37] Consequently, the spouse in that case, after eight years of living in a common-law relationship, obtained exclusive possession of the family dwelling for herself and her children. Some people might describe as paternalistic this tendency of the law reform commissions and the Supreme Court of Canada to treat common-law unions in the same way as marriage in that freedom of choice is not respected, at least in the case of heterosexual couples (since homosexual couples are not allowed to marry). However, the following comments of Justice L'Heureux-Dubé show that this trend is probably not unrelated to another trend, namely the disengagement of the state and the privatization of support:

> The real question in such cases is whether the state should automatically bear the costs of these realities, or whether the family, including the former spouses, should be asked to contribute to the need, means permitting. Some suggest it would be better if the state automatically picked up the costs of such cases: Rogerson, *Judicial Interpretation of the Spousal and Child Support Provisions of the Divorce Act, 1985 (Part I)*, *op. cit.*, at p. 234, n. 172. However, as will be seen, Parliament and the legislatures have decreed otherwise by requiring courts to consider not only compensatory factors, but the "needs" and "means" of the parties.[38]

Speaking for the majority, Justice Iacobucci went further in *M.* v. *H.*:

> As I see the matter, the objectives of the impugned spousal support provisions were accurately identified by Charron J.A. in the court below.... he identified the objectives of the Part III provisions as both a means ... "for the equitable resolution of economic disputes that arise when intimate relationships between

> individuals who have been financially interdependent break down" and to "alleviate the burden on the public purse by shifting the obligation to provide support for needy persons to those parents and spouses who have the capacity to provide support to these individuals" (p. 450). I find support for this position in the legislative debates, the terms of the provisions, as well as the jurisprudence of this Court.[39]

2.2.2 The family residence and exclusive possession thereof

The conjugal home is either a property owned by one or both of the spouses or a dwelling that they lease. Often the deed of ownership or lease is in the name of only one spouse, who may decide to dispose of or terminate it without consulting the other. In Quebec, spouses are protected by a number of provisions: article 401 of the *Civil Code*, which prohibits the spouse who owns an interest in the family residence from disposing of it without the consent of the other; article 403, which prohibits the transfer of a right or subletting the property; article 410, which makes it possible to award the right of use of the family residence to the spouse who has custody of the child; and article 409, which provides that the Court may "award to the spouse of the lessee the lease of the family residence", and this provision is binding on the lessor. *De facto* spouses do not enjoy this protection, although an exception is made in the provision concerning maintenance of occupancy in the leased property.[40] This provision states that if the spouse of a lessee has lived with the lessee for at least six months, the spouse may remain in the premises and assume the position of the lessee when they cease to cohabit, provided that the spouse notifies the lessor within two months of the end of the cohabitation. We should note that this provision is not limited to *de facto* spouses but also applies to a cohabiting relative by blood or marriage.[41]

In the common-law provinces, under the provisions concerning family property, a married spouse may not transfer family property without the consent of the other spouse.[42] This has the effect of forcing the lessor to maintain the lease in effect and to comply with rent controls where they exist. A right to exclusive possession exists in most of the provinces as a result of the provisions governing support or maintenance, to which cohabiting couples are subject.[43] Even in those provinces where *de facto* spouses enjoy this legislative protection, gays and lesbians are excluded from the rights relating to the family residence by the definition given to "spouse". The amendment made in Ontario in November 1999[44] did nothing to change this situation.

British Columbia is an exception in this regard since, as a result of the amendment to its family law in 1998, the ability of the Court to order exclusive possession of the conjugal home was extended to same-sex cohabiting spouses.[45]

In *M*. v. *H*.,[46] the Supreme Court of Canada ruled that the definition of "spouse" in the part of the Ontario *Family Law Act* governing support was discriminatory. The Ontario government was ordered to rectify this constitutional invalidity, failing which the whole Act would be of no force or effect. The correction was limited to the provisions dealing with entitlement to support and did not affect the first two parts of the Act, which concern property. It is to be expected that the Ontario amendments and similar legislation in the other provinces will be challenged in the

courts. Unless there is a reversal of the prevailing trend in the Supreme Court of Canada, it does not require much imagination to assume that lesbian couples will soon have the right to have all family laws apply to them, including the right to exclusive possession of the family residence. In the meantime, as McCarthy and Radbord (1998, p. 148) point out, common-law heterosexual and homosexual spouses who are subject to "family" violence can already obtain exclusive possession of the family home since judges usually make this a condition of the order to keep the peace.

2.2.3 Domestic contracts

In the absence of legislative provisions governing their "conjugal" relationship, cohabiting couples can always sign a contract to determine their mutual obligations. Although these contracts are not classified as marriage contracts or domestic contracts,[47] they are not prohibited. Domestic contracts were not available to lesbian couples until very recently in Ontario and British Columbia and are still not available in other provinces such as New Brunswick and Nova Scotia. Domestic contracts are a specific form of contract since, unlike so-called commercial contracts, they are not deemed to be concluded between equal and informed persons but presuppose an unequal balance of power. According to this presumption, domestic contracts may be concluded only after disclosure by both parties of their assets and liabilities and after the parties have received independent legal advice, in the absence of which the Court is justified in rectifying the terms of the contract. The "commercial" form of contract that lesbian spouses will have to use, however, does not include these forms of protection and it may be assumed that, if the rules governing interpretation of so-called commercial contracts rather than those governing domestic contracts are applied to them, the courts will not intervene to correct the unfair terms. Since there is very little case law on the interpretation given to these contracts between unmarried spouses, it is not possible at this time to verify our hypothesis. This problem no longer arises in British Columbia and Ontario because in those two provinces all persons, without distinction as to their sexual orientation, who cohabit or have cohabited and separate may conclude cohabitation and separation agreements. These agreements cover their respective obligations and rights with respect to property, the division of family assets, the support obligation, the right to direct the education and moral training of their children and any other question relating to the governing of their affairs.[48]

Finally, in the absence of a domestic contract, a large number of unmarried cohabiting couples will wish to ensure, when they acquire property, that the deeds relating to the transaction are registered in the names of both partners. If they have not taken these precautions, the partner whose name is not registered could at great expense bring a claim of unjust enrichment in order to recover part of the property. In Quebec, in addition to this doctrine, unmarried partners may seek relief on the basis of a "specific *de facto* partnership"[49] or a "contract of *prête-nom*" (contract using a borrowed name)[50] to recover all or part of property to which a party has contributed even though title is in the other party's name.

2.2.4 Support or the right to alimony

Historically, the right to support was linked to marriage, more specifically to the fact that the husband acquired rights over the property of the wife; in exchange, he had a duty to support her. If the relationship ended in divorce and the wife was not in the wrong, the husband had

to support her for the rest of her life since the marriage was deemed to be indissoluble. Over the years, divorce has become easier to obtain. Since it is no longer based on fault, the conduct of the parties is no longer a useful factor in determining whether alimony should be provided. Support is now based on need and ability to pay and it is reciprocal in the sense that either the wife or the husband may be required to provide it. Traditionally, support did not apply to *de facto* spouses; it was only as a result of legislation that this obligation was extended in the common-law provinces to persons who lived together maritally. It should be noted that it was the fact that these provisions did not apply to lesbian couples that was the subject of the challenge in *M*. v. *H.* and led to the most recent Ontario reforms.

Before describing the state of the law relating to support, we should note that, although the duty to provide and the right to receive alimony do not exist for lesbians in some jurisdictions, support by the spouse is not necessarily excluded when it is a question of determining eligibility for public assistance plans. Thus, in those provinces that have broadened the concept of common-law spouse to include same-sex couples, there is a presumption of support to the extent that the partners in the couple live together. This presumption is discussed in greater detail in the next chapter.

2.2.5 Support obligations to the spouse

Section 30 of the *Family Law Act*[51] of Ontario provides that "[e]very spouse and same-sex partner has an obligation to provide support for himself or herself and for the other spouse or same-sex partner, in accordance with need, to the extent that he or she is capable of doing so". The duty to support a spouse or partner does not end with the breakdown of the relationship but, depending on the needs and the resources of each, may continue for some time after the separation. Note that the support order is also binding on the estate of the payor spouse.[52] As a result of the decision in *M.* v. *H*. and the subsequent reform in Ontario, gays and lesbians now have a right to receive and a duty to provide support, although the expression used is "same-sex partner" rather than "spouse". This is possible to the extent that they:

> … 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.[53] [Emphasis added.]

The duration and amount of the support are established in light of the current and future resources of the parties.[54]

Lesbians living in couples and residing in Ontario and who wish to opt out of the support obligation or to waive the right to support must enter into an agreement to this effect with their partner. Without such a contract, they must — whether they want to or not — provide support for their partner during the relationship and after separation. However, even if they have concluded a contract to withdraw from the application of the Act, they could still have this obligation imposed on them if their partner receives benefits under the *Family Benefits Act*, the *General Welfare Act* or the *Ontario Works Act, 1997* or income security under the *Ontario Disability Support Program Act, 1997*. The agencies responsible for these programs

are in fact authorized to make an application for support in the place of the partner.[55] This substitution of a government agency is designed to reduce the burden on the state, as we noted in the section concerning ownership of property.

A reading of the legal definition of "spouse" in the Ontario legislation suggests that parenthood is included in the definition. Those persons will be considered to be partners who are the natural or adoptive parents of a child, in which case the duration of the relationship may be less than three years. Aside from the duty to support the child, a spouse who has adopted the child of her partner might have an obligation to provide the partner with support imposed to the extent that the presence of the child is a factor that limits the ability of the partner to support herself.

In British Columbia, partners, for the purpose of support, are considered to be those persons of the same or the opposite sex who have lived in a quasi-marital relationship for not three but two years.[56] In the other common-law provinces, the legislative provisions that create a duty of support apply solely to opposite-sex spouses even though the reasoning of the Supreme Court of Canada in *M.* v. *H.* applies as much to these provisions as to those of Ontario. Only the future will tell whether gays and lesbians will have to bring court challenges to these acts one by one and province by province or whether the legislatures will comply with the decision of the Supreme Court of Canada without being forced to do so by the courts.

In Quebec, there is no duty of support for partners in a cohabitation relationship, whether or not the partners are of the same sex. However, this duty may be created voluntarily by a domestic contract.

2.2.6 Duty to support children

In Ontario and in British Columbia, support obligations to children are imposed not only on natural and adoptive parents but also on the spouses of the parents and on persons who have helped to support the child for a certain time. The amount of the support is calculated on the basis of the federal support guidelines.[57] As in the case of spousal support, an application for support may be made by a government agency that provides assistance benefits.[58] Thus, in Ontario, the *Family Law Act*[59] provides that the term "parent" shall designate "a person who has demonstrated a settled intention to treat a child as a child of his or her family …."[60]

"While adults may move in and out of relationships without expectations of permanence, the expectations and needs of a child are not as elastic", stated Justice Chadwick of the Ontario Court General Division.[61] For this reason, when a person has displayed an intention to assume responsibility for a child, that person cannot subsequently terminate those obligations unilaterally. The facts of each case will serve to determine whether there was a "settled intention to treat a child as a member of his or her family". Simple courtesy and the fact that adult and child have become attached will not be sufficient. It is the quality and not the duration of the relationship with the child that will be the determining factor. In this situation, factors such as the sharing of the home, contributions to the child's expenses, a clear interest in the child's welfare and the assumption of parental responsibilities including discipline are

considered. Although the existence or lack of cohabitation is not conclusive, it serves as an indicator of the degree to which these responsibilities have been assumed.

In British Columbia and some other common-law provinces, the mere fact that an individual is the spouse of a parent creates an obligation to support the parent's children as long as this spouse has contributed to their support for at least one year.[62] Although the definition is different from that used in the Ontario legislation, as can be seen in the decision in *Re L.K.F.*,[63] a sporadic and insignificant contribution will not create a support obligation. In that case, the Court had to determine whether B., a lesbian who had cohabited with W., the mother of two young boys, for about four years out of a total of six years for which the relationship had lasted, had a duty to support the children. The Court held that B.'s contribution to the household expenses covered merely her own food and lodging and that she did not share the expenses of the household as a whole. Furthermore, although the rent she paid to W. was income that benefited the children, such an indirect contribution was not sufficient to establish an assumption of responsibility. As regards the gifts, for example trips, for which B. had paid, the Court felt that they were not more generous than those she had given to her nephews and nieces. Finally, although the children benefited from B.'s new refrigerator, dishwasher and van, these articles had been purchased by B. for her own convenience. While the material conditions of the children's lives had been improved thereby, this was, in the Court's opinion, merely an incidental consequence of B.'s relationship with the children's mother and not an assumption by B. of responsibility for the children.

In Quebec, biological and adoptive parents have a duty to support their children. However, in the case of an unmarried couple, the spouse of a child's parent has no duty toward the child. Nevertheless, this does not mean that, for the purposes of public plans, the income of the spouse or same- or opposite-sex partner is not taken into account.

The question of economic support between spouses goes beyond the framework of the obligations imposed by private family law since the presence of a *de facto* spouse may have an impact on the parent's eligibility for certain social assistance and insurance programs. We shall look at this subject in greater detail in the next chapter. Furthermore, conjugal status — whether the person is married or in a *de* facto union[64] — will have different consequences for tax purposes.

2.2.7 Custody of children and right of access to children

Since lesbians have had support obligations to the children of their partners imposed on them under public programs, it could be concluded that they have custody and access rights when the relationship breaks down. Although the test used to decide these questions is that of "the best interests of the child"[65] and custody and access are more in the nature of privileges than of rights, the courts tend to prefer the biological or adoptive parents to the "psychological" parents or, in other words, the co-parent of the same sex. Furthermore, as Ann Robinson (1998) and Katherine Arnup (1991) have shown, lesbophobic prejudice affects the assessment of applicants, even when they are the biological mothers.[66]

It is not, however, the legislation that causes problems, since it provides that custody of and access to a child may be given to the father, the mother or any other person.[67] Custody may be exclusive or joint and case law indicates that it may be given to, among others, the biological or adoptive parents, grandparents, uncles and aunts and other relatives or the spouses of the parents, whether or not they are married.[68] The same rules apply to access and visiting rights. Questions of custody and access may be resolved in a separation agreement although such a measure is currently possible in most provinces only for persons who are married.[69] However, the courts are authorized to cancel or amend such an agreement if it is not in the best interests of the child.[70] A person who has exclusive custody of a child may also transfer such custody by means of a legal will.[71]

A right of custody gives the person holding it the rights and responsibilities of the mother and father.[72] As far as access is concerned, in addition to visiting rights it also permits the father or mother to request and obtain information concerning the health, education and welfare of the child.[73] In 1997, a court in Ontario heard an application by a non-biological mother (or same-sex co-parent) for exclusive custody of the biological child of her former partner.[74] The couple had planned the birth together and shared in caring for the child, who was two and a half at the time of the trial. Although the Court rejected the application because, according to the facts, the biological mother was the principal caregiver, it would have been prepared to grant shared custody if relations between the two women had been less tense. In that case, the non-biological mother had also requested a declaration by the Court that she was the child's mother because such status would have increased her chances of obtaining custody or, at the very least, of gaining recognition of her status with respect to the child and establishing a tie of filiation. The Court rejected this application on the basis of case law relating to adoption, which we consider in the next section.

If a lesbian partner displays a very clear intention to treat the child as if it were a child of her own family, if she is actually involved in the child's education and the care it is given or if her participation is necessary to resolve disputes, she will then be a full partner and has a right to be heard at the trial.[75] In British Columbia, it has been recognized that this right to participate requires first that this person be informed of the application; the applicants are therefore required to inform each parent and each adult with whom the child usually resides.[76] Note that, since February 1998, the term "parent" in that province includes a step-parent, without any distinction based on sexual orientation, who has contributed to the support and maintenance of the child for at least a year.

Unlike the situation in the common-law provinces, an award of custody to a third person in Quebec does not involve the loss of authority for the father and mother. They retain a right to supervise the maintenance and education of the child[77] until this right is removed from them, which happens only for serious reasons.[78] No case relating to an award of custody or access rights to a lesbian co-parent has been reported, although this does not mean that there have been no cases in which this right was conferred by contract or by legal will.

2.2.8 Adoption

In November 1999, Canadian newspaper headlines referred to two attempts by lesbians to gain recognition of their parental status with respect to the biological child of their partner. In the first case,[79] that of Paquette and Greenbaum,[80] the Quebec Superior Court dismissed an application for recognition of status as the psychological mother and the possibility that the biological mother might share parental authority with her spouse. In the Court's judgment, the concept of psychological mother does not exist in law. It held that the concept should not be confused with that of *in loco parentis*, which, although it involves custody and access rights, does not confer parental authority because the biological parent retains this authority as long as that parent has not waived it, which was not the case in these proceedings. Parental authority, for its part, may be held jointly only by a father and a mother but not by two mothers.[81] The Court added that it could confer parental authority on the applicant if the child were eligible for adoption under article 562 of the *Civil Code of Quebec*. In fact, in the second case in Alberta, adoption was the mechanism relied upon.[82] However, the Quebec applicant, unlike her Alberta counterpart, did not choose to ask for the right to adopt.

Whereas in Quebec a person (married or in a *de facto* relationship) may adopt the child of his or her spouse,[83] under the law of Alberta, this person is referred to as a "step-parent" or, in French, a "*beau-parent*".[84] In the Alberta case, the Court had to determine whether this expression included lesbian couples. On the basis of government documents published in May 1999 when the Act was amended to replace "spouse" with "step-parent", the Court found that the legislature had acknowledged the diversity of families and had not intended to exclude same-sex partners from the definition of "step-parent". The Court added that this interpretation was in accordance with the purposes of the adoption legislation, whose objective is the best interest of the child. It is in the best interest of the child that his or her relationship with the step-parent enjoy legal recognition without regard to the legal status of the link between the step-parent and the natural parent.[85] In order to determine whether the applicant was a step-parent, the Court applied the *in loco parentis* test, that is to say, it determined whether the applicant had in the past displayed a clear intention to assume the role of a parent. Finally, since it relied on the ordinary rules of statutory interpretation, the Court held that it was not necessary to consider the application of the *Canadian Charter*, especially since the Ontario case law had indicated as long ago as 1995 that, under the *Canadian Charter*, the word "spouse" could not exclude same-sex partners in adoption cases.[86]

In all the cases referred to, the child had been conceived by artificial insemination and, consequently, the consent of the biological father was not required and the question of adoption concerned only the adopting party, the child and the biological mother. However, when a lesbian couple wishes to adopt jointly through the adoption authorities, the partners have to deal with the resistance of those authorities,[87] which they may well have to challenge in court. In the case of a biological father or mother who has not waived his or her parental authority, the adopting parents may encounter a further obstacle, namely the refusal of the biological parent who still retains parental authority to entrust the child to a lesbian couple for

homophobic reasons. Since the consent of the parent who still retains parental authority is required for the adoption, the application would become null and void.

In Ontario, subsections 146(2) and 146(4) of the *Child and Family Services Act* confer a right to adopt on one individual or jointly on two individuals, who are spouses of one another.[88] Rather than broadening the definition of "spouse" to include same-sex spouses, the reform of October 29, 1999 (following the decision in *M.* v. *H.*), simply added the following subsection: "any other individuals that the court may allow, having regard to the best interests of the child".[89] This wording opens the door to a restrictive interpretation in the case of lesbian partners. In Quebec, there appears to be no legal impediment to a lesbian's adoption of the child of her partner since article 546 of the *Civil Code* provides that "[a]ny person of full age may, alone or jointly with another person, adopt a child". Thus, two sisters, two friends or a lesbian couple could exercise this right. However, there are no reported cases of such joint adoptions. Only the future will tell whether the courts will be more receptive to such applications than to that of Paquette and Greenbaum or whether they will again hide behind the so-called impossibility of a child having two mothers.

In reaction to pressure from the gay and lesbian communities, British Columbia amended its adoption legislation in 1996 to make it more neutral so that an individual or two adults jointly can adopt.[90] For greater certainty, it authorizes an adult to become an adoptive parent jointly with the child's biological parent.[91]

Adoption by the "psychological mother" is likely to become more widespread because this mechanism recognizes not only the emotional attachment to the partner's child and, in many cases, the fact that the birth was a joint undertaking, but also because it will make it possible to resolve practical, everyday difficulties. Paquette and Greenbaum argued in this regard that the co-parent actually exercises parental authority, although this fact is not recognized when the child has to be registered at school or takes a trip requiring a passport (the child's name appears only in the passport of the biological or adoptive mother).

Although the biological or adoptive mother may give her partner a power of attorney authorizing her to act in the biological or adoptive mother's name in dealing with the school authorities or medical services, as Kathleen Lahey has pointed out (1999a, p. 304), the members of the medical professions are not as impressed by powers of attorney as lawyers. To the extent that they are respected, powers of attorney allow an agent to act on the parent's behalf when consenting to treatment or managing some material aspect of family life. These powers of attorney must be express but in the case of married persons, the powers of attorney may be presumed when one of the spouses cannot express his or her wishes or cannot do so in a timely manner.[92]

2.2.9 Inheritance

The freedom of married persons to make a will is limited by the provisions governing matrimonial property (or the family property) and the provisions governing the duty to support the testator's family. Thus, a testator may not deprive a surviving spouse of his or her share of the property or leave that spouse or dependants in need by providing benefits for others.

Furthermore, married persons enjoy particular protection with respect to the family residence such that they cannot be evicted by the heirs.

For common-law spouses, there is no restriction on their freedom to make a legal will, except that they may not include any interest their spouse may have in property, for example, property that is co-owned. This means that, under the doctrine of unjust enrichment to which we referred earlier, the surviving spouse could apply to the Court for restitution from the heirs of a share equivalent to his or her contribution to the property or to the value of the property.

In the event that the deceased has died intestate (without a valid will), the property will devolve in accordance with the order and degree of relationship. As a rule, if a person who dies intestate has a spouse and children (natural or adopted), they will share the whole of the estate; otherwise the property devolves in the following order: father and mother, brothers and sisters, nephews and nieces etc. If there are no close relatives, the estate reverts to the Crown. In Ontario, the surviving spouse is entitled to the whole estate if the value thereof does not exceed the "preferential share",[93] currently set at $200,000.[94] If the value of the estate exceeds this amount, the surviving spouse receives the preferential share and the residue is then divided among the surviving spouse and the children.[95] As far as the children are concerned, whether the parents are married or not makes no difference. If there is no surviving spouse, the children will share the estate equally.[96] The situation in Quebec is comparable. However, it differs in terms of the share to which the spouse is entitled, namely, one-third of the estate, while the descendants are entitled to two-thirds.[97] However, depending on the matrimonial regime adopted by the spouses, the surviving spouse may, as an alternative, claim one-half of some of the deceased's property and be the creditor by application of the family property.

Nowhere in Canada do common-law spouses and the "psychological" children of the deceased benefit from the rules governing the division of the estate of a person who dies intestate.[98] They could even be supplanted by the spouse if there has been a separation but no divorce of former spouses. The only remedy for a common-law spouse and the "psychological" children is based on the provisions relating to dependants. These provisions make it possible to assert a support obligation against a testamentary or intestate succession. For this purpose, dependants in Ontario may include the spouse, father or mother, child and brother or sister of the deceased. "Child" includes any person toward whom the deceased displayed a clear intention to treat that person as though he or she were a child of the deceased's family. "Spouse" includes not only married persons but also men and women who, while not married, have cohabited in a conjugal union for at least three years or for a shorter period if they are the parents of a natural or adopted child.[99]

In the case of lesbian spouses, the amendment made in Ontario in November 1999 does not correct discrimination that occurs with respect to succession, except that "same-sex partners" may be appointed executors of the estate of a person who dies intestate or of an estate for which no executor has been appointed. As for the right of a dependant to a share of the estate by way of support, the Act was not changed and the prospect that the courts will seek refuge behind legal precedents, even recent ones, is not very encouraging. In 1996, two lower courts

in Ontario refused to recognize a homosexual in one case and a lesbian in the other as dependants.

In *Obringer*,[100] the Court found that, although Obringer and Kennedy had maintained an intimate and exclusive relationship for more than 20 years, they could not be considered spouses because they had not lived together. The fact that cohabitation was impossible because of their employment (Obringer worked in the U.S. and Kennedy in Canada), that they had spent every weekend and all vacations together, that it had not been possible for them to marry, which would have eliminated the need for them to live together, and that the sole heir was the daughter of a cousin of Kennedy, did not affect the decision. In the second case, Modopoulos[101] had lived together for almost 14 years with her spouse, Breen, who had bequeathed to her all her property except the family residence, which was worth $400,000 and which she owned jointly with her mother. Because the house was jointly owned, it automatically devolved to the mother, who evicted Modopoulos less than a month after Breen's death. In order to defend herself against an action brought by the mother who claimed she was owed a sum of $45,000, the value of the estate, Modopoulos sought status as a dependant. The Court concluded that she was not a dependant. On the contrary, when Breen first became ill and for six years thereafter, it was Modopoulos who alone had provided for the couple, including purchasing medication, doing the household chores and paying the cost of improvements, insurance and property tax on the family residence. Moreover, according to the Court, Modopoulos had to establish that Breen had not made adequate provision for the dependant. That was dubious in this particular case since Modopoulos was the sole beneficiary and was not in need: "she is a young, healthy, single woman with no dependants and there is no evidence of any impediment to her ability to support herself".[102]

In July 1999, the British Columbia government introduced Bill 103 to do away with the distinction between heterosexual and homosexual *de facto* spouses. When the legislation comes into force on a date to be determined, spouses who have lived together as a couple for at least two years prior to the intestate death of one of them will have the same rights as married persons.

In Quebec, support for a dependant exists in only very limited circumstances. Under article 684 of the *Civil Code*, this remedy may be exercised only by the person who is owed support and this within six months of the death. The claim may have been established by an order or a contract. However, as we saw previously, only married spouses and children are covered by the provisions concerning the survival of support and this means that *de facto* lesbian spouses cannot obtain a support order against the estate.

2.3 Conclusion

In this chapter, we have provided a brief survey of private family law and attempted to determine the extent to which it recognizes lesbian conjugality. We have observed that, in all of Canada's provinces, marriage remains the privilege of heterosexuals. However, the adoption in the Netherlands of a law giving same-sex couples the right to marry will force Canada to recognize these marriages in accordance with the rules of private international law. This legal

situation could encourage discussion of this issue in this country in the near future and open the door to a reinterpretation of both common law and the Quebec *Civil Code*, which currently restrict marriage to persons of the opposite sex.

Nevertheless, the current trend among lawmakers in Canada is to grant same-sex couples the same rights and obligations as are given to opposite-sex cohabiting couples, with the exception of certain provisions concerning adoption and filiation. The evidence for this comes notably from the enactment of Bill 32 in Quebec, specific statutes in some provinces such as British Columbia and recent judicial decisions. The inclusion of same-sex couples in the legal definition of "spouse" is being achieved gradually and unevenly, as is shown by the provisions in Bill 5 in Ontario and more generally the differences in conjugal status granted to gay and lesbian couples in the provinces of Canada. These piecemeal reforms are producing a private family law regime that is asymmetrical and inconsistent because they are usually the result of legal challenges rather than the result of a declared political decision to put an end to discrimination based on sexual orientation.

We have also noted in this chapter the fact that resistance to equality rights for same-sex couples crosses all provincial borders when it is a question of children and the lesbian or gay two-parent family. Whether a question of support, custody or adoption of children is involved, lesbian partners still do not enjoy the same recognition as is given to heterosexual spouses with respect to the children of their partners. This is not surprising because procreation and parental status have historically provided an excuse to deny legal recognition to lesbian and gay couples.[104] Although decision-makers have now recognized that conjugality and parental status are not inextricably linked, they still have to be convinced that a child can prosper with two mothers. In the best interest of children, the state should support, through private law, in its assistance and insurance programs and in the tax system, a parental model that makes no distinction based on the sexual orientation of the parents.

We have also shown that, to different degrees and in various conditions depending on the province, unmarried heterosexual couples have obtained rights and duties that are more or less equivalent to those of married couples. In the common-law provinces, change has occurred primarily in the area of alimony payments whereas in the area of property, including inheritance, the distinction between marriage and common-law partnerships persists.

Quebec is different because it prefers to keep *de facto* spouses outside the private family law regime that is governed by the *Civil Code*. This difference between Quebec and the common-law provinces takes on an unsuspected dimension when it is a question of including lesbian and gay couples. In Quebec, as in the common-law provinces, legislative amendments that extend the rights and duties of same-sex spouses have taken the rights and duties arising out of heterosexual cohabitation relationships as the norm. The legislative assembly deliberately chose not to give couples living in a *de facto* relationship any legal status in the *Civil Code of Quebec*, regardless of the number of years they have been together or the sexual orientation of the partners. However, although the *Civil Code* does not regulate the status of *de facto* spouses, the legislative assembly has over the years given these couples certain benefits and certain obligations in specific statutes and public programs. Lesbian couples in Quebec do not

enjoy rights respecting the ownership of property, the family residence, alimony, intestate inheritance or consent to treatment when one of the partners lacks legal capacity — all of which rights are given solely to married persons under the *Civil Code*. Consequently, the elimination of discrimination based on sexual orientation in Quebec will have to be accompanied by a debate on the more general inclusion of *de facto* relationships in the *Civil Code*.

The similarity between the rights and obligations of cohabiting partners and those of married couples becomes even more clear when we consider the role played by conjugality and parental status in tax and public assistance programs. Our review of these programs in the next chapter will complete our description of family law.

Notes to Chapter 2

[1] Section 91(26), *Constitution Act, 1867,* (U.K.) 30 & 31 Vict. c. 3.

[2] Section 92(12), *ibid.*

[3] *Marriage (Prohibited Degrees) Act*, R.S.C. 1985, c. M-2.

[4] *In the Matter of a Reference to the Supreme Court of Canada of Certain Questions Concerning Marriage*, [1912] A.C. 880.

[5] "Canadian Marriage Challenge", GayLaw Net staff report (October 26, 1998) in the archived document "Canada DP Immigration, Lawsuit", NewsPlanet Staff (January 7, 1998) available at the following website: <http://www.planetout.com>.

[6] *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12, s. 10.

[7] *Layland* v. *Ontario* (*Minister of Consumer and Commercial Relations*) (1993), 14 O.R. (3^d) 658 (Gen. Div.). See Appendix 1 for more details on this decision.

[8] *Ibid*., p. 666-667.

[9] In July 2000, EGALE reported that the City of Toronto and a group of six couples had instituted a legal challenge in the Ontario courts against the denial of the right of persons of the same sex to marry. It also reported that, in British Columbia, a complaint on the same ground had been filed by Murray Warren and Peter Cook with the provincial Human Rights Commission. Furthermore, after he found that the refusal to grant a marriage licence to lesbians Cynthia Callahan and Judy Lightwater was discriminatory, the Attorney General of British Columbia took the case to court. See <htttp://www.islandnet.com/|~egale/equal marriage.htm>, consulted on September 6, 2000.

[10] On September 12, 2000, the government of the Netherlands enacted legislation giving homosexual couples the right to marry. This law, which came into force on January 1, 2001, gives gays and lesbians all the rights relating to marriage, the only restriction being, for

reasons of foreign policy, eligibility for international adoptions. See Martha Bailey (1999) and <http://coc.guts.nl/index.html?file=marriage>, consulted on September 12, 2000.

[11] This resolution was adopted by the African National Congress on December 20, 1997. See in this regard McCarthy and Radbord (1998, p. 120).

[12] *Hansard* No. 240, 1999, 1020-1355.

[13] "Most in poll want gay marriages legalized: 53% support idea despite MPs' vote to uphold status quo", *Globe and Mail*, June 10, 1999, p. A1.

[14] 414-426 C.C.Q.

[15] 432 C.C.Q.

[16] 391 C.C.Q.

[17] 392 C.C.Q.

[18] 82 C.C.Q.

[19] 394 and 395 C.C.Q.

[20] 396 C.C.Q.

[21] 401 C.C.Q.

[22] 403-408 C.C.Q.

[23] 423 C.C.Q.

[24] Although a compensatory allowance may be granted for the normal contribution to household expenses, for example a financial contribution to these costs that did not take into account differences in income or responsibility for child care which frees the husband to devote himself to his business, which prospers as a result, a large number of claims are rejected because of the difficulty in adducing evidence of the enrichment of one partner and establishing a direct or indirect causal link between the contribution of one spouse and the enrichment of the other. See *S.D.* v. *A.L.*, [1999] J.Q. No. 1487 (Que. S.C., Fam. Div.); *M.C.* v. *J.T.*, [1999] J.Q. No. 4414 (Que. S.C., Fam. Div.); *L.P.* v. *R.H.*, [1999] J.Q. No. 433 (Que. S.C., Fam. Div.); *H.S.K.* v. *A.K.*, [1999] J.Q. No. 1075 (Que. S.C., Fam. Div.); *M.K.* v. *M.A.K.*, [1997] A.Q. No. 459 (Que. S.C., Fam Div.); *M.E.M.* v. *P.L.*, [1992] 1 S.C.R. 183 (S.C.C.); *Lacroix* v. *Valois*, [1990] 2 S.C.R. 1259 (S.C.C.).[25] In *Miron* v. *Trudel*, [1995] 2 S.C.R. 418, which involved a challenge of the Ontario auto insurance legislation on the ground that it made a discriminatory distinction between married persons and common-law spouses, Justice McLachlin noted at par. 155: "Of late, legislators and jurists throughout our country have recognized that distinguishing between cohabiting couples on the basis of whether they are legally married or not fails to accord with current social values or realities....

63 Ontario statutes currently make no distinction between married partners and unmarried partners who have cohabited in a conjugal relationship.... Other provinces have adopted similar benefit thresholds. In the judicial domain, judges have recognized the right of unmarried spouses to share in family property through the doctrine of unjust enrichment: *Pettkus* v. *Becker*, [1980] 2 S.C.R. 834; *Peter* v. *Beblow*, [1993] 1 S.C.R. 980. All this suggests recognition of the fact that it is often wrong to deny equal benefit of the law because a person is not married."

[26] See on this point Francine Lepage, Guylaine Bérubé and Lucie Desrochers, 1992.

[27] In Bill C-23, *An Act to modernize certain benefits and obligations*, the federal government standardized the period of cohabitation at one year in all statutes.

[28] *An Act to amend various legislative provisions concerning* de facto *spouses*, *op. cit.*

[29] In New Brunswick the expression "matrimonial property" is used, in Ontario "net family property" and in Quebec "family patrimony". Regardless of which expression is used, it usually refers to the residences used by the family, household items, motor vehicles used for family travel, the accumulated interests in pension plans, money deposited in financial institutions and used for the purposes of housing and transportation or for household, educational, recreational or social purposes.

[30] In Ontario, pension plans are included as a result of judicial interpretations of section 4 of the *Family Law Act*, R.S.O. 1990, c. F.3 (see *Bes*t v. *Best*, [1999] S.C.J. No. 40).

[31] *Family Law Act*, R.S.N. 1990, F-2, s. 63.

[32] *Family Relations Act*, R.S.B.C. 1996, c. 128, as amended by the *Family Relations Amendment Act*, 1997 (proclaimed February 4, 1998), s. 120.1: "(1) If spouses who are not married to each other make an agreement, Parts 5 and 6 apply to (a) the agreement, and (b) if covered by the agreement, (i) an annuity, (ii) a pension or an interest in a pension plan, (iii) a home ownership savings plan, (iv) property not described in subparagraphs (i) to (iii) …. (3) In applying Part 5 or 6 for the purposes of this section, a reference to "marriage in Part 5 or 6 must be deemed to be a reference to a marriage-like relationship between the spouses who are not married to each other."

[33] Law Reform Commission of Nova Scotia, *Reform of the Law Dealing with Matrimonial Property in Nova Scotia*, March 1997.

[34] Law Reform Commission of Ontario, *Report on Family Property Law*, 1993.

[35] Despite the amendments of February 1998, *Family Relations Act*, R.S.B.C. 1996, c. 128, as amended by the *Family Relations Amendment Act*, 1997 (proclaimed February 4, 1998), Parts 5 (matrimonial property) and 6 (pension funds) do not automatically apply to spouses who are not married to each other. Section 1 reads as follows: ""spouse" means a person who (a) is married to another person, (b) except under Parts 5 and 6, lived with another

person in a marriage-like relationship for a period of at least 2 years if the application under this Act is made within one year after they ceased to live together and, for the purposes of this Act, the marriage-like relationship may be between persons of the same gender …" [emphasis added]. However, in Part 9, s. 120.1 provides that if spouses who are not married to each other conclude a domestic contract, Parts 5 and 6 of the Act will apply.

[36] *Miron* v. *Trudel*, [1995] 2 S.C.R. 418.

[37] *Watch* v. *Watch*, [1999] S.J. No. 490, F.L.D. No. 229 of 1999 (Sask. Q.B., July 19, 1999).

[38] *Bracklow* v. *Bracklow*, [1999] 1 S.C.R. 420, par. 32.

[39] *M*. v. *H.*, [1999] 2 S.C.R. 3, par. 93.

[40] This is one of only two references to the concept of "*de facto*" spouse (called a "concubine") in the *Civil Code of Quebec*.

[41] 1938 C.C.Q.

[42] For example, in Ontario the *Family Law Act*, R.S.O. 1990, c. F.3, s. 21.

[43] *Ibid*. in s. 24. In *Williams* v. *Hudson*, [1997] O.J. No. 4649, November 7, 1997 (Ont. Gen. Div.) (Wright J.), the Court granted leave to appeal, recognizing the need to clarify whether an order for exclusive possession may be made to unmarried spouses. The Court noted that the case law was contradictory since certain judges associate this right with the part of the Act that deals with support, to which unmarried spouses are subject, whereas others associate it with the part that deals with family property, to which unmarried spouses are not subject. We were not able to trace the decision rendered on appeal. In Prince Edward Island, New Brunswick, Newfoundland and Yukon, the power to grant exclusive possession of the family dwelling is linked to a support order and is accordingly available to unmarried spouses.

[44] *Amendments Because of the Supreme Court of Canada Decision in M. v. H. Act*, *op. cit.*

[45] Part 10, s. 124, *Family Relations Act*, R.S.B.C. 1996, c. 128, as amended by the *Family Relations Amendment Act*, 1997 (proclaimed February 4, 1998).

[46] *M.* v. *H.*, *op. cit.*

[47] In Ontario: "domestic contracts".

[48] *Family Relations Act*, R.S.B.C. 1996, c. 128, as amended by the *Family Relations Amendment Act*, 1997 (proclaimed February 4, 1998), s. 120.1; *Amendments Because of the Supreme Court of Canada Decision in M. v. H. Act*, *op. cit.*, ss. 23 and 24.

[49] One party claimed that with her partner she had formed a partnership similar to a commercial partnership, albeit a tacit partnership. She also argued that the terms of the partnership provided that the property held by either party belonged to the partnership.

[50] When the existence of a contract of *prête-nom* is alleged, it is argued that the apparent owner is not the real owner; that if, for example, the spouse of the legal owner acted with respect to the property as though he or she were the sole owner, in fact he or she had an unwritten mandate to act but the property was never formally transferred. Consequently, the property or part of it really belongs to the party alleging the existence of a contract of *prête-nom*.

[51] *Family Law Act, op. cit.*, s. 30.

[52] *Ibid.*, subs. 34(4).

[53] *Ibid*., s. 29 as amended by the *Amendments Because of the Supreme Court of Canada Decision in M. v. H. Act*, s. 2.

[54] The court will consider, in particular, the results of the division of property; the dependant's capacity to contribute to his or her own support; the age, physical and mental health of both parties; the dependant's needs, in determining which the court shall have regard to the accustomed standard of living while the parties resided together; the measures available for the dependant to become self-supporting and the length of time and cost involved to enable the dependant to take those measures; any legal obligation of the respondent or dependant to provide support for another person; the desirability of the dependant or respondent remaining at home to care for a child; a contribution by the dependant to the realization of the respondent's career potential; the length of time the dependant and respondent cohabited; the effect on the spouse's or same-sex partner's earning capacity of the responsibilities assumed during cohabitation, whether the spouse or same-sex partner has undertaken the care of a child who is eighteen years old or over and unable by reason of illness, disability or other cause to withdraw from the charge of his or her parents; any housekeeping, child care or other domestic service performed by a spouse for the family; and, finally, any other legal right of the dependant to support, other than out of public money. In the case of a same-sex partner, housework and child care are taken into account only if they were performed for the family of the respondent. *Family Law Act, op. cit.*, subs. 33(9).

[55] *Ibid*., subs. 33(3); British Columbia has a similar provision in subs. 91(5) of the *Family Relations Act*, R.S.B.C. 1996, c. 128, as amended by the *Family Relations Amendment Act*, 1997 (proclaimed February 4, 1998).

[56] *Family Relations Act*, R.S.B.C. 1996, c. 128, as amended by the *Family Relations Amendment Act*, 1997 (proclaimed February 4, 1998), s.1.

[57] *Federal Child Support Guidelines*, SOR/97-175.

[58] *Family Law Act*, subs. 33(3), *op. cit.*

[59] *Family Law Act, op. cit.*, subs. 1(1). New Brunswick, Manitoba, Prince Edward Island and Saskatchewan have similar provisions: *Family Services Act*, S.N.B. 1980, c. F-2.2, s. 113 and

s.1, definition of "parent"; *Family Law Reform Act*, R.S.P.E.I. 1988, c. F-3, s. 1(a); *The Family Law Act*, S.N. 1988, c. 60, s. 37(1), s. 2(d); *Family Maintenance Act*, S.S. 1997, c. F-6.2, s. 2.

[60] *Family Law Act, op. cit.*, subs. 1(1) "father or mother".

[61] *Bradbury* v. *Mundell* (1993), 13 O.R (3[d]) 269 (Gen. Div.), quoted with approval by the Supreme Court of Canada in *Chartier* v. *Chartier* [1999] 1 S.C.R. 242, par. 23.

[62] *Family Relations Act*, R.S.B.C. 1996, c. 128, as amended by the *Family Relations Amendment Act*, 1997 (proclaimed February 4, 1998), s. 1. definition of "parent" paragraph (b). For an interpretation of the words "at least one year", see *S.E.H.* v. *S.R.M.*, [1999] B.C.J. No. 1458 (B.C.S.C., June 8, 1999).

[63] [1998] B.C.J. No. 3186 (B.C. Prov. Ct., December 11, 1998).

[64] This is no longer the case for some tax measures with Bill C-23. Additional distinctions remain between married and unmarried persons because of the requirements respecting the duration of the relationship.

[65] For example, the Ontario legislation provides that the whole situation must be taken into account, "including, (a) the love, affection and emotional ties between the child and, (i) each person entitled to or claiming custody of or access to the child, (ii) other members of the child's family who reside with the child, and (iii) persons involved in the care and upbringing of the child; (b) the views and preferences of the child, where such views and preferences can reasonably be ascertained; (c) the length of time the child has lived in a stable home environment; (d) the ability and willingness of each person applying for custody of the child to provide the child with guidance and education, the necessaries of life and any special needs of the child; (e) any plans proposed for the care and upbringing of the child; (f) the permanence and stability of the family unit with which it is proposed that the child will live; and (g) the relationship by blood or through an adoption order between the child and each person who is a party to the application. *Children's Law Reform Act*, R.S.O. 1990, c. C.12, subs. 24 (2).

[66] For a critical analysis of the stereotypes and prejudices that exist concerning the parental status abilities of gays and lesbians, see *K (Re)*, [1995] O.J. 1425 (Ont. Prov. Ct., May 24, 1995).

[67] *Children's Law Reform Act, op. cit.*, s. 28.

[68] As can be seen in *Shoemaker* v. *Blais*, [1999] O.J. No. 837 (Gen. Div. March 16, 1999), the phenomenon of blended families gives rise to new challenges. In that case, Ms. Shoemaker, the biological mother, had obtained access rights, while custody had been awarded to Mr. Arthur, the biological father, who subsequently became the *de facto* spouse of Ms. Blais. Later, when the Arthur-Blais relationship broke down, Mr. Arthur lost custody, which was then awarded jointly to Mesdames Shoemaker and Blais. However, since they failed to reach agreement, exclusive custody was finally awarded to Ms. Blais.

[69] See section 2.2.3, Domestic contracts.

[70] *Children's Law Reform Act, op. cit.,* s. 69.

[71] *Ibid*., subs. 61(1): "A person entitled to custody of a child may appoint by legal will one or more persons to have custody of the child after the death of the appointor." This right of transfer does not apply in the case of joint custody, subs. 61(4).

[72] *Children's Law Reform Act, op. cit.,* subs. 20(2).

[73] *Ibid*., subs. 20(5).

[74] *Buist* v. *Greaves*, [1997] O.J. No. 2646 (Ont. Ct. Gen. Div.).

[75] *Children's Law Reform Act*, subs. 62(3).

[76] *Family Relations Act, op. cit.,* subs. 22(1).

[77] 605 C.C.Q.

[78] 606 C.C.Q.

[79] *N.P. (Re)*, [1999] J.Q. No. 5002 (Que. S.C. Fam. Div., October 25, 1999).

[80] *Ibid*. Although this case is identified only by initials to protect the anonymity of the parties, the applicants decided to make their case public and were interviewed by *La Presse*, "La vie quotidienne de bébé Léo avec ses parents lesbiens" [TRANSLATION: Baby Leo's Day-to-Day Life with His Lesbian Parents"], Monday, November 8, 1999, p. A-11. See also the *Globe and Mail*, "What Is the Ideal Family. The Lesbian Couple Are Unlikely Trailblazers, But They Are Fighting For Parental Rights to Protect Their Son and Unborn Baby", Friday, January 7, 2000, p. A-16.

[81] Without further explanation concerning these articles, the judge stated: [TRANSLATION] "It is clear from articles 597 to 600 that the spouses wielding joint parental authority are the father and mother of the child." *N. P. (Re), op. cit.,* par. 10.

[82] *A (Re)*, [1999] A.J. No. 1349 (Q.B., November 26, 1999).

[83] 579(2) C.C.Q.

[84] *Child Welfare Act* R.S.A. 1980 c. C-8.1, subs. 59(3) as amended by the *Miscellaneous Statutes Amendment Act*, S.A. 1999, c. 26, s. 4 (May 1999).

[85] *N. P. (Re), op. cit.,* par. 31.

[86] *K. et al., Re* (1995), 23 O.R. (3rd) 679 (Ont. Prov. Div.); *C.E.G. (No. 2) (Re)*, [1995] O.J. No. 4073 (Ont. Gen. Div.).

[87] See Benjamin Freedman, P.J. Taylor, Thomas Wonnacott and Katherine Hill, "Criteria for Parenting in Canada: A Comparative Survey of Adoption and Artificial Insemination Practices", 3 C.F.L.Q. 35, p. 43. The study asserts that 84 per cent of workers in the adoption services who responded to this Canadian survey would reject a lesbian candidate living in a stable relationship with another woman. It comes as a surprise that couples in which one of the partners had a history of sexual abuse or negligence received a more positive assessment than lesbian couples.

[88] *Children's Law Reform Act*, R.S.O. 1990, c. C.11.

[89] *Amendments Because of the Supreme Court of Canada Decision in M. v. H. Act, op. cit.*, s. 6.

[90] *Adoption Act*, R.S.B.C. 1996, c. 5, ss. 5 and 29.

[91] *Ibid*., subs. 29(2).

[92] 398(2) C.C.Q.

[93] *Succession Law Reform Act*, R.S.O. 1990, c. S.26, s. 45.

[94] O. REG. 54/95.

[95] *Succession Law Reform Act, op. cit.*, s. 46.

[96] *Ibid*., subs. 47(1).

[97] 666 C.C.Q.

[98] *Succession Law Reform Act, op. cit.*, definition in section 1: "spouse", means a man and woman who (a) are married to each other, or (b) have together entered a marriage that is voidable or void, in good faith on the part of the person asserting a right under this Act."

[99] *Ibid*., s. 57.

[100] *Obringer* v. *Kennedy Estate*, [1996] O.J. N^{o} 3181(Ont. Ct. Gen. Div.).

[101] *Modopoulos* v. *Breen Estate*, [1996] O.J. N^{o} 2738 (Ont. Ct. Gen. Div.).

[102] *Ibid*., subs. 21.

[103] *Definition of Spouse Amendment Act*, B.C., Bill 100, proclaimed on July 15, 1999 (the regulations prescribing the effective date of this Act had not been made at the time this report was written).

[104] For example, see the reasoning of Justice Laforest in *Egan*: "My colleague Gonthier J. in *Miron* v. *Trudel* has been at pains to discuss the fundamental importance of marriage as a social institution, and I need not repeat his analysis at length or refer to the authorities he cites. Suffice it to say that marriage has from time immemorial been firmly grounded in our legal

tradition, one that is itself a reflection of long-standing philosophical and religious traditions. *But its ultimate raison d'être transcends all of these and is firmly anchored in the biological and social realities that heterosexual couples have the unique ability to procreate, that most children are the product of these relationships, and that they are generally cared for and nurtured by those who live in that relationship. In this sense, marriage is by nature heterosexual.* It would be possible to legally define marriage to include homosexual couples, but this would not change the biological and social realities that underlie the traditional marriage." [Emphasis added.] (*Egan* v. *Canada*, [1995] 2 S.C.R. 513, par. 21).

3: INCLUSION OF SAME-SEX COUPLES AND THEIR FAMILIES IN CANADIAN INCOME-SECURITY PROGRAMS

3.1 Background

The federal and provincial governments take account of conjugal status in many kinds of programs. In some cases, persons who are recognized as spouses benefit financially from this recognition whereas in others they are penalized. Lesbians place great importance on the legal recognition of the couples they form but they are also concerned about the economic consequences of being included in Canadian tax programs and income-security programs, as we shall see in the next chapter. Although this chapter deals primarily with the conjugal relationship between two adults, we shall see that the presence or absence of children is closely linked to the reasons for recognition of the conjugal relationship. For this reason, we include this factor in the analysis.

In the first part of the chapter, we provide a description of the income-security programs and tax measures that take spousal status into account. We indicate whether lesbian couples are currently recognized[1] for the purposes of these programs and explain the financial impact of this recognition. Because there are so many programs, we have grouped them into five categories: universal schemes, assistance programs, taxation, public insurance and private insurance. Each group is analyzed briefly on the basis of whether being recognized as a same-sex spouse is advantageous or not.

The second part of this chapter takes a critical look at the objectives and the ideological premises underlying the creation and development of various programs. We shall see, as a large number of feminist analysts have already pointed out, that there is often a wide gap between stated objectives and concrete results. The various programs examined are designed to provide better protection for the income of all Canadians. They particularly target women and children, who currently have a much higher rate of poverty than men. According to Bailey (1999, p. iii), "the state's objectives in relation to the family … include procreation, maintenance of stable and nurturing environments for children, provision of a social support scheme for family members and the promotion of social cohesion". Since the programs in question do not attain the desired objectives, in Chapter 6 we shall set out proposals designed to better achieve these goals as well as to eliminate discrimination on the basis of sexual orientation or marital status.

3.2 The place of spouses in income-security and tax programs in Canada

We have grouped the programs into the five categories listed above but also according to jurisdiction: federal programs, programs provided in most provinces, and programs unique to Quebec. Note that Quebec is the only province that manages its own tax system separately from the federal system (although the other provinces may adapt the federal system by adding credits and surtaxes) and that has created its own pension plan. Quebec has also been much more innovative than the other provinces in terms of income-security programs, especially for families. Where a provision of the federal tax system also applies to the Quebec system because of the harmonization of the two systems, we do not repeat our analysis.

3.2.1 Universal programs

A government creates universal programs because it feels that the service rendered or the income provided is part of an essential standard of living for any member of society. Access to these programs is a right of citizenship[2] and a reflection of social solidarity among the people belonging to that society.

The concept of "spouse" is, for all intents and purposes, absent from universal programs and this reduces the likelihood of systemic discrimination based on sex, sexual orientation, marital or family status. Entitlement to the various benefits does not require being a member of the labour force or being poor. In addition, since these benefits are not linked to the income of the spouse, they help to counteract the economic dependence experienced by women and other low-income earners. In Canada, the most important universal programs are health insurance, hospital insurance, primary and secondary education and, to a lesser extent, post-secondary education.

Unfortunately, lesbians and gays are still faced with a number of discriminatory measures in these programs, and this calls their universality into question. For example, in order to receive the Old Age Security Pension (which is an almost universal measure), the claimant must have lived in Canada for a certain number of years. A person, as well as his or her spouse, is deemed to be a resident of Canada even when the person is physically outside the country if he or she works for certain Canadian or international organizations. Until the federal government enacted Bill C-23, same-sex partners were not recognized for this purpose.[3] Provincial health and hospital insurance legislation includes similar provisions relating to residence.[4] At the present time, Quebec, Ontario and British Columbia recognize same-sex couples in their laws.

The last 20 years have been marked by the gradual erosion of universal programs. Thus, federal family allowances were finally abolished in 1993 and the Old Age Security Pension (OASP) has not been available to upper middle-income seniors since 1989 (Rose, 1998b; National Council of Welfare, 1999a). Quebec was the only province to provide universal family allowances in 1988 (Health and Welfare Canada, 1989, p. 43-47) but eliminated them in 1997. Cuts in health and education and the privatization of some of these services as well as certain municipal services now threaten universality in these areas.

The result is increasing polarization not only of income but also of well-being as the poorest segment of the population loses the right to these services and a large section of the middle class has to accept lower-quality services. On the one hand, governments claim that priority in public assistance must be given to the poorest households but, on the other hand, they have been cutting the amounts given to those households. To justify their actions, they sometimes invoke the need to save and sometimes argue that the poor must not become dependent on government.

3.2.2 Assistance programs

Assistance programs are designed to help the most disadvantaged persons in society. Consequently, they involve an evaluation of the claimant's income and, if this exceeds a certain pre-established threshold, the benefit is "clawed back".[5] Assistance programs are almost always based on the concept of "family income", since the object is to make people rely on private resources before they get government support. The programs are based on the premise that spouses owe each other mutual support.

Some public welfare schemes such as social assistance have always considered heterosexual common-law partners to be members of a family in the same way as married spouses. They were included in other programs only after 1993, when the tax system started to treat them as married couples.

With a few exceptions, there is no benefit in having a spouse recognized for the purpose of assistance programs. The spouse's income may be sufficient to make the applicant ineligible and, at the least, is likely to reduce the benefit. Furthermore, most assistance programs provide couples (or even two people sharing a dwelling) with smaller amounts than are granted to two independent individuals. This practice is based on the assumption that it costs less for two people to live together than to live separately. The savings are made primarily in terms of housing and the related costs (telephone, furniture, electricity and heating). When the two people share a bedroom and share their lives, there may be further savings, but these are small at the subsistence standard of living that assistance programs are designed to provide.[6] We should also note that the fact that very little weight is placed on the second person for the purpose of assistance benefits discourages the creation of families and encourages fraud in the reporting of conjugal relationships.

Assistance programs are accordingly the main place where same-sex couples derive a benefit from the fact that their conjugality is not recognized. This is what Lahey (1999a) refers to as "*queer benefits*". When lesbians are finally recognized as spouses (or same-sex partners) — in Bill 32 in Quebec and Bill 5 in Ontario or in the federal Bill C-23 (*Modernization of Benefits and Obligations Act*) — they lose the advantage they previously enjoyed when they were not recognized for the purposes of assistance programs.

Let us now look in greater detail at the following public assistance programs:

- provincial social assistance programs;
- federal programs for seniors, namely the Old Age Security Pension (OASP), the Guaranteed Income Supplement (GIS) and the Spouse's Allowance (SA);
- federal and Quebec loans and bursaries for post-secondary education;
- targeted benefits for children and the particular problems experienced by single mothers.

We shall conclude by listing other assistance programs for which it is disadvantageous to be recognized as a spouse.

Provincial social assistance programs

Since June 16, 1999, lesbian and gay couples in Quebec have been treated as *de facto* spouses for the purposes of social assistance if they are of full age, cohabit and "at any one time, [have] cohabited for a period of not less than one year."[7] This means, for example, that a lesbian mother with a child who receives a welfare benefit and has lived with her partner for at least 12 months will lose her benefits completely if her partner earns more than $1,200 per month. She will lose part of them if her partner earns more than $300 per month.

In Ontario too, lesbian couples have been considered to be cohabitees for the purposes of social assistance since November 20, 1999. If they have an agreement concerning their financial relations or if one of them provides the other with financial support, they could be considered to be "*spouses*"[8] immediately for social assistance purposes. Otherwise, the cuts apply only after the couple has lived together for three years.

In the other provinces, with the exception of British Columbia, lesbian and gay couples are not always recognized and thus continue to enjoy the "privilege" of being excluded. Some provinces do not require a minimum period of cohabitation: persons of the opposite sex who live together maritally are considered to be spouses from the very first day of cohabitation. Usually, however, the rule is one year of cohabitation, as under federal tax law. If the provinces in question legislate to recognize same-sex spouses, they will apply the same rules to them as to opposite-sex couples. We should note that it is often the responsibility of the recipient of social assistance to prove that the person with whom he or she is living is not his or her spouse.

The Old Age Security Pension and the Guaranteed Income Supplement

The federal government provides a minimum income for all persons who are at least 65 years old and who meet certain criteria concerning the length of time they have resided in Canada. In January, 2000, this income, which consists in part of the Old Age Security Pension (OASP) and in part of the Guaranteed Income Supplement (GIS), was $11,028 annually for a single person and $8,940 for each retired member of a recognized couple.[9] In other words, a person who lives with a retired partner receives approximately $2,000 less than a person who does not have a recognized spouse; a couple accordingly loses more than $4,000. With the enactment of Bill C-23, lesbian couples have lost this advantage. The test for recognition as a common-law spouse for the purposes of the OASP and the GIS is the same as in the federal tax system, namely, having cohabited in a conjugal relationship for at least one year or cohabitation and having had a child together.

The OASP, which amounted to $5,039 in 2000, was a universal benefit until 1989. It is now clawed back (at a rate of 15 per cent) when the income of an individual exceeds $53,960 and is nil when that income reaches $86,000 (Canada, Department of Finance, 2000, p. 235). It can therefore be considered to be "quasi-universal" since only some well-off people do not receive it. As in the case of other universal programs, marital status does not affect eligibility, because the OASP is based on the individual. Consequently, lesbians and gays receive the same amount as heterosexual persons, regardless of their conjugal status.

In 1996, the federal government proposed replacing the OASP and the GIS with a new "Seniors Benefit". This program would have functioned in a manner similar to that of the old program, except that the part corresponding to the OASP would have been clawed back once *family income* reached $25,921 (Government of Canada, 1996). Large sums would accordingly have been taken away from heterosexual women living with a spouse with middle-level family income. While women's and seniors' groups vigorously condemned this proposal, it was the financial services industry that persuaded the government to abandon this project on the ground that many middle-income taxpayers would no longer have any interest in investing in an RRSP (National Council of Welfare, 1999a, p. 5-6). This is a another example of the process that was

begun by the federal government in the late 1970s to replace universal schemes with assistance programs to the detriment of the public as a whole and especially of middle-class women.

The Guaranteed Income Supplement (GIS) is an assistance program that gives a sum of $5,989 to single persons (or persons living with a spouse who does not receive the OASP or the Spouse's Allowance, which we shall discuss later). However, the supplement is only $3,901 for a person whose spouse receives the OASP or the Spouse's Allowance. In addition to providing less to a person living in a couple than to a single person, the GIS is reduced by $0.50 for every dollar of income (excluding that derived from the OASP) received by a beneficiary or his or her spouse. In the case of a heterosexual couple — and a homosexual couple starting in 2001 — each spouse loses $0.25 for each dollar of income. This means that the person with the lower income is penalized because of the partner's income. By way of illustration, let's look at the case of Thérèse and Armande. If Thérèse receives $8,000 annually from the Canada Pension Plan (CPP) or the Quebec Pension Plan (QPP), $2,000 will be deducted from the GIS of her partner, Armande, and $2,000 from the GIS of Thérèse. Thérèse will have an income of $14,940 ($5,039 from the OASP, which is not affected, $8,000 from the CPP/QPP but only $1,901 from the GIS). Armande, however, will receive only $6,940 dollars ($5,039 from the OASP and $1,901 from the GIS).

These penalties, which apply to seniors living in couples, may be regarded as the *quid pro quo* for the surviving spouse's pension and the Spouse's Allowance, which are forms of subsidy given to the members of a recognized couple because of their marital status. We should note, however, that if each of the two persons recognized as spouses has independent income (excluding OASP) of over $12,000, their GIS will be nil, regardless of their marital status. In that case, recognition of their couple would have no impact on their retirement benefits. Since men generally have much higher independent retirement income than women, recognition of same-sex couples can be expected to have the effect of impoverishing many more elderly lesbians than gays.

Spouse's Allowance

The Spouse's Allowance (SA) is an assistance program offered to seniors between 60 and 64 years of age living conjugally with a person who is at least 65 years of age (and who receives the OASP) as well as for widows and widowers between 60 and 64 years of age. It is more or less the only assistance program in which it is advantageous for lesbians to be recognized as same-sex spouses. For a person with a spouse, the maximum amount is equal to the sum of the OASP and the GIS received by a person of 65 or over, namely $8,940 per year. However, the couple loses $0.75 for each dollar of income received from independent sources. For a widow or widower, the amount is less than that received by a single person aged 65 but more than social assistance benefits.

The SA was created in 1975 to increase the financial resources of heterosexual couples living solely on the husband's income when the husband retired and his wife was not yet 65 years old and was therefore not eligible for the OASP or the GIS. However, there was an anomaly in the program: if the husband died before his wife reached the age of 65, she lost her entitlement to the Spouse's Allowance. In 1979, the allowance was extended to low-income widows and

widowers whose spouse was at least 65 years of age when he or she died and in 1985 to all heterosexual widows and widowers between 60 and 64 years of age (National Council of Welfare, 1999a, p. 14). It is clear, therefore, that this program discriminates on the basis of marital status and, prior to the enactment of Bill C-23, sexual orientation. In fact, unmarried, divorced or separated persons and persons living in couples in which both partners are under 65 years of age are not eligible for the SA.

Let us remember that in *Egan* v. *Canada*,[10] the younger partner in a gay couple was refused the Spouse's Allowance essentially because, in the view of the Court, this program was designed to provide income for persons who had cared for children and only heterosexual couples are able to procreate. We should note, however, that heterosexual couples are not required to have had children in order to receive the SA. On the other hand, single mothers, who have genuinely sacrificed income in order to be able to take care of their children, are eligible only if they are widows. No lesbian mother, regardless of her marital status, was eligible before the enactment of Bill C-23 unless she was the widow of a male spouse.

Loans and bursaries for post-secondary studies

The federal government has created a program of loans for post-secondary studies for students in all provinces and territories except Quebec, which administers its own program of loans and bursaries. The federal government provides grants (non-repayable and thus similar to bursaries) to persons with a permanent disability, part-time students in need, female students registered for certain doctoral programs — to encourage participation by women in certain disciplines — and students with dependants who have already received a loan.[11] Furthermore, since January 1, 2000, "millennium scholarships" have been awarded to certain students on the basis of need or merit.[12]

In the loan and bursary programs, a person is eligible as an individual. However, the assessment of a person's financial need may take into consideration a contribution by a parent or by the student's spouse. This is a doubled-edged sword. For very young students (those who finished secondary school too recently or who have not been part of the labour force long enough to establish their independence from their parents on an individual basis), legal recognition of a spouse eliminates the need to request a parental contribution, and may thus entitle those involved to a bursary or loan. However, it is not advantageous for a student who is already eligible for loans or bursaries to have a spouse recognized. The amount of the loan is reduced not only on the basis of the spouse's actual income but also on the basis of a deemed minimum income (unless exceptional circumstances exist).

Since August 1, 2000, it is the provinces which determine eligibility for the federal program and each formulates its own definition of spouse.[13] In some provinces such as Alberta, only persons who are legally married are recognized, which excludes lesbian spouses *ipso facto*. In Ontario, common-law spouses are also recognized, including same-sex partners, whereas in British Columbia common-law spouses are recognized but not those of the same sex.[14] In the other provinces, with the exception of Quebec, even if common-law spouses are recognized, same-sex partners are excluded.

In Quebec, the system of loans and bursaries does not recognize *de facto* spouses, either heterosexual or homosexual, unless one of the partners has a child (Quebec, Department of Education, 1999). Thus, since June 1999, lesbians have had recognition as spouses only if their partner has a child, since they are not allowed to marry. They must prove their independence from their parents by the other means prescribed, namely they must have earned their own living for two years, have left school at least seven years earlier, have a child or be 20-weeks pregnant or have obtained a Bachelor's degree. However, a single-parent lesbian student would have no interest in having her spouse recognized since she would already be eligible for a loan. However, once recognized, the spouse could thereby become eligible for loans.

Single mothers and assistance programs for families with children

In 1944, the federal government created a program of universal family allowances. According to Vaillancourt (1988, p. 358), one of the purposes of this program was to persuade women who had joined the labour force during the Second World War to return to the home and leave their jobs to the men returning from the armed forces. Its purpose was also to encourage childbearing after a decade and a half of economic crisis and war. The universal nature of federal family allowances was strengthened in 1974 when they were substantially increased and indexed to the cost of living. In the same year, Quebec created its own program of universal family allowances (Canada, Health and Welfare Canada, 1989, p. 44).

In 1979, the federal government began a long process that led to the abolition of both family allowances and tax exemptions for children which while unfair for other reasons, were also universal in nature (see the section entitled "Taxation" below). Today, the only federal scheme for children is an assistance program, namely the Child Tax Benefit. During the year beginning in July 2000, it provided families whose income was under $21,214 with a maximum benefit of $2,056 for the first child and $1,853 for each successive child (Canada, Department of Finance, 2000, p. 237-240). If family income exceeds the threshold of $21,214, the amount provided is reduced. Consequently, it is not beneficial for single parents to declare a spouse, since the spouse's income will be taken into consideration in calculating the federal benefit. As Bill C-23 came into force on July 31, 2000, and as the amount of the federal child benefit paid between July 2000 and June 2001 is based on the tax return for 1999, lesbian mothers in *de facto* relationships will not be penalized on the basis of their partner's income until July 2001.

Quebec, Saskatchewan and British Columbia are the three provinces with the most generous and best-structured financial support programs for families with children. No province has provided a universal allowance since Quebec abolished its program in 1997 (Jenson and Thompson, 1999). Only a few provinces offer universal non-refundable tax credits, but these tax credits are generally claimed by fathers rather than mothers, who continue to be primarily responsible for the care and education of the children. All other programs are assistance programs targeting the poorest families, and this makes it disadvantageous to obtain recognition of a spouse. For example, let us look more closely at the Quebec programs. The main element in the income-security program is the family allowance, which, for the year beginning in July 2000, provides $1,925 for the first child in a single-parent family and $625 for each other child (whether in a single- or two-parent family) (Girard, 2000). However, families lose this amount at a rate of approximately 35% once the family income exceeds $15,332 in the case of a single-parent family

and $21,825 in the case of a two-parent family. When she completes her tax return for 1999, a lesbian mother in Quebec cohabiting with her partner will have to declare the partner and thus lose virtually all of her Quebec family allowance.[15] Under Bill C-23, she will also lose a large part of her federal child tax benefit in the following year.

Let us take the fictitious case of Jacinthe, a lesbian mother of two children who earns $15,000. For the year running from July 1999 to June 2000, she is entitled to $2,890 in Quebec family allowances and a federal child tax benefit of $3,410 for her children, for a total of $6,300. If her partner, Chantal, earns a modest $25,000, the family income will be $40,000. In the year beginning in July 2000, the Quebec family allowance will be only $160. In the following year, because the federal government has also recognized same-sex spouses, the federal tax benefit will fall from $3,410 to $1,461 (ignoring the increases that have been announced for all families). Furthermore, Jacinthe will lose her single-parent family status for tax purposes, and this will cost her at least $883 at the federal level[16] and $540 at the provincial level. The total loss will therefore be $6,100![17]

Because of these financial penalties, Jacinthe, like many heterosexual women living in blended families, may hesitate to declare her partner. Paradoxically, her partner, Chantal, could probably deduct all or part of the total Quebec tax reduction for families (more than $800) that Jacinthe cannot use because her income is too low. If Chantal has a genuine commitment to the children and helps to support them, Jacinthe and Chantal may decide to accept the new rules and renegotiate their financial relationship. However, the financial impact could also be a source of tension, as can happen when a heterosexual single mother establishes a conjugal relationship with a new partner who is not the father of her children. Such consequences raise questions about the fairness and logic of child support schemes in Quebec and the rest of Canada.

Other assistance programs

Other assistance programs are designed to assist low-income households to meet particular expenses. All are governed by the criterion of family income and a number of them offer a lesser amount to couples than to two independent persons. In other words, having a spouse reduces the amount provided and often disqualifies the person because of his or her partner's income. At the present time, lesbian couples in Quebec and Ontario are treated in the same way as heterosexual couples in a *de facto* relationship and suffer the same disadvantages. Gradually, effective July 31, 2000, lesbian and gay couples will lose the advantages they currently have under federal programs whereas in most of the other provinces, they will continue to be treated as two single persons.

The refundable federal GST tax credit is a case in point. According to Albert Wakkary (1999), a large number of lesbians and gays will lose all or part of this credit (a maximum of $308 per person in 2000) with the application of Bill C-23. He estimates that, as a result, the government will recover $28 million (for 1994) but would spend only about $18 million for the various benefits for which same-sex couples will now be eligible.[18] In Quebec, same-sex couples will also lose up to $154 per person in QST credits.[19]

We list below the main federal and provincial welfare schemes (including those examined earlier) that provide assistance depending on the make-up of the household and family income. Tax programs that depend on an assessment of family income are also included.

Public welfare schemes taking spousal status into account — federal level

- Guaranteed Income Supplement for Seniors
- Spouse's Allowance (certain people aged between 60 and 64)
- Child Tax Benefit
- Employment Insurance Child Supplement
- Student Loan Plan and Millennium Scholarships
- Supplement to Personal Amounts (non-refundable tax credit) — 1998 and 1999 only
- Refundable GST tax credit

Public welfare schemes which take spousal status into account — in most of the provinces

- Social assistance
- Legal Aid
- Assistance for parents to cover daycare costs
- Refundable credits for property taxes
- Housing allowances and eligibility criteria for public housing

Public welfare schemes which take spousal status into account — in Quebec

- Student loan program (married persons or *de facto* spouses when there is a minor child even where this is the child of only one of the spouses)
- Family allowance
- Parental Wage Assistance (PWA) – an earned income supplement — some of the other provinces have similar programs
- Refundable tax credit for the QST
- Tax reduction for families
- Refundable tax credit for daycare costs
- Non-refundable age credit
- Refundable tax credit for medical expenses
- Non-refundable tax credit for medical expenses
- Drug insurance plan
- Maternity benefit program (PRALMA)

3.2.3 Taxation

In Canada, the tax systems are based in principle on the individual, unlike the U.S. and French systems that are based on the family. However, because they make it possible to transfer certain tax benefits between married spouses and common-law partners and because they also provide certain benefits for children, they may be characterized as mixed individual-family systems. The proliferation in the last few years of assistance programs administered through the tax return — we have just seen the list of these programs— makes the legal status of spouse increasingly relevant in the federal and Quebec tax systems. We shall now examine the tax benefits that may be transferred between recognized spouses and those for which only single individuals

(or persons living alone) are eligible. Then, we shall briefly consider certain tax benefits linked to the non-taxation or the deferral of capital gains tax on property transferred between spouses. In this regard, we should note that, following the enactment of Bill C-23, the (federal) *Income Tax Act* will recognize same-sex couples in 2001. In Quebec, the *Taxation Act* has recognized them beginning in 2000.

Tax benefits that can be transferred between recognized spouses

The right to transfer tax benefits between spouses is based on a presumption that the spouses are economically interdependent and implies at the same time a number of obligations. It is presumed that the person claiming an amount for his or her spouse, who does not have sufficient income to claim the tax benefit directly, will support that spouse. For example, the right to deduct tuition fees or the education amount for the spouse (or a child) is accompanied by the presumption in the student loan and bursary plans that a contribution is made to these expenses.

As a rule, the spouse who transfers a tax benefit does not receive a monetary gain directly. Rather, the benefit accrues to his or her partner. In traditional heterosexual couples, these measures usually reflect the dependence of women who renounce their financial autonomy in order to care for children and perform domestic tasks, which benefits the husband. In 1996, for example, men counted for 82 per cent of taxpayers who claimed an amount transferred from their partner[20] (Canada, Revenue Canada, 1998, Table 4).

Since, as a rule, lesbian and gay couples are not organized according to the provider-housekeeper model with its traditional gendered roles and duties, these tax benefits may have very little positive impact on them when they are recognized as couples by the tax systems. If the income of each woman in a lesbian couple exceeds $10,000 (slightly more in the case of people aged over 65 or who have a disability), each will use her own tax benefits rather than transferring them to her partner.

We list below the benefits transferable between spouses in the federal and Quebec systems and those that are lost when a spouse is recognized. The fact that the date of recognition of same-sex couples is different in Quebec (1999 taxation year) than under the federal system (2000 taxation year) may cause a great deal of confusion for lesbians living in Quebec. In 1999, for example, a lesbian mother living with her partner will still be entitled to an amount equivalent to the married person’s amount at the federal level but not to the amount provided for a single mother at the provincial level. A retired lesbian could transfer her amount on account of age or for pension income to her partner in Quebec but not under the federal system. Other provinces have announced their intention to create tax forms that are separate from the federal forms so this problem could also arise in those provinces in the future if the partner is recognized at the federal level but not at the provincial level.

Federal tax system — benefits transferable between spouses*
- Spouse's amount
- Age amount
- Amount for pension income
- Amount for disabled persons if the spouse or one of his or her close relatives is disabled
- Tuition fees, amount for students and interest paid on a student loan
- Caregiver amount where, for example, the spouse takes care of a disabled person
- Deduction for the medical expenses of the spouse or a close relative of the spouse[21]
- Cost of care by an attendant for the spouse or a close relative of the spouse

Federal tax system — benefits lost when a spouse is recognized*
- Equivalent to spouse's amount (granted primarily to single-parent taxpayers who lose this benefit when their spouse is recognized)
- The value of the deduction for child care may be less if there is a spouse

* Same-sex spouses have been recognized in the federal system since 2000.

Quebec tax system — benefits transferable between spouses (other than those harmonized with the federal system)**
- Spouse's amount[22]
- Amount for serious and prolonged mental or physical disability
- Amounts for dependent children

Quebec tax system — benefits lost when a spouse is recognized**
- Amount for a single-parent family
- Amount for a person living alone

** Same-sex spouses have been recognized in the Quebec system since 1999.

Tax advantages and disadvantages attached to the transfer of property between spouses

Kathleen Lahey (1999a, p. 223-234) lists about twenty provisions in the federal tax system that either reduce or defer payment of taxes when a taxpayer transfers an asset or finances a service (cost of a second residence for a railway worker, for example) for his or her spouse.[23] We shall not examine these provisions in detail. Most of them concern the possibility that a taxpayer may transfer an asset to his or her spouse on death, the breakdown of the marriage or, sometimes, during the marriage. For the purposes of the Act, the taxpayer is not deemed to have sold this asset and he or she is not therefore required to report capital gains. These do not need to be reported until the spouse disposes of the asset.

Lesbian partners will be able to enjoy these benefits for the first time in 2000. However, in the past they avoided at least two kinds of restrictions that applied to opposite-sex spouses. The first concerned the fact that a couple recognized as spouses are allowed to report only one principal residence, which is exempt from capital gains tax when it is sold. On the other hand, Micheline was able to report the cottage she purchased in 1990 as her principal residence while

Suzanne, the partner with whom she lives, reported their house in town as her principal residence. At the time of the sale, both houses were exempt from capital gains. The other restriction that did not apply to same-sex partners before 2000 relates to the attribution rules: these require a person to report income derived from an asset given or loaned to a spouse.[24]

In Quebec, the fact that the *Taxation Act*, R.S.Q., c. I-3, has recognized same-sex partners since 1999 may well cause confusion. For example, if Micheline and Suzanne sold one of their two houses in early 2000, they might have to pay Quebec but not federal tax on the capital gains.[25] There may also be uncertainties as to the retroactive effects of federal legislation. For example, suppose that Micheline and Suzanne have considered themselves to be spouses since 1992. When they sell the country house, must they pay capital gains from the beginning of their relationship in 1992 or since the recognition of this relationship by Quebec in 1999 or since its recognition by the federal government in 2000? Will a different date apply to the calculation of the capital gain for provincial and federal tax?

The Conseil du statut de la femme (1998, p. 51) and Demczuk and Gariépy (1999, p. 25) have identified another advantage with respect to transfers of property between spouses. In Quebec, under the *Act respecting duties on transfers of immovables*, a so-called "welcome" tax is imposed by municipalities when someone purchases a property. However, when the property is sold to the vendor's spouse, son, daughter, father or mother or to the spouse of one of them, the purchaser does not have to pay this tax. Paradoxically, if a purchaser who is not one of those exempted from the tax, for example a friend, is the co-owner of the property (divided co-ownership) and purchases only the other party's share, that person must still pay the welcome tax. Since same-sex spouses are now recognized in Quebec, the exemption applies to them. However, this is not the case in the other provinces that have similar legislation, with the exception of Ontario, where Bill 5 amended the *Conveyancing and Law of Property Act* to include same-sex partners.

3.2.4 Public insurance plans

Plans providing income on retirement, death or disability

The public plans listed below are considered in this section.

- Canada Pension Plan (CPP) and Quebec Pension Plan (QPP);
- insurance plans for industrial accidents and occupational diseases;
- public automobile insurance plans;
- programs to assist and compensate the victims of criminal acts.

The main advantages of conjugality under these public insurance plans are pensions for surviving spouses, orphans' pensions, lump-sum payments (death benefits) paid to surviving spouses and children and the right to divide pension credits.

As a rule, it is advantageous to obtain recognition as a spouse under these plans. The surviving spouse's pension and orphans' pensions constitute a direct subsidy that is financed by employers

or all contributors. Because there is only one contribution rate, members who have a spouse or children do not pay more than single persons.

Surviving spouse's pensions
Same-sex spouses in Quebec have been recognized since June 1999 in all four types of plan that we have discussed. They are accordingly eligible for surviving spouse's pensions if they meet the criteria for the definition of *de facto* union.[26] In the four plans referred to, *de facto* same-sex or opposite-sex spouses are recognized after living together for three years or after one year if they have had a child together. Thus, discrimination persists against same-sex spouses. In the case of heterosexual couples, they are recognized immediately as spouses if they are married and the requirement of cohabitation for recognition as *de facto* spouses is only one year if the couple has a child together (by birth or adoption). Since the partners in lesbian and gay couples are not yet permitted to marry or to adopt their partner's child and the right to adopt a child jointly is admitted in principle but not in practice, this mechanism for gaining recognition quickly as spouses does not exist.

Same-sex partners have been recognized in Ontario since November 1999 in the *Workplace Safety and Insurance Act, 1997,* the *Victims' Bill of Rights, 1995* and the *Victims' Right to Proceeds of Crime Act*.[27] Ontario does not have a public automobile insurance system. In Ontario workers' compensation legislation, same-sex partners are recognized for benefit purposes if they have cohabited for at least one year, are the parents of the same child, or have concluded a cohabitation agreement under section 53 of the *Family Law Act* (amended by Bill 5, section 67, subsection 3). Thus same-sex partners can eliminate delays in acquiring protection under the law by signing a cohabitation agreement.

As far as the two Ontario statutes respecting the victims of crime are concerned, the amendments made by Bill 5 do not include a definition of "spouse". The "defendants' claim for damages", however, is addressed in sections 61 to 63 of the *Family Law Act*, R.S.Q., c. F-3. In order to determine whether a right of support exists (section 29 of the *Family Law Act*), these sections refer to the criteria used to recognize same-sex partners and spouses. For these purposes, recognition is given to spouses who have lived together continuously for at least three years or are "in a relationship of some permanence, if they are the natural or adoptive parents of a child". Thus, the requirements for same-sex partners are more onerous than those imposed on opposite-sex couples because they may not marry and the adoption of a child is problematic.

As far as the public pension plan is concerned, persons who live in Ontario are part of the Canada Pension Plan (CPP), like those living in the territories and all the other provinces except Quebec. Same-sex spouses have been recognized under the CPP since July 31, 2000, but they receive a survivor's pension only if their partner has died since January 1, 1998.[28]

Pensions for orphans and the children of disabled contributors
For purposes of the QPP, a person who is under 18 years of age is considered the child of a contributor for the purpose of an orphan's pension if he or she "is related to the contributor by blood or by adoption"; "is the stepson or stepdaughter of the contributor and resides with him";

"has been residing with the contributor for at least six months and for whom the contributor stands *in loco parentis*, on the condition that no person other than the contributor or the spouse of the contributor residing with him maintains that person"; or "is maintained by the contributor in the conditions provided for by regulation".[29] Accordingly, if a lesbian mother receives support from the father of her child, the child will not be considered a dependant of her spouse and will not be eligible for an orphan's pension if the spouse dies, which would also be true in a blended heterosexual family. If, on the other hand, the mother's partner is supporting the child and no support payments are being received from the father, the child would probably be entitled to a pension. The Quebec Pension Plan must still interpret, without distinction based on sexual orientation, the expression "contributor who stands *in loco parentis*" to the child (Demczuk and Gariépy, 1999, p. 16). The fact that children's benefits are calculated on the basis of the spouse's income would be an argument supporting the presumption that the spouse is contributing to the child's needs.

In Quebec, for the purposes of *An Act respecting industrial accidents and occupational diseases*[30], the child of a worker includes "a person to whom the worker stood *in loco parentis* at the time of his death". The child is entitled to a monthly allowance of $250 until he or she reaches the age of majority and a lump-sum payment of $9,000 if he or she is attending an educational institution on reaching that age (section 102). The laws governing compensation for the victims of crime and automobile insurance refer to *An Act respecting industrial accidents and occupational diseases* for their definitions.

The situation in Ontario has been similar to that in Quebec since Bill 5 became law. Elsewhere, there is still no recognition of same-sex spouses in the provincial legislation. Thus, the child of one of the partners could not request an orphan's pension on the death of the other. However, the child could be classified as a dependant within the meaning of some provincial laws.

Death benefits

In the case of the QPP, death benefits are relatively modest (maximum of $2,500) and are now paid to the person (or charitable organization) that pays the funeral expenses[31]. If no one claims these expenses within 60 days or if there is money left after these expenses have been paid, a benefit is paid to the heirs and this payment depends on the statutes governing inheritance and private family law. Note that in Quebec *de facto* same- and opposite-sex spouses are excluded from the provisions of the *Civil Code* concerning intestate succession.

Under the CPP, and thus in the provinces other than Quebec, the estate has priority over the person who pays the funeral expenses. Thus, in the absence of a clear will, and especially in those provinces that do not recognize same-sex spouses, a surviving lesbian partner might find it difficult to claim death benefits, even though the CPP recognizes the lesbians as a couple.

Division of CPP and QPP pension credits

Each year in which a person has income from employment (whether the person is an employee or self-employed), he or she must contribute to the QPP if she is a resident of Quebec or to the CPP if residing elsewhere in Canada. The pension credits thus accumulated are expressed as a percentage of the maximum insurable earnings for the year in question. When the person retires,

the government calculates the average of these credits, excluding 15 per cent of the years in which the percentage credited was lowest. It also excludes the years in which a person (almost always a mother) received a family allowance for a child under 7 years of age, if such is advantageous for the person.

In the case of a married couple, governments consider CPP or QPP pension credits accumulated during the marriage to be part of family property and they are divided equally and automatically on receipt of a notice of divorce, annulment or judicial separation. In the case of the CPP, if a common-law relationship breaks down, the credits will be divided if only one of the partners so requests within four years of the cessation of their cohabitation[32]. For the purposes of the CPP, persons who have lived maritally with another person for at least one year are considered to be common-law spouses. Same-sex partners have been recognized for this purpose since July 31, 2000.

For the purposes of the Quebec Pension Plan, same-sex partners are recognized as *de facto* spouses but only after living together for three years or for one year if the couple has had a child together. It is only since July 1999 that the division of pension credits has been authorized in the case of a *de facto* relationship and then only if both partners agree. A written cohabitation agreement signed at the beginning of or during the relationship, or a separation agreement concluded at the time it breaks down, can be used to indicate the wishes of the couple. Without such an agreement, the *de facto* spouse — whether heterosexual or homosexual — who has the most credits may refuse the division.[33]

Under both plans (CPP and QPP), married persons may also request that the pension paid be divided equally if both spouses are retired. However, the division will no longer apply if there is a breakdown of the marriage through divorce, separation or death. In all cases, if one of the spouses dies, there is no division of the credits since death will entitle the other spouse to a surviving spouse's pension if he or she qualifies.

Public health insurance plans

For a long time, public health plans discriminated against same-sex couples by refusing to provide them with family coverage. This discrimination arises primarily from the fact that individuals were required to make contributions from their employment income and the contribution was less for a couple and their dependent children than for two single persons. However, any person considered a resident of Canada was covered under the *Canada Health Act* (chapter C-6), even when she or he did not contribute and was not covered as a dependant of a contributor. Over the years, all the provinces, with the exception of Alberta and British Columbia, have abolished individual contributions (except with respect to non-salary incomes). In so doing, they have eliminated the concept of family coverage (Ontario, Social Assistance Review Board, 1988, p. 465). Thus, these plans have acquired more of the characteristics of a universal scheme since each person is eligible on an individual basis.

In Alberta, however, where the concept of family coverage still exists, same-sex partners are still excluded. In British Columbia, in the case of *Knodel* v. *British Columbia*,[34] the provincial Supreme Court determined that same-sex partners were spouses for the purposes of the public health insurance plan.

Discrimination may also exist with respect to the definition of a resident of a province. Thus, a person living temporarily outside the province (for example for study purposes or a temporary work-related assignment) may maintain his or her eligibility for the plan. This eligibility also extends to the spouse and dependent children. In Quebec, Ontario and British Columbia, same-sex partners are recognized for the purposes of this measure but that is not true of the other provinces and the territories.

In the late 1980s, taxpayers in Ontario were also required to pay health insurance contributions. In *Andrews* v. *Ontario*[35], Karen Andrews requested family coverage for her partner and the partner's two children. Despite a campaign in the media by lesbian and gay organizations (Gavigan, 1993, p. 610), the Court upheld the decision of the Ministry of Health to refuse this coverage. It excluded conjugality between lesbians on the ground that a relationship between two persons of the same sex could not lead to the procreation or support of children. The Court also considered that there was no discrimination based on sexual orientation because Ms. Andrews was treated like any other single person. With the enactment of Bill 5 in Ontario, same-sex couples are now recognized under the health insurance plan although individuals are now no longer required to pay contributions.

In Quebec, the recognition of same-sex spouses could have an indirect harmful effect on lesbian and gay couples with respect to the drug insurance plan (Demczuk and Gariépy, 1999, p. 17, 43). This plan, which was created in 1996, provides drug insurance for anyone who is not covered by an employer's plan (or some other private plan). The premiums, the deductible and co-insurance are all determined on the basis of family income as well as family size. The problem for lesbians arises from the fact that if one of the partners is covered by an employer's plan, she is required to obtain coverage for her partner from the same plan (unless the partner is covered by her own employer). This requirement is the government's way of ensuring that as many people as possible are covered by private plans. For those lesbians who do not wish to reveal their sexual orientation to their employer out of fear of prejudice, this requirement can cause problems, as we were told by a number of lesbians consulted in our research and whose opinions are presented in the next chapter.

3.2.5 Private insurance plans and registered retirement savings plans

Supplementary health insurance plans

It is very advantageous to have a spouse and children included in a supplementary health insurance plan. These plans reimburse people for certain expenses relating to health care that are not covered by the basic public plan, for example the cost of a semi-private hospital room, certain medical or paramedical treatments (physiotherapy, chiropractic services, psychiatry, etc.), additional costs of treatment outside the province, orthotics or prostheses and drugs.

In principle, the person who pays the contributions must pay the extra cost of obtaining coverage for his or her partner and other dependants. In practice, many private plans go halfway since persons with a spouse or children pay more than single persons but not the full cost of the benefits they receive. In other words, the employer and sometimes also single contributors help to fund the costs of spouses and children.

The employer's contribution to a supplementary health insurance plan is a deductible business expense. However, until Bill C-23 became law, Revenue Canada ruled that, if such a plan provided benefits to a contributor's same-sex partner, the value of the contribution was not deductible and had to be reported in the contributor's income for tax purposes. The Department had even indicated that the employer could lose the right to deduct the whole plan (Young, 1994, p. 540). A number of employers were prepared to provide such benefits to same-sex partners but did not wish to be forced to create a separate plan or to adopt different administrative procedures.

In *Vogel* v. *Manitoba*,[36] the Manitoba Court of Appeal reversed a decision that excluded Vogel's partner from coverage by a dental insurance plan provided by the employer, which happened to be the Government of Manitoba. As was true of supplementary pension plans, the decisions of the courts prohibiting discrimination created a great deal of legal uncertainty in the face of Revenue Canada's refusal to recognize these plans for the purpose of tax deductions. Only the enactment of Bill C-23 ended this uncertainty.

Registered pension plans and registered retirement savings plans

Each year taxpayers may contribute a percentage of their income to an RPP[37] or an RRSP in order to save for their retirement. These contributions, those provided by the employer (within the limits defined by law), and the income from the funds invested in these plans are not subject to tax although the income withdrawn after retirement is taxable.

There are two kinds of private retirement plans, namely fixed contribution plans and fixed benefit plans. A fixed contribution plan essentially operates like an RRSP: both the contributor and the employer contribute each year to a fund registered in the contributor's name. When the contributor retires, he or she has a sum at her disposal that can be used to purchase a pension, that is, an amount to be paid regularly for the rest of his or her life (life annuity) or over a fixed period.

A fixed benefit plan promises to pay a certain income for the rest of the contributor's life. This may be a fixed amount but is usually calculated as a percentage of the income earned during the contributor's working life multiplied by the number of years of contributions. A good plan, for example, will offer 2 per cent of the average salary for the best five years for each year of contributions. A person who contributes to the same plan for 35 years, for example, will receive 70 per cent of his or her pre-retirement salary. In fixed benefit plans, the employer is responsible for any deficit if the amounts invested fail to provide the expected return. For this reason, small employers prefer fixed contribution plans and, in many cases, will simply make a contribution to their employees' personal RRSP. Most large employers offer fixed benefit plans.

Since the mid-1980s, all the provinces and the federal government (for its own employees and those of the banks, transport and communications companies and other sectors over which it has jurisdiction) have enacted legislation that requires RPPs to provide a pension for surviving spouses. In addition, all the provinces consider that the credits accumulated in RPPs and the sums invested in RRSPs are part of family property. The right of a surviving spouse or an heir to receive a pension from the interests accumulated by his or her partner in the event of death or termination of the relationship are benefits that lesbian and gay communities have long demanded. We shall examine these questions below.

Division of pension credits
In concrete terms, the division of pension credits means that in the event of divorce or separation, the value of the pension credits accumulated during the relationship (RPPs or RRSPs) must be divided between the two spouses. In Quebec same-sex or opposite-sex *de facto* spouses have been able to request such a division since July 1999 only, provided that the couple has agreed in writing to such a division. In the other provinces, the division will occur at the request of only one of the common-law spouses but same-sex partners are not recognized except in Ontario (Bailey, 1999, p. 80).

In the case of an RRSP or a fixed contribution plan, the division is easy because the credits represent a sum of money. In the case of fixed benefit plans, however, the division will cause the contributor to lose a large part of his or her future retirement pension without the spouse getting a proportional benefit[38]. In practice, therefore, many women will trade the pension credits for some other asset such as the house or a lump sum when they divorce or separate. In Quebec, lesbian partners now have to make these choices as well.

It should be noted that governments give taxpayers the right to contribute to their recognized spouse's RRSP or to transfer amounts tax free to the spouse's RRSP or to other retirement savings instruments. Same-sex spouses now have the same rights under tax programs but the fact that the amendments came into force on different dates (1999 in Quebec and 2000 at the federal level) may cause confusion.

Surviving spouse's pensions and death benefits
At the federal level and in most provinces, when a person who contributes to an RRP dies before retiring, his or her spouse, married or *de facto*, inherits all or part of the value of the accumulated pension credits[39]. In most cases, this will take the form of a lump-sum payment. However, if the person who died was eligible for a retirement pension at the time of death, the surviving spouse may be entitled to a pension immediately or to a deferred pension payable when he or she retires. In Quebec, a spouse is defined as a married person or a person "of the same or the opposite sex" who has lived together with the contributor for at least three years or for one year if they have had a child together[40]. Therefore, as is the case for the QPP, same-sex spouses are recognized for the purpose of a surviving spouse's benefits but must meet more restrictive conditions than opposite-sex spouses. In the case of companies subject to federal jurisdiction (banks, transport and telecommunications companies, the federal public service, Crown corporations, the armed forces etc.), same-sex spouses have been recognized

since July 31, 2000[41]. However, in the other provinces except for Ontario, same-sex spouses are not yet recognized for the purpose of pensions or surviving spouse's benefits.

When a person who is married or in a common-law relationship retires, there is normally a reduction in that person's retirement pension in order to finance a possible survivor's pension for his or her spouse. If the spouse waives this right, the pension is not reduced. Let us take the case of Pauline and Agnès, who are lesbian partners. Pauline works for a company that recognizes same-sex couples for the purpose of its pension plan. When Pauline retires, Agnès must decide whether Pauline will receive a full pension of $35,000, which will end when Pauline dies, or a reduced pension, typically 88 per cent or $30,800,[42] that will provide Agnès with a pension if Pauline predeceases her. Agnès's pension must be equal to at least 60 per cent of the reduced pension, namely $18,480. If Agnès has her own retirement pension or thinks she will not survive Pauline, she could waive this. However, there may be cases in which the contributor exerts pressure on the spouse to waive his or her rights.

In the case of a fixed contribution plan, it is also at the time of retirement that the contributor and spouse have to make a decision since they must transfer the sum accumulated into a retirement fund that will pay income each year. Several formulas are possible but all of them must provide a pension for the survivor unless the survivor waives this pension. Consequently, the contributor will receive a smaller income during his or her lifetime. The same is true of RRSPs except that it is possible to delay the decision until the contributor reaches his or her 70th birthday.

The right to a survivor's pension in an RPP is one of the benefits that lesbian and gay communities have been fighting for a long time. As a result of repeated pressure, beginning in the 1980s a number of employers have agreed to include same-sex spouses in their retirement plans. The federal government nonetheless indicated that their plans would be deregistered and therefore not deductible for tax purposes. Since 1995, however, the federal government has refrained from taking action against any RPPs (Yogis *et al*., 1996). As early as 1992, in *Leshner* v. *Ontario*[43], the Ontario Human Rights Commission found that the refusal to grant a survivor's pension to Leshner's same-sex partner was discriminatory. However, given the restrictive rule imposed by the federal government, the proposed solution was to order the employer (the Government of Ontario) to create a separate unregistered plan. The Ontario Government had three years in which to comply if the Government of Canada did not change its definition of spouse in the *Income Tax Act* (Yogis *et al.*, 1996, p. 27). In 1998, in *Rosenberg* v. *Canada*[44], the Ontario Court of Appeal held that the refusal to include same-sex spouses in an RPP was discriminatory under section 15 of the *Canadian Charter of Rights and Freedoms*. Finally, the federal government amended its legislation in 2000 when it passed Bill C-23.

3.3 Why recognize opposite-sex or same-sex couples?

Why is it necessary to recognize opposite- or same-sex spouses, married or common-law, in public income-security plans and tax programs? Throughout this chapter, we have noted the importance of the recognition of conjugal status given to heterosexual men and women. However, the reasons for which the government does or does not grant benefits to couples

are much less clear. In this connection, we have identified a number of contradictions, not to say injustices, in a large number of plans as well as discrimination based on marital status and sexual orientation; it is only recently that efforts have been made to correct the latter form of discrimination. The fight of gays and lesbians to have their unions recognized, and the reasons given by the courts and legislatures for refusing or granting such recognition, highlight the contradictions between the declared objectives of the plans and their concrete results when these plans use conjugality as a criterion for eligibility.

Some of these contradictions have already been analyzed by critics. One of the most prolific authors on this subject is the feminist sociologist Margrit Eichler. She points out that the massive influx of women into the labour force and the increase in the numbers of divorces mean that the traditional family consisting of a man as provider and a woman at home with several children today represents only a minority of families (Eichler, 1988, p. 395). Programs that are premised on this model are often discriminatory since they exclude the people who need them most. One has only to think of the exclusion of divorced women from the Spouse's Allowance merely because their family unit does not reflect the traditional heterosexual model. Eichler (1988, p. 395) concludes that " 'family policies', in spite of their name and their explicit rationale, therefore often work against families rather than for them". In her opinion, these policies reinforce the dependence of women and the traditional division of roles and duties; they do a poor job of helping mothers with children, whether they are married or the heads of single-parent families.

Bussemaker and van Kersbergen (1994, p. 18) have conducted a gender-based analysis of different kinds of welfare states. In "liberal" countries such as the United States or Canada, there is a two-track system: a male track based on modest social insurance programs and a female track based on assistance programs involving an income test. The typical male model is that of an independent man who earns his living and who may, in certain circumstances, receive public insurance benefits to which he is entitled "because he has paid for them". Women whose unpaid work for children and her husband is not socially recognized are considered to be undeserving dependants. They rely more often than men on social assistance programs, especially if their relationship breaks down. And because public assistance programs are much less generous than insurance plans, they help perpetuate the poverty of women and their children.

These criticisms underscoring the inappropriateness of the eligibility criteria for family benefits have been echoed by a number of feminist lesbian authors dealing with the inclusion of same-sex couples in family law legislation and income-security schemes. As we indicated in Chapter 1, several authors display profound ambivalence with respect to the model of formal equality as a way for same-sex couples to obtain the same rights and obligations as opposite-sex couples. Following *Andrews* v. *Ontario* (1988) and the "*We are Family*" campaign of gay and lesbian organizations, Didi Herman (1990) questioned the assimilationist position aimed at including lesbian and gay couples in family law and social policies:

> Our relationships [gay and lesbian] simply cannot be family, because family necessitates the productive, reproductive, and sexual exploitation of women by men … By appropriating familial ideology, lesbians and gay men may be

> supporting the very institutional structures that create and perpetuate women's oppression (Herman, 1990, p. 797).

Young (1994) stresses that the existing system has differentiated effects, both positive and negative, according to social class (with income functioning as an indicator of class) and sex: "Men tend to be wealthier than women […] which means that gay men on average stand to gain more than lesbians from recognition as spouses under the Act" (1994, p. 555). According to Young, the fact that some benefits are provided solely on the basis of conjugal status constitutes discrimination against people who do not live in couples. As long as same-sex couples are not recognized, this discrimination based on marital status affects all gays and lesbians. However, even if homosexual conjugality were recognized, lesbians and gays who choose to live alone would continue to be excluded. In short, Young expresses as follows her reluctance towards a model of formal equality:

> In short, there will be winners and losers and, as I have demonstrated, the losers will be those least able to afford the loss. Furthermore, lesbians and gay men not in "spousal" relationships will gain nothing. Is this too high a price to pay for equality? I believe that it may be (Young, 1994, p. 558).

For her part, Susan Boyd (1996) is concerned about the economic consequences of the liberal strategy of fighting for recognition of same-sex spouses, especially the privatization of social support. Referring to *M.* v. *H.*, she notes that allowing lesbians to bring legal actions for support merely serves to extend the privatization of income support already begun by government without challenging it. She maintains that changing the concept of "spouse" to include same-sex couples is not an end in itself; the ultimate goal should be economic security for everyone.

In a forceful essay, Bruce Ryder argues that the inclusion of same-sex couples should not be treated as a mere broadening of the concept of "spouse" by replacing the expression "a man and a woman" with "two persons". Laws that are based on the concept of "spouse" should aim instead to determine "the attributes of relationships that are relevant to the purposes of legislation, and they should do so in a manner that respects a diversity and equality of intimate relationships" (Ryder, 1993, p. 445). Ryder is in favour of introducing the criterion of economic interdependence into family law and family policies to replace the heterosexist concept of "conjugal life".

More recently, Lahey (1999a) has acknowledged that there are disadvantages as well as advantages to recognizing lesbian and gay couples. She devotes at least three chapters of her book to estimating the financial losses and gains that would result. She concludes, however, that individual interests should not be used to justify the perpetuation of discrimination. She advocates the elimination of any form of discrimination based on sexual orientation, the reform of tax and income-security programs that reinforce the economic dependence of women, as well as the abolition of government subsidies paid to certain persons because of their marital status.

> Queer communities have reacted rationally and logically to the choices being given to them by this structure. Those who would pay higher taxes, lose social assistance, or otherwise be disadvantaged if they were deemed to be spouses, and those who would run the risk of being forced out of the closet by ascribed status, have quite sensibly pointed out that they have nothing to gain from relationship recognition. Therefore, they oppose it. Those who recognize that relationship benefits are premised on the appropriative, hierarchical or monogamous features of heterosexual relationships have also opposed relationship recognition, and are sometimes joined by those who find that making those arguments helps mask their own self-interest with the guise of anti-establishment values. And splitting queer communities very neatly down a deep fault line, those who have something to gain from relationship recognition endorse it, seek legislation, bring test litigation, seek funding, and try to organize around that goal.
> …
> Restructuring benefits around more encompassing 'hinges' like raising children, providing care for incapacitated adults, or factual dependency might represent a humane and politically feasible way to begin the process of recognizing the full legal personality of all adults in Canada… That 'third choice' might end up looking like assimilation of heterosexual existence to queer existence or vice versa. But whatever it becomes, it will dialectically result in rethinking how the state subsidizes and thereby regulates human connections. (Lahey, 1999a, p. 280-281).

Bailey (1999, p. 138) also advocates allowing same-sex couples to marry (or to engage in an equivalent form of registered partnership to the extent that public opinion is not prepared to accept marriage). However, she questions the consistency of existing family policy with respect to the values that it is supposed to defend and its discriminatory application to lesbians and gays. She states that:

> [c]urrent laws, however, are not entirely consistent with the values of freedom of choice, mutual affection, autonomy, protection of the vulnerable, fairness, and equality that underlie marriage and marriage-like relationships. As well, existing laws are somewhat inconsistent with state objectives in relation to the family, which include procreation, maintenance of stable and nurturing environments for children, provision of a social support scheme for family members, and the promotion of social cohesion (Bailey, 1999, p. iii).

Our analysis has also highlighted a certain inconsistency between the declared objectives of family-support programs and their results, as well as several discriminatory features. In particular, we have emphasized the confusion between the objectives of gaining recognition of conjugality and those relating to support for families with children. We have also noted that some programs have the effect of impoverishing women and children, especially those living in single-parent families, instead of giving mothers the resources they need to become

independent. The trend towards downsizing governments and the conversion of universal programs into assistance programs is likely to exacerbate these problems.

3.4 Conclusion

Since the late 1960s, women have entered the work force in large numbers and the structure of the family has changed. The "traditional" family is now in the minority and is giving way to single-parent families, blended families and other forms of opposite and same-sex couples with or without children. Furthermore, families are in an increasing state of flux and a child has a strong chance of living in several types of family before reaching adulthood.

Because of the changes that have occurred, Canadian laws governing the family have also evolved. Where heterosexual conjugality is concerned, divorce is now permitted, biological filiation and the legitimacy of all children is legally recognized, regardless of the marital status of the parents. Women have obtained legal equality within the family and measures have been introduced to help women (and, in principle, men) to better reconcile family and work.

From the point of view of lesbian and homosexual conjugality, the legal changes are only now beginning to be made. By and large, Canadian laws governing the family still contain provisions that discriminate against same-sex couples and their families, as we saw in this and the previous chapter. Partners in these couples have not obtained full and complete legal equality since they may not marry or divorce or rely on the automatic division of family property. The recognition of *de facto* relationships between persons of the same sex exists in only some laws and some jurisdictions (Quebec, Ontario, British Columbia and the federal government) and even then the recognition is uneven. Furthermore, non-biological filiation is still very limited.

Since the laws concerning the family have never been subject to an overall review in light of the new realities, all kinds of anomalies and inequities still exist in the treatment of individuals and households, depending on the circumstances. Furthermore, the new era of globalization and the gradual disengagement of government from social programs are again threatening the ability of women to achieve financial autonomy. These two phenomena are contributing to a new wave of feminization of poverty.

The demands of lesbians and gays for recognition of their unions for the purpose of taxation and income-security programs have made the inherent contradictions and injustices long criticized by feminist analysts clearly apparent. It is particularly significant that poor lesbian mothers have the most to lose if their spouses are legally recognized, while high-income childless gays have the most to gain.

In many childless lesbian and gay couples where both partners have more or less equal and reasonable incomes (more than $15,000), that is most same-sex couples, recognition of their conjugality will have the fewest economic consequences. They will probably lose all or part of the GST credit and, in Quebec, the QST credit. On retirement, the same couple will lose up to $4,000 per year from the Guaranteed Income Supplement (GIS). This is likely to affect lesbians more than gays since women generally have less independent retirement income and

therefore rely more heavily on the GIS. However, they may obtain certain benefits, especially coverage for one of the partners under the other partner's health insurance plan and recognition of family-related employment leave (for bereavement, for example).

On the death of one of the partners, there will also be significant benefits as a result of the recognition of the couple, in particular, the survivor's pension and the right to inherit property from the deceased without being taxed on the transaction and with a right to delay reporting capital gains. We should note, however, that inheritance rights of *de facto* spouses are much less clear than is the case for married couples, especially in Quebec. No province has yet granted lesbians and gays the right to marry, and they accordingly do not enjoy the presumptions in favour of married spouses in terms of inheritance and the division of the family property. Even if one day they do obtain this right, many couples will choose not to marry, preferring the less rigid framework of a common-law partnership. In all cases, it is important for each couple to make clear, through written agreements and wills, any wishes they may have with respect to inheritance and the division of family property in the event of separation or death.

We shall see in the next chapter that the lesbians we consulted in our study are aware of the economic advantages and disadvantages associated with the legal recognition of their relationships. They are even more concerned about the social impact of such recognition on their own daily lives.

Notes to Chapter 3

[1] The analysis of the inclusion of same-sex couples in income-security programs takes into account the amendments made by Bill C-23, the *Modernization of Benefits and Obligations Act*, which received Royal Assent on June 14, 2000. However, it does not reflect any legislative changes that may have been made since October 25, 2000, by the provinces or the federal government.

[2] We use the expression "citizenship" in the generic sense to refer to a member of a particular society.

[3] *Old Age Security Regulations*, C.R.C., c. 1246, section 21. The concept of spouse also exists for the purposes of the Guaranteed Income Supplement and the Spouse's Allowance, which programs are also governed by the *Old Age Security Act* and *Regulations*. However, those are non-universal assistance programs.

[4] There may also be discrimination against same-sex spouses to the extent that the health insurance and hospital insurance legislation has adopted certain features of insurance (see the appropriate heading in section 3.2.4). There may also be problems concerning eligibility for certain services, including artificial insemination. In Quebec, for example, this service is provided solely to mitigate problems of infertility experienced by men living in a stable heterosexual relationship, which excludes lesbians wishing to bear a child without having sexual relations with a man. However, this exclusion is a matter of interpretation of the

legislation with regard to medically necessary actions and not the actual law itself (Quebec, Conseil du statut de la femme, 1998, p. 40-41).

[5] Some public welfare programs, in particular social assistance, also involve an evaluation of assets. For example, someone who owns a house with a value greater than the fixed limit is not eligible and might be required to sell the house to support himself or herself.

[6] Very few studies have taken a serious look at the question of the cost of a second person in the household, especially in the light of whether the two persons share a bedroom and share their lives. Estimates of the impact of this second person (in relation to the first person, who is assigned a value of 100 per cent) range from 36 per cent in the Statistics Canada low-income cut-off (National Council of Welfare, 1999b, p. 115) to 75 per cent (Quebec, Department of Income Security, 1996, p. 29). These weightings are higher at a minimum subsistence standard of living than with a modest but more comfortable level.

[7] R.S.Q. c. S-3.1.1, section 2. As under the tax legislation, a temporary breakdown of the relationship will not interrupt the 12-month period of cohabitation. Once they are considered to be spouses, two persons are always considered to be such when they start to live together again, even though 12 months may not have elapsed since the cohabitation resumed.

[8] The regulation made under the *Family Benefits Act* (General R.R.O. 1990, Reg. 366) defines "*spouse*" as a person who has an obligation to support the applicant or any of his or her dependant children under sections 30 or 31 of the *Family Law Act*, R.S.O. 1990, F. 3. This regulation exists only in English. The sections referred to impose a support obligation on married persons and on a man and a woman, or same-sex partners who have cohabited continuously for at least three years or who are the natural or adoptive parents of a child. However, the regulation considers two persons living together to be spouses, without requiring a period of cohabitation, if one of them provides financial assistance to the other or if they have an agreement concerning their financial affairs and if the social and family aspects of the relationship between the claimant and the other person are akin to cohabitation.

[9] Human Resources Development Canada Website, January 17, 2000: <http://hrdc-drhc.gc.ca/isp/oas/rates_lf.shtml>.

[10] See *Egan* v. *Canada*, *op. cit.* and Appendix 1 for more details on this case.

[11] Human Resources Development Canada Website, Canada Study Grants, September 2001: http://canlearn.ca/English/nslsc/tools/index.cfm?var=csg>.

[12] Website: <http://hrdc-drhc.gc.ca/hrib/learnlit/millenium/cmsf128x.shtml>, consulted on October 26, 2000.

[13] Website: <http://www.hrdc-drhc.gc.ca/prets_aux_etudiants/admin/adminx.shtml>, consulted on October 26, 2000.

[14] Website: <http:www.aett.gov.bc.ca/studentservices/defition.htm>, consulted on October 26, 2000. According to the list of definitions: "students who have cohabited with a person of the opposite sex in a marriage-like relationship for a period of at least 12 consecutive months as of the first day of classes are deemed to be in a common-law partnership" [emphasis added].

[15] This effect is not really retroactive because it is not until July 2000 that newly recognized spouses will lose a part of their Quebec family allowance on the basis of the income of both spouses for the 1999 calendar year.

[16] These figures do not include the indexing of the federal tax system that took effect on January 1, 2000. For residents of provinces other than Quebec, the non-refundable credit for an "equivalent to spouse", to which the heads of single-parent families are entitled, is worth $1,057. This value is less in Quebec because of the tax abatement.

[17] In fact, Jacinthe could also lose the relatively small sums in the PWA program and part of her subsidy for daycare costs. If Jacinthe has only one child, the loss would be in the range of $4,500. If her initial income is over $15,000, the loss would be less because the greatest reduction occurs when income increases from $15,332 to $26,000.

[18] Albert Wakkary is an official with the federal Department of Finance. The estimate in question is taken from an affidavit he swore in the case of *Rosenberg* v. *Canada* (1994), Ontario Court (General Division) Court File N^{o} 79885-94. It should be noted that Wakkary did not estimate the losses that would be sustained by lesbian and gay couples in terms of the Guaranteed Income Supplement or the gains they would make if they are eligible for the Spouse's Allowance. Moreover, he estimated that the losses in terms of the child tax benefit would be small since his evaluation of the number of same-sex couples with children was only 4,800 or less than 4 per cent of all same-sex couples.

[19] In Quebec, the government has, since the late 1980s, implemented various measures targeted to persons living alone (who do not share their dwellings with other adults) in order to ensure that two co-tenants suffer some of the disadvantages experienced by a married couple. For example, two unrelated persons who live together receive about the same total amount of welfare benefits as two spouses and nearly $3,000 less than if each lived alone (the Government of Quebec has promised to abolish this measure gradually). In the tax system, low-income individuals living alone are granted a special credit and a supplement of $100 for the purpose of the QST credit. Thus, when two lesbians move in together, each of them immediately loses this $100. After cohabiting for one year, when they are recognized as a couple, they will lose up to $154 each, depending on their combined income. At the federal level, for the 2000 taxation year, a single person is entitled to a supplement to the GST credit of not more than $106, but this credit does not depend on whether the taxpayer lives alone or not. Thus, with the enactment of Bill C-23, a lesbian who lives with her partner will at the same time lose the $106 (because she will no longer be considered to be single) and all or part of the $202 granted to each adult on the basis of the couple's income.

[20] They also accounted for 64 per cent of the people who claimed the amount for a spouse or equivalent to spouse. Unfortunately, these two categories are not shown separately. Nevertheless, we know that the heads of single-parent families are predominantly women, and these family heads account for the great majority of persons claiming the equivalent to spouse amount. This means that men probably account for between 75 and 80 per cent of taxpayers claiming the spousal amount.

[21] At the federal level, the medical expenses of both spouses can be combined and the person with the lower income can claim them without having to deduct 3% of his or her spouse's income. The value of this credit may thus be greater for two spouses than if the same persons had to make separate claims. In Quebec, on the other hand, only one claim is filed for each family and 3% of the combined income of both spouses must be deducted. Thus, a person who has substantial individual expenditures may not be able to claim them because of his or her spouse's income. This is why we included refundable and non-refundable credits for medical expenses in Quebec in the list of assistance programs, whereas we included the non-refundable federal credit in the list of tax benefits for spouses.

[22] Note that in 1998, Quebec created a simplified tax system under which thirty or so non-refundable tax deductions and credits were replaced with a lump-sum of $2,350 each for a taxpayer and his or her spouse. This system is generally beneficial for a taxpayer whose spouse has little or no income and who makes little use of his or her own deductions. This measure will probably not apply very often to lesbian couples if each member earns her own income.

[23] We have excluded from this discussion the tax benefits that may be transferred between spouses referred to earlier and those linked to retirement plans and RRSPs, which are discussed in the section on that subject.

[24] However, it is possible to circumvent these provisions by means of a trust, a mechanism used mainly by very wealthy taxpayers.

[25] Bill 32 in Quebec, *An Act to amend various legislative provisions concerning* de facto *spouses*, provided for a transitional period (section 39) that enables newly recognized couples to dispose of assets before December 13, 1999 without being subject to tax under the new rules. This section was probably designed to cover the situation where a couple decides to sell a second home free of tax. The federal Bill C-23 does not appear to include a similar transitional measure.

[26] In *An Act respecting the Quebec Pension Plan*, R.S.Q., c. R-9, section 91, it is indicated that, for the purpose of the surviving spouse's pension, the deceased spouse must be "either legally separated from bed and board or unmarried on the day of his death … for at least three years or, in the following cases, for at least one year". The cases in question refer to the fact that the spouses had had or had adopted a child together. *An Act respecting industrial accidents and occupational diseases*, (R.S.Q., c. A-3.001, section 2), and automobile insurance and the program of compensation for the victims of criminal offences, which refer

to this Act for their definition of spouse, do not require the spouse to be judicially separated from bed and board. However, they require this person to be "publicly represented as the worker's spouse".

[27] Bill 5, *Amendments Because of the Supreme Court of Canada Decision in M. v. H. Act*, sections 65, 66 and 67.

[28] Bill C-23, *Modernization of Benefits and Obligations Act*, sections 42 to 45.

[29] *An Act respecting the Quebec Pension Plan*, R.S.Q., c. R-9, section 86.

[30] R.S.Q., c. A-3.001, section 92.

[31] *An Act respecting the Quebec Pension Plan*, R.S.Q., c. R-9, section 168.

[32] *Canada Pension Plan*, c. C-8, section 55.1.

[33] *An Act respecting the Quebec Pension Plan*, R.S.Q., c. R-9, sections 102.10.3 to 102.10.10.

[34] *Knodel* v. *British Columbia* (1991), *op. cit.* See Appendix 1 for further details on this case.

[35] *Andrews* v. *Ontario* (1988), *op. cit.* See Appendix 1 for further details on this case.

[36] *Vogel* v. *Manitoba* (1992), *op. cit.* See Appendix 1 for further details on this case.

[37] The expression "registered pension plan" is used in the federal *Income Tax Act*. It refers to pension plans provided by employers that are recognized for the purposes of the tax return. They may also be called supplementary pension plans, registered retirement plans or private pension plans.

[38] The pension of the contributor is calculated on the basis of his or her salary at the end of the contributor's career whereas the spouse's pension is calculated on the basis of the salary at the time of the breakdown of the relationship.

[39] We did not check each of the statutes governing supplementary pension plans, but in the federal act and in those of Ontario, Quebec and British Columbia, *de facto* spouses are entitled to benefits. Furthermore, they take precedence over other heirs. According to the National Council of Welfare (1999a, p. 40-42), the federal and provincial governments agreed in 1986 to improve and harmonize to some extent the standards to which RPPs are subject. All the provinces now provide for a surviving spouse's pension when the contributor dies after retiring and most of the provinces provide some benefits if the contributor dies before retiring.

[40] *Supplemental Pension Plans Act*, R.S.Q., c. R-15.1. Sections 85 to 90 deal with the definition of spouse and the main provisions governing benefits after the contributor's death.

[41] Bill C-23, the *Modernization of Benefits and Obligations Act*, sections 254 to 264. Note, however, that as far as the division of pension credits is concerned, section 25 of the *Pension Benefits Standards Act, 1985*, R.S.C., c. 32 (2[d] Supp.) refers to provincial legislation governing the division of family property between spouses and common-law partners. Thus, lesbians and gays who work for companies under federal jurisdiction may be eligible for a surviving spouse's pension but not be entitled to a division of the pension credits, depending on the province in which they live.

[42] In principle, this reduction must be sufficient in actuarial terms to cover the cost of the surviving spouse's pension. In practice, however, the reduction in many fixed benefit plans is too small and the plan, that is the employer and the other contributors, subsidize part of the surviving spouse's pension.

[43] *Leshner* v. *Ontario* (1992), *op. cit.* See Appendix 1 for further details on this case.

[44] *Rosenberg* v. *Canada* (1998), *op. cit.* See Appendix 1 for further details on this case.

4: EXPECTATIONS, NEEDS AND PARADOXES EXPRESSED BY LESBIANS

4.1 Consultations held in Quebec and Francophone Ontario

4.1.1 Background and methodology

The legal and financial consequences of legal recognition of same-sex spouses are at the very heart of lesbian concerns. In our research we wished to ascertain the expectations and needs expressed on these subjects by the members of organizations involved in the defence of lesbian rights. We felt that this was essential for two reasons. First, the recent enactment of legislation granting rights to and imposing obligations on same-sex couples is undoubtedly the greatest legislative change made in the lives of lesbians since the decriminalization in 1969 of sexual practices associated with homosexuality. The omnibus act of 1969 allowed lesbians to emerge from the stifling secrecy that had previously marked their lives. Today, the inclusion of same-sex couples in an increasing number of provincial and federal laws gives lesbians an opportunity to affirm their own existence as well as that of their couples and their families. These legislative amendments will have a major impact on the daily lives of lesbians in their relations with government, their employers and those around them. For lesbians, the practical and symbolic impact of this new legislation was comparable to that experienced by heterosexual women in Quebec when the legal incapacity applying to married women was abolished in 1964.

Moreover, the inclusion of same-sex couples in the concept of spouse is likely to change and even broaden the symbolic representation of conjugality. It is still too early to understand what the impact will be on the collective imagination of the people of Canada, but it can already be predicted that it will be more difficult in future to argue that heterosexual conjugality is a unique and superior relational model. This narrow view of conjugality will gradually give way to a perception of the real diversity of sexually based love relationship models.

Second, we found that, despite the many legislative changes, we know little about the views of lesbians on the subject. The struggle of same-sex couples for legal recognition has been led primarily by individuals and organizations in which gay men represent a majority, and they have put forward their views in a variety of forums over the last few years. Do lesbians — who are often more critical of conjugality and marriage which they perceive as an institution for the suppression of women — collectively have the same interest in having their relationships as couples institutionalized? How do they react to the idea of the federal and provincial governments granting legal recognition to the couples they form? What importance do they place on this recognition of their unions? Do these new rights meet their needs? In the event they can be recognized as spouses, will the partners in a lesbian couple exercise their right to equality? These are a few of the questions that provided a framework for the consultations held with the main lesbian rights advocacy groups in Quebec and French-speaking Ontario.

Few Canadian studies have attempted to assess the needs and preferences of lesbians with respect to the conditions under which their relationships should be recognized. However, grassroots consultations with lesbians were held by organizations such as the Women’s Legal

Education and Action Fund in 1993 (LEAF, 1993) and by the Quebec Lesbian Network in 1998. One of the objectives of our research was to fill this gap.

This chapter summarizes the consultations held between June 12, 1999 and January 8, 2000. This was an ideal time to collect information as the Supreme Court of Canada had just rendered its decision in *M*. v. *H*. and Quebec and Ontario were in the process of enacting legislation to recognize same-sex couples. Since the consultations took place while these legislative changes were still fresh, respondents showed marked interest and participated actively. Wherever we went, in urban communities or remote areas, lesbians spoke to us about their lack of information on the subject and the powerlessness they felt with respect to the legislative changes that will have a profound impact on their lives but were made without their community being consulted. In fact, the Government of Quebec, the Government of Ontario and the federal government did not hold any public consultations with Canada's lesbian communities before passing the bills.

We held consultations with five lesbian community organizations using the focus group technique. The meetings, which were conducted using a structured interview guide (see Appendix 2), brought together 75 participants from different backgrounds. We selected the participating organizations on the basis of their mission, membership size, location and interest in the subject of our research. These organizations were the Collective lesbienne de l'Ontario, the Quebec Lesbian Network (Quebec), the Association des mères lesbiennes (Quebec), the Association des femmes d'affaires et professionnelles gaies (Quebec) and a group of lesbians brought together by the Women's Centre in Rouyn-Noranda (Quebec). A majority of the women who were involved in two of these organizations, the Collective lesbienne de l'Ontario and the group from the Rouyn-Noranda women's centre, live in remote areas and often in rural communities.

Readers will no doubt note the important difference in the number of groups consulted in Quebec and those consulted in Francophone Ontario. In fact, with the exception of Quebec, there are few community organizations of lesbians in Canadian provinces. Ontario is no exception to the rule. Anglophone lesbians seem to prefer a mixed organizational structure (gays and lesbians) rather than collectives consisting exclusively of women, as is the case in Quebec, where ties to the feminist movement are much stronger. As a result, we were able to meet with only the Collective lesbienne de l'Ontario, the only organization of Francophone lesbians in the province.

To supplement the information collected, we also held three separate interviews with representatives of three lesbian and gay rights advocacy organizations that have played a leading role in the legislative changes made in Quebec and Ontario and at the federal level. These were the Coalition québécoise pour la reconnaissance des conjoints et conjointes de même sexe, the cross-Canada organization EGALE and the Coalition des gais et lesbiennes du Québec. We felt that these interviews were essential for a better understanding of the principles underlying their political actions to gain recognition for same-sex couples. Finally, the expertise of two resource persons was also deemed invaluable for our purposes: they were Ms. Andrée Côté, Director of Legal Affairs at the National Association of Women and

the Law, and Ms. Nathalie Ricard, a social worker who conducted in-depth research on lesbian mothers in Quebec. A brief description of each of the organizations and resource persons consulted, together with a statistical portrait of the women who took part in the consultations may be found in Appendix 2.

4.1.2 Interview methodology

From a methodological point of view, we should note that the same interview process was used for all five focus groups. We spoke to the organizations in the spring of 1999 and again in the late fall. We sent them a letter of invitation and a summary of the project, setting out the objectives of the research, the theoretical perspective, an introduction to the members of the team, the goal of the consultation and the rules of confidentiality and anonymity. All the groups targeted agreed enthusiastically to participate. The recruitment of lesbians to participate was made much easier by the fact that those responsible for this aspect of the research had a long experience of involvement in their respective communities. A telephone conversation with the person responsible for the group followed the mailing of the invitation. During this conversation, it was agreed that consultations involving a maximum of 15 group members would be organized. However, we had to be flexible given the obvious interest in certain groups who exceeded this limit and the difficulties of others that managed to find only ten or so respondents. We strongly recommended that they choose members offering the greatest possible diversity of opinion on the legal recognition of same-sex couples. The co-ordinator of the group also agreed to send the participants a summary of the research project. Once these conditions were satisfied, the consultations took place either on the premises of the organization in question or in a nearby community hall. The meetings were directed by the two people responsible for this component of the research.

The length of each consultation varied from three and a half hours to six hours, the difference depending on the number of participants and their knowledge of the subject. We asked the permission of the participants to record the consultation. A verbatim transcript was later summarized and retranscribed to ensure that the information obtained was reliable. We also attributed pseudonyms to the participants in order to preserve their anonymity. Before the interview began, a questionnaire was distributed to the respondents in order to ascertain their conjugal and family status as well as some socio-economic data. These data are summarized in Appendix 2.

Given the changing legislative context and the obvious desire of the participants to learn about the contents of the Quebec and Ontario laws that gave recognition to same-sex couples, we had to change our research protocol in order to provide an hour of information at the beginning of each meeting. This information component was essential to the consultation because of the participants' lack of knowledge of family law and the public welfare schemes that use conjugality as a condition for eligibility. Using an overhead projector and transparencies, we provided a brief presentation that was as objective as possible on the areas of application of Bill 32 in Quebec, Bill 5 in Ontario, and a possible Bill C-23 at the federal level. Thus, the participants had a basic understanding of the issues before they expressed their expectations and needs in the context of legal recognition of their relationships.

4.1.3 Profile of participants

The characteristics of those participating in the consultations were relatively varied. In terms of age, 70 per cent were between 35 and 54, 19 per cent between 26 and 34 and 5.5 per cent each between 18 and 25 and between 55 and 64. Note that we were not able to contact any older or very elderly lesbians. Most older lesbians have spent the greater part of their lives in secrecy and it is particularly difficult to contact them through the network of community organizations. Our sample was well-educated: 72 per cent had completed a post-secondary degree and 55 per cent of them had completed university. This high level of education was reflected in their employment status. Thus, 84.5 per cent of the participants were employed, almost four-fifths of them (79 per cent) working full time. Despite their high level of education the lesbians we consulted had widely differing levels of income. Thus, almost one lesbian in three (30 per cent) earned an annual income of less than $25,000 and one in five (20 per cent) received less than $15,000, which is below the poverty level. Forty per cent of the respondents earned annual incomes of between $25,000 and $40,000 whereas one in eight (12.5 per cent) had an income of over $50,000.

As far as their conjugal situation was concerned, three-quarters of the respondents (75 per cent) are part of a couple yet only two-thirds of them live with their partner. The duration of the cohabitation ranged from one to 23 years, the average being seven years. Almost one half (43 per cent) of our sample were the mothers of at least one child. We included in this figure the six co-mothers who stated that they were parents although they were neither the biological nor the adoptive mother of the child. Of these mothers, 59 per cent indicated that they live with their children. In most of the other cases, the children were adults who had left home. Among the respondents' spouses, a little more than a third (37%) had children and in 71 per cent of these cases, the children lived with the couple.

The profiles of the lesbians consulted obviously cannot be generalized to represent all lesbians in Quebec and Ontario. However, we feel that our consultations offer a good indication of the way in which lesbians from those provinces view the legal recognition of same-sex couples. After consulting eight community groups and two resource-persons, we feel that we have achieved a level of saturation which is satisfactory for the purpose of assessing the expectations and needs of francophone lesbians with respect to the rights of same-sex couples, at least in Quebec.

It should be noted that our consultations brought a surprising fact to light. Although the majority of the respondents thought that the legal recognition of lesbian couples is very important, more than 80 per cent of them stated that they would not exercise their rights even if they were recognized as *de facto* spouses. We found this piece of information more profoundly disturbing than any other, especially since the participants had just been informed of the legislative changes made or planned and had spent more than three hours sharing their thoughts on the legal and financial impact of those changes.

4.2 Importance placed on legal recognition of same-sex couples

4.2.1 Expectations and hopes

The majority of the participants and resource-persons consulted placed great importance on

the legal recognition of lesbian couples. Respondents were asked to rate the issue on a scale of one to four ranging from “not important” to “very important”. A small minority of lesbians stated that they did not consider this question to be important for their personal lives. This was more likely to be the case for the lesbians from Ontario than those from Quebec. This discrepancy can probably be explained by the fact that we met with the Collective lesbienne de l’Ontario only a few days after the Supreme Court released its decision in *M.* v. *H.*, which required the spouse to pay alimony.

The recognition of same-sex couples also reflects some of the needs expressed by the respondents. First of all, everyone agreed that the legislative changes designed to include lesbian spouses in private and public family law were an important step in gaining equality. The federal and provincial governments should not discriminate against same-sex couples and families, no matter what form they take. The three national advocacy organizations for gays and lesbians added that equality is a fundamental principle of law on which democratic systems are based. Depriving one category of people of this right constitutes a violation of their personal dignity and security.

> [TRANSLATION]
> *I think it’s very important because discrimination is dangerous. We tend to forget that only a few decades ago, our lives and our safety were threatened because we were lesbians. It is important to move forward and not go backward.* (Annette, 45, Association des mères lesbiennes)
>
> *By legitimizing our existence, these laws will reduce the violence against us and increase our safety in the streets and in public spaces. Soon, taking my lover by the arm in the street will no longer provoke the same feeling of threat and hidden fear.* (Jeanne, 39, Coalition québécoise pour la reconnaissance des conjoints et conjointes de même sexe)

Many respondents stated that the federal and provincial governments have a particular social responsibility for minorities. In this respect, they must act proactively to instill the values of respect, tolerance and equality in the general population.

> [TRANSLATION]
> *At the present time, it is a dimension of ourselves that is ignored by the law and thus by society. It is the responsibility of government to promote the recognition of lesbian couples. If the government does not assume leadership on this issue, who will? Certainly not our employers or our families.*
> (Françoise, 45, Quebec Lesbian Network)

Others stated that the recognition of homosexual couples is not an insignificant right in a society where conjugality and the family are the social institutions on which society is founded. In this sense, the legislative changes have an impact which is not only legal but also social and symbolic.

> [TRANSLATION]
> *The family and marriage are the most fundamental institutions in our society. We may be critical of them, but in the minds of most people they are two structures that are absolutely central. Many lesbians suffer because they have been excluded from their own families or rejected by those around them, and their relationships are not accorded legitimacy and social recognition. Society functions in terms of couples and the failure to recognize lesbian relationships is a manifestation of the discrimination that persists.* (Andrée Côté, National Association of Women and the Law)

Secondly, a majority of the participants stated that the most important effect of the legal recognition of same-sex couples is the legitimacy that it provides to lesbianism as a model for love relationships. It is no longer merely a question of recognizing homosexuality as the sexual orientation of some people but of representing it as a normal, and by no means inferior, relational model. The law is an essential tool for the normalization of social relationships. Also, for many people, legislative changes in this area toll the knell for exclusion.

> [TRANSLATION]
> *In my experience, it has never been important to have my lesbian relationships recognized by the law. I broke with my family. It is a choice of lifestyle which implies dissent and there are political elements in this choice. For those who have broken with their families without wanting to do so — because the families have rejected them — and who want to be accepted as "normal", the demand for recognition of same-sex couples is essential to their well-being. They want to be part of the system. It is not that they want to conform but it is the only recognized model of conjugality in our society. It is an indirect way to have their human dignity acknowledged.* (Agnès, 42, Collective lesbienne de l'Ontario)

> *It's more than a question of rights because at the present time it is possible to protect yourself with a good notarized contract with your partner. I have been living with my partner for 11 years and we have signed a contract concerning our property and our house if one of us dies or if we separate, but recognition by the government would allow us to stop living in secrecy.* (Agathe, 48, lives in a remote rural area)

Some did not hesitate to describe this legal recognition as "revolutionary" in a patriarchal social context. In their view, it would be harder to deny the existence of lesbians or to reduce it to silence after such legislative changes. The heterosexual standard will give way to a recognition of the true diversity of intimate relationships not only between women and men but also between women and women.

Third, the legal recognition of same-sex couples is viewed as an essential lever in increasing the public visibility of lesbians and gays and making society more open toward them. The

respondents gave many examples of the effects that recognition of their unions could have on their way of life.

> [TRANSLATION]
> *The recognition of same-sex couples is essential to the struggle against homophobia. With these changes, attitudes will also change. We shall hear fewer statements to the effect that homosexuality is not natural or that it is a sickness. The media and schools will be forced to accept homosexuality as normal. It is a very important step*. (Mireille, 21, Rouyn-Noranda)

A number of respondents noted the positive impact that the recognition of their conjugality could have in the workplace, although the enacting of legislation is not sufficient to overcome homophobic attitudes and behaviour.

> [TRANSLATION]
> *Love between women will come out of the shadows. If it is referred to in the law, that will give us a stronger basis for fighting against discrimination. … I work for Canada Post and my colleagues are not always easy to put up with. I have never told them that I am lesbian because I do not think that I would be accepted as I am. If the government recognizes us, it seems to me that I will have more strength to say to my colleagues: "Look, that's enough! Grow up a bit; homophobia is backward!"* (Solange, 44, Rouyn-Noranda)

> *If the government recognizes us, employers will no longer be able to discriminate against us in terms of insurance and pension funds. For people who are not unionized, I think it will always be more difficult to gain respect in the workplace. If your boss is homophobic, there's not much recourse.* (Johanne, 36, Association des femmes d'affaires et professionnelles gaies)

As parents, others feel that recognition of their relationships would do a lot to improve their relations with the schools their children attend.

> [TRANSLATION]
> *I want to have children with Nadine and I would like my children to have an easier life than mine.… This legal recognition would allow my children and me to live in the open. For example, when I take him to school, I would like him to be able to introduce us as his two mothers without being teased. That is only one example but it's part of our daily life. Without recognition, you retreat into your couple and become isolated.* (Alexandra, 35, Association des mères lesbiennes)

> *It's very important because what counts is not when things go well but when they go badly. If my partner dies, for example, who will have custody of the children? Since we are not recognized as mother and partner, I could well lose custody of the children. We have already encountered obstacles when we*

> *registered our child at school 4 years ago. The reaction was very negative. Then, last year, a teacher came to tell us at the parents' meeting that he had seen a program on lesbian mothers on the television. It is important to be visible socially by all means possible and the law is one of those means. It is important so that people know who we are, even if the initial reaction is one of shrinking back. At some point, the information gets across, people are less fearful and then the prejudices start to dissolve.* (Solange, 38, Association des mères lesbiennes)

Finally, many lesbians talked about the painful relationships with their families. They felt that the legislative changes offered hope that they would gain full recognition from their relatives without having to hide their feelings.

> [TRANSLATION]
> *I am open and everyone at work and in my family knows that I am a lesbian but, even at the age of 48, I have never dared dance a slow dance with my girlfriend at a family party. Even though everybody knows that I have been living with Sylvie for 11 years, nobody makes any comments or asks any questions. If we are recognized by government, we shall perhaps be allowed to have the same attitudes as heterosexuals and to behave like them. I can imagine the reaction of my parents, who are over 70, of my brother-in-law, my sister-in-law and my little cousins if we started to dance together. Imagine the change! However, there could be nothing more normal; it is the fear of doing it that is completely abnormal.* (Agathe, 48, lives in a remote rural area)

There was a definite sense of idealism among many of the participants concerning the social and symbolic effects of the legal recognition of lesbian couples once accomplished. However, what was most important in this testimony was the potential for "empowerment" (or enabling) that these legislative changes could create in lesbian communities if they were implemented in a way that took the stigmatization suffered by lesbians into account.

4.2.2 Fears and disappointments

Some lesbians also expressed reservations concerning the legal recognition of their couples. The most important was the fear of losing the specific, even emancipatory, nature of their intimate relationship by having it become the norm. They pointed out that conjugal relationships between women are not based on unequal positions, prescribed roles and a rigid sexual division of duties as much as are relationships between men and women. They expressed fear that the process of normalization would have the effect of a steamroller and not allow for the public expression of differences, especially those that might be critical of the standard. According to one respondent, once lesbian couples gain recognition, they are likely to be viewed as having a function identical to that of heterosexual couples. [TRANSLATION] "First we met with silence, and now we face having the heterosexual model projected onto our love relationships." This normalization of intimate relationships between women could, in the eyes of some, serve to change lesbian identity.

On the other hand, many lesbian mothers feel that the legal recognition recently given to same-sex couples is inadequate because it does not take their family status into consideration. These couples live together as families and are distressed by the fact that the state makes a distinction between their conjugal reality and their family reality. This dissociation between conjugality and parental status does not exist in their daily lives and in their own views of themselves. This partial recognition of their situation denies [TRANSLATION] "what we are as lesbian mothers and sends a message that it is socially unacceptable to be a lesbian and a mother at the same time".

> [TRANSLATION]
> *In public opinion, everyone feels that the question has been resolved except that the Government of Quebec has excluded recognition of families at all levels. With Bill 32, we are given economic responsibilities as the partner of a mother but we are not given the benefits of the law as a parent. That really makes me angry.* (Anne, 30, Association des mères lesbiennes)

The public demands of lesbian couples for recognition of their family are relatively recent. As Nathalie Ricard reports, these couples whose life together includes the choice to have children demand the right to experience the institution of maternity and question the existing rules of filiation between members of a family. The existence of lesbian mothers casts into the limelight the social processes that tend to make only one type of family the standard, namely the nuclear, heterosexual, two-parent, middle-class family in which the parents are the biological parents of the children.

> [TRANSLATION]
> *It is certain that adoption is the central issue for us and that we are disappointed with Bill 32. Recognition as a family would make us eligible for parental leave, group insurance and, of course, would allow my partner to become a parent legally with the same responsibilities.* (Diane, 32, Association des mères lesbiennes)

The co-mothers who took part in our consultations told us about the many practical problems caused by their lack of legal recognition as parents: they may not accompany a child to the hospital, sign a school report card or travel outside the country with the child without the authorization of the biological mother. They also noted the social and symbolic impact of this lack of status. Fathers who have conceived or adopted a child have rituals that publicly acknowledge their paternity, such as permission to be present at the birth, recognition in the birth certificate, at the time of baptism or on the tax return. Most of the rituals of recognition are in fact consecrated by the law. On the other hand, the unique links existing between a co-mother and her child are not celebrated by any public symbol or ritual of recognition; there is not even a word to describe their filiation. Although the civil law and common law do not explicitly exclude the possibility of a co-mother adopting a child, her desire to be a parent falls within a kind of "sub-legal" area that does not currently give her any social existence other than that which the private universe of her family attributes to her. Odile Dhavernas (1978) describes this extra-legal area well as it applies to women:

> [TRANSLATION]
> Even today, with respect to women, there is still an interpretation of the law, the dominant morality and social conventions such that it is virtually impossible to separate them. The result is a kind of unwritten, specific, constricting law that lies below the level of common law, a customary rule with a tiny area of application and which the courts reaffirm on a daily basis.[1]

Finally, other lesbians expressed their disappointment at the limited scope of the legal recognition given to same-sex couples, especially in Quebec.

> [TRANSLATION]
> *I would not like to see so much importance given to the recognition of same-sex couples in the legislation. First, if the Government of Quebec did it, it did so in order to get more money through taxes — because we'll be required to declare each other — and in a bid for votes. The government wants to give itself a positive image before the next referendum but it doesn't have a long-term plan for eliminating discrimination. It gave only what suited its own purpose. The proof for this is the fact that nobody in the National Assembly publicly challenged the law. It did not grant the right to adoption or to artificial insemination. I had hoped that it would do so, because I want to have children. The recognition that we gained is economic but the couple of which I am part is more than that! I want recognition that applies to all aspects of my life: at work, in my family, at the Cegep I attend where the social work teachers are still not even capable of talking about homosexuality in the year 2000.* (Mélanie, 19, Rouyn-Noranda)

4.3 The obligation to declare a spouse: a barrier to the exercise of rights

A majority of the respondents rejected the principle of automatic recognition of same-sex couples. They expressed surprise, disappointment and sometimes anger in this regard during the consultations in all the groups from Quebec and Francophone Ontario. Several described this government-imposed "coming out of the closet" as unfair and contrary to the principles of the *Canadian Charter*. It is as if the image and dream of legal recognition for their couple, which they had previously viewed as the result of a commitment by the partners and a voluntary act of affirmation before the law, had just been broken. The concept of consent is central to their concerns for a number of reasons.

Lesbians engage throughout their lives in selective disclosure of their sexual orientation in their circle of friends and family, and in the workplace. Automatic recognition will short-circuit their most important strategy for adjusting to homophobia, which is why the debate produces such an emotional reaction. Furthermore, Quebec's drug insurance plan and group insurance plans require that the participants disclose their conjugal situation to their employer.

The respondents stated with conviction that they wanted to be able to themselves assess the risks of disclosing their sexual orientation to the government or to an employer. They want to be able to decide to whom, where, how and when they disclose their sexual orientation and their conjugal situation.

Most of the respondents stated that the mandatory declaration of their spousal status will have a greater impact on lesbians than on gays.

> [TRANSLATION]
> *Lesbians will have more problems because they are more likely to conceal their homosexuality than gays. Gays also have more income, they hang together when they have problems, whereas lesbians are more isolated.… We also suffer more oppression as women, even if only because salaries are smaller and more insecure.* (Diane, 49, Quebec Lesbian Network)

If the declaration of a person's conjugal situation is mandatory, several claim that it will merely increase the secrecy of lesbians rather than promote their coming-out. Some lesbians are more vulnerable than others to disclosure of their sexual orientation, especially those who live in rural or remote areas, who are elderly or hold prestigious positions, who belong to ethnocultural or aboriginal communities, or who live in a homophobic environment. Others wonder how the government will apply this legal recognition to households made up of two adults of the same sex. [TRANSLATION] "How will they distinguish between co-tenants and same-sex couples?" asked one participant.

Furthermore, the lesbians we consulted want to be informed of the consequences of the legal recognition of their couple before they seek such recognition. Because they were excluded for a long time from family law, many lesbians are not well informed about the legal and economic consequences of acquiring the status of common-law spouses. [TRANSLATION] "It's scary because we don't know the consequences; I would be afraid to come out without knowing what the government wants to do with that information." They want to know all the implications before they declare their conjugal status.

> [TRANSLATION]
> *I would like to know the economic and personal implications before I am recognized as a spouse. I don't want to give the government a blank cheque. How can I trust it when it has discriminated against us for so long?* (Rolande, 56, Rouyn-Noranda)
>
> *There is no discussion of our view of society in this whole process. We can see this clearly with the adoption of Bill 5 concerning the recognition of same-sex couples in Ontario. There was no discussion of the concepts of a couple and family. What does it mean to live as a couple in the year 2000? On the basis of what criteria are we regarded as spouses? Should we give lesbians and gays the right to marry? If there is no social debate on these questions, it's a missed opportunity for everyone and for lesbians in*

> *particular, especially when there has been no dialogue in the lesbian communities as to the meaning of the proposed reforms, their ramifications or their implications.* (Andrée Côté, National Association of Women and the Law)

Many lesbians are afraid that, as a result of the mandatory declaration of spousal status, the government will exercise greater control over their lives: [TRANSLATION] "We are used to living on the margin of society since marginality provides a certain degree of freedom where we do not have to account for our private lives to government".

> [TRANSLATION]
> *What concerns me, however, is information processing. What will the government do with this information? I don't want them to create a central information file on homosexuals. That may seem paranoid, but at another time no one foresaw that Hitler would come to power and, would use the information collected by a research centre on homosexuality to imprison homosexuals in concentration camps. The government must tell us what it plans to do with this information.* (Claire, 54, Association des femmes d'affaires et professionnelles gaies)

Yet others doubt the effectiveness of the rules governing the confidentiality of personal information in both the workplace and government services. Many of them gave examples of inappropriate disclosure of personal information by institutions, especially in the case of small and medium-sized businesses that do not have human resources departments. And it is these kinds of businesses that currently constitute the engine for economic development in this country. To make the law effective and to reduce the risk of prejudice against homosexuals, they suggest large fines for breaches of confidentiality by government officials or employers. Andrée Côté gives an example of the transmission of personal information among government services.

> [TRANSLATION]
> *As far as income-security plans are concerned, lesbians are required to declare their conjugal status; if they don't, they are making a false declaration. If they receive social assistance, there will be files on them all over the place. Subsequently, if there are problems, juvenile delinquency for example, the mother of the child involved may have to deal with the youth protection services that will automatically know that she is a lesbian. Personal information can travel fast in the system. Consideration has to be given to the fact that, like other personal information, there is little confidentiality concerning sexual orientation in information banks managed by government services.* (Andrée Côté, National Association of Women and the Law)

At the end of these discussions with participants, it was clear that automatic recognition of spousal status does not have either the same resonance or the same consequences for same-

sex couples as for opposite-sex couples. Most lesbian couples, even today, still hide their sexual orientation and conjugal status, especially in the workplace, in order to protect themselves against negative reactions. One respondent eloquently summarized the obstacles preventing lesbians from fully exercising their right to equality by declaring their conjugal status.

> [TRANSLATION]
> *The issue of mandatory disclosure can be regarded from the legislative point of view, but we also have to look at it from a psychological point of view. Why do so many lesbian couples not want to disclose their relationship; what are lesbians afraid of? If we encourage lesbians to integrate into society, we also have to look at what would enable them to adjust psychologically. At the present time, lesbians are not ready for this change on the personal level. The situation of lesbians as a collectivity is important but so is their perspective as individuals. The battle will need to be waged at two levels because we will not obtain them together.*

To the question as to what this would mean in practice, she gave the following answer:

> *If the government asks lesbian couples to declare themselves and if such a declaration is mandatory, in order to do this, they will need to be comfortable with themselves as lesbians. I feel that, collectively, we can do a good job at this. I even feel that we have never in our history been so at ease with being lesbians as we are at the present … but before we are asked to change this attitude of distrust, there must be something given in return.*
>
> *The government did not change these laws in Quebec [to include same-sex couples] solely to gain votes. We have to trust the government. We have to trust in the fact that it accepts us as we are. This needs to be said and repeated publicly by government authorities with a view to helping heal ourselves of the injuries that homophobia and social intolerance have inflicted on us. We have to come together. Otherwise, lesbians will continue to be afraid and to hide. If they do not declare themselves as spouses, their actions will be based on the negative reactions of their families when they told them that they were lesbians, the friends they have lost and their colleagues at work. All kinds of social healing need to take place before lesbians stand up and say: this is who I am, but to require a declaration of our conjugal situation to the government and our employer, I do not believe that that is the right solution. We have to take that into consideration and this is even truer if we are parents. If I cannot stand up and say who I am for myself, I cannot expect my child to be comfortable with her lesbian family.*
> (Barbara, 34, Association des mères lesbiennes)

We asked the participants whether they would declare their relationships in the event that same-sex couples were given legal recognition as common-law spouses. Four respondents

out of five answered no to this question for one or the other of the reasons stated above. A minority who answered this question in the affirmative stressed the fact that they would do so to give legitimacy to intimate relationships between women — even if this caused them personal financial loss — or to blaze a trail for future generations of lesbians, or because they would be required to do so and do not wish to place themselves in an illegal position.

Finally, several participants said that they were disappointed that lesbians themselves had not taken any deliberate action to gain recognition of their relationships. The idea of signing a joint contract and registering their relationship publicly before the law and thus before society is central to their thinking. The signing of a marriage contract has a great symbolic significance of which they currently feel deprived. Others noted that it was important to have a commitment ritual to accompany the legal recognition of same-sex couples. Rituals are significant in all kinds of ways and, for many of them, automatic recognition is an indicator of the lack of respect paid by the government to relationships between persons of the same sex.

4.4 Economic consequences of spousal status

Most of the lesbian groups with whom we met had never previously discussed the economic advantages and disadvantages of recognition for same-sex couples. When informed of the possible impact on taxes and eligibility for government income-security plans, many lesbians expressed astonishment at the fact that these plans take conjugal status into account.

> [TRANSLATION]
> *We had very high hopes for recognition as a lesbian couple by the government. Perhaps we romanticized this recognition in the light of what we now know about Bill 32. When the time comes to talk about the economic obligations that this status involves, it's a new ball game!*
> (Andrea, 37, Association des mères lesbiennes)

Despite certain economic disadvantages, most of the respondents felt that lesbians should not assess equality solely on the basis of economic criteria. Some added that it was a moral question: do we or do we not want to be considered to be full citizens? Nevertheless, they were concerned that lesbian mothers and lesbians with little or no income who live with a partner who is better off would suffer the greatest losses from having their spouse recognized.

> [TRANSLATION]
> *Since the passing of Bill* 32*, I was surprised when I completed my tax return to find that I had lost the deduction for a single-parent family and that I had to consider my partner's income for the tax credit for daycare costs. Myriam is not the mother of my child but there is a presumption that she must contribute. We had never before had to discuss our income in that way. I did not even know what exactly her salary was (laughter). Now I am embarrassed because I had never involved my lovers in my family life. Those are two separate things from my point of view, especially since François has a father with whom I share custody. It just means that my tax refund this year will be small,*

> *although I was counting on it for my holidays.* (Michelle, 34, Association des mères lesbiennes)

Many were of the view that income-security plans should use individual rather than family income in determining eligibility. This approach would be more consistent with the financial autonomy of the partners, which, in their view, is characteristic of intimate relationships between women. They recognized that, like many heterosexual women in common-law relationships or in blended families, lesbians would prefer being excluded from existing programs in order not to be subject to the obligation to support their partner economically. However, because they reject the idea of special treatment for homosexual couples, many feel that [TRANSLATION] "they must redesign the programs rather than exclude us". On the other hand, they wonder [TRANSLATION] "why provide benefits only to couples in society and not to individuals? That way, collective rather than individual interests would be served."

Given the lack of information concerning the financial consequences of recognizing same-sex couples, they want the government to provide more information before they are prepared to disclose their relationships to the government.

4.5 Opinions on the criteria for a legal definition of common-law partnerships

When informed about the criteria for a definition of common-law partnerships, the respondents expressed a number of thoughts as to their relevance and applicability to their way of life. No consensus or majority view emerged from these discussions. The lesbians consulted were clearly divided on this issue.

4.5.1 Cohabitation

For a majority of the respondents, the cohabitation test is reasonable for granting rights and responsibilities to the partners in a couple. According to some of the participants, cohabitation has the advantage of providing a clear yardstick as to the mutual commitment of the partners. [TRANSLATION] "Shared intimacy should entitle them to a form of recognition. I fail to see how economic obligations could be imposed on two lovers who do not live together." As for the prescribed duration of the cohabitation, from one to three years, they were of the opinion that it should depend on the purpose of the law.

For a substantial minority, by imposing this test, this means the government is imposing a certain view of the preferred conjugal way of life. Some lesbian couples do not live together despite their emotional attachment to each other. This is also true for a growing number of heterosexual couples. While for some people this is a choice, for others it is a strategy dictated by the homophobia of the community, especially in small rural communities where everybody knows almost everybody else. Some would like to be able to enjoy certain rights and responsibilities as partners even though they do not live together, because they provide each other with mutual support when they experience difficulties. Others, however, would like to sign a domestic contract with a girlfriend with whom they live without being linked in a conjugal relationship.

4.5.2 Mutual support

There are many lesbians who consider this criterion important because it reflects their view of the commitment they have made to their partner. However, several are not in favour of the government using this criterion to cut social assistance benefits to a partner who has little or no income and forcing her to depend on her partner's income. For some, by privatizing support, the government appears to be delegating its social responsibilities for the poorest members of society to their conjugal partners.

> [TRANSLATION]
> *We are currently witnessing a general movement toward the privatization of social security. In my opinion, this is a dangerous time to gain recognition of same-sex couples. For example, last spring the Supreme Court of Canada issued a judgment concerning a severely disabled woman who was divorced by her husband after several years of marriage. The husband had asked that the support requirement be cancelled. She, for her part, had sought an increase in support and had obtained it. So 12 years after the divorce, the Court said that it is still not up to the government to look after this woman but up to her former husband. We are in the process of forcing the family to assume responsibility for the socio-economic security of each individual. This is very serious because we are now losing the possibility of relying on government and the right to support services. Lesbian communities have not thought about the imposition of this model, which can completely undermine the liberating aspect of lesbianism. Because lesbian couples will not have the possibility to say "No, I'm not getting involved" unless they don't live together. That is the grand entry of the government into our lives.* (Andrée Côté, National Association of Women and the Law)

The presumption that partners will support each other is based on the idea that spouses pool their assets and are economically interdependent in the daily functioning of the family. According to the participants, this model does not necessarily reflect the reality of lesbians, who are by and large economically independent and do not have children. They claimed that this test does not take into account the financial arrangements of lesbian couples or even those of a large number of heterosexual couples.

> [TRANSLATION]
> *That depends on our economic arrangements. I was with a partner who had addiction problems and who was not very responsible. I would not have liked to have to support her. Perhaps with this measure we'll pay more attention to whom we live with as a couple. Here, it's not Montréal, it's very difficult to meet other lesbians. To find one who shares the same interests and the same way of life as you is a real challenge.* (Francine, 48, Rouyn-Noranda)

> *I find it disturbing because there are not a lot of jobs in Abitibi, and there are even fewer for women. Rather than promoting economic dependence on a*

> *man or a woman, they should promote economic independence for women.* (Angèle, 51, Rouyn-Noranda)

4.5.3 Public acknowledgment of the relationship

Some public programs consider public acknowledgment of the conjugal relationship to be a criterion in the definition of a common-law partnership. According to the respondents, this is the most unacceptable of the three tests. Some of them claim that this is a projection of the heterosexual conjugal model onto their lives. While heterosexual conjugality confers publicly recognized status, the same is not true of same-sex unions. Because of the stigma attached to homosexuality, it may be difficult for some lesbians to provide proof of their conjugality. A number of respondents were concerned about the way in which government might apply this test. What kind of evidence will have to be provided in order to receive a benefit such as a survivor's pension? Will government officials be sensitive in their treatment of elderly or other lesbians who have opted for a strategy of secrecy to protect themselves against the judgments of others? Will they respect the confidentiality of this information?

> [TRANSLATION]
> *And if the official is your neighbour, the brother of your brother-in-law or even your cousin, how can I be sure that it will not become the talk of the town? I work at the CLSC [local community service centre] and the question of confidentiality of information is always a challenge because everyone knows everybody else in a small town. Many lesbians will hesitate to claim their rights to a benefit under these conditions.* (Suzanne, 46, Rouyn-Noranda)

However, many respondents stressed the fact that they did not have any opinion on these three criteria and that the question required closer examination. If the government wishes to include same-sex couples in the definition of common-law partnership, it should, in this case as well, inform and consult them to ensure that the criteria used in the definition reflect the diversity of their conjugal ways of life.

4.6 General principle: access to all forms of conjugal status without discrimination

All the groups and persons consulted were unanimous in saying that same-sex couples should have access to the same forms of conjugal status as heterosexual couples. Given the wide variety in ways of domestic life and the increasing tolerance for homosexuality among the Canadian public, there are no longer any legitimate reasons to refuse lesbians and gays the right to marry, according to the respondents. They based their arguments on the principle of equality and the need to be able to choose among various forms of legal status the one that bests reflect their conjugal realities.

Thus, marriage would give lesbian couples wishing to marry a number of rights, protections and obligations that they do not currently enjoy in a common-law partnership. This is particularly true in Quebec, where *de facto* unions are recognized only in statutory law. In that province, lesbians who want to be able to benefit automatically from the rules governing

the division of family property if the relationship breaks down, the obligation to support, filiation, or even the right to inherit do not have access to these protections.

> [TRANSLATION]
> *It is important for lesbians to have this choice. However, we know that marriage is a sexist institution designed for the benefit of men. Marriage was created to ensure the transmission of land, property, inheritances as well as women and children to men. Having said this, lesbians should have the right to marry or to reject the institution of marriage. If they had this right, maybe the meaning of marriage would change precisely for that reason.* (Solange, 38, Association des mères lesbiennes)

> *Marriage would simplify a lot of things in terms of rights; it would be one way to protect yourself, especially when you have children together. For a common-law relationship, there is an established period of cohabitation, whereas marriage protects you immediately. It is available to everyone … why not to us? That's what equality means, that's all there is to it.* (Barbara, 34, Association des mères lesbiennes)

Lesbians would also like to see the legal recognition of their couples applied to all laws. They reject the idea of special status for lesbians and gays. They are categorical on this issue because they associate special status with the marginalization of homosexuality. [TRANSLATION] "I can't think of a single law where it would be justifiable to exclude us."

The idea of creating a registered partnership for homosexuals does not tempt many lesbians. The voluntary aspect of the declaration is welcomed and even desired but the principle of creating a separate system for homosexual couples in lieu of the right to marry makes more than one shudder. The national advocacy organizations for gay and lesbian rights express the same reluctance.

> [TRANSLATION]
> *There is no one on our board of directors who thinks that a registered partnership is the best model for the legal recognition of same-sex couples or that it would be sufficient to satisfy the aspirations of gays and lesbians in this country. A few people on our board see it as a step forward but certainly not as an end solution.* (John Fisher, EGALE)

This view is shared by the Coalition québécoise pour la reconnaissance des conjoints et conjointes de même sexe and the Coalition gaie du Québec.

However, what emerged as the most fundamental aspect of our consultations was the strong desire of the participants for the introduction of a voluntary declaration of their relationships or the possibility of opting out of the common-law marital regime. This registration or opting out mechanism would apply to heterosexual couples as well as to lesbian and gay couples. In the view of our respondents, governments should respect the freedom of choice of partners as to

the legal framework governing their couples and the autonomy of individuals. It should also leave them free to choose to live in an open relationship outside any legislative framework imposed by the state. Many of the lesbians consulted affirmed that they would gladly waive the benefits as well as the responsibilities attached to various forms of conjugal status in both private and public law.

> [TRANSLATION] *For those who wish to commit publicly and for whom the symbolism is important, marriage should be an option available. Economic interdependence of partners can be seen as something very positive because it is a form of economic solidarity, but everybody should have the right to choose between an informal arrangement and a legal framework for their relationship. What is important is to give people a choice and not to impose a form of union or a legal classification that inevitably leads to legislated rules and eventually to incorporation into the institution of matrimony.* (Andrée Côté, National Association of Women and the Law)

The possibility of concluding a domestic contract with a partner with whom one does not have a conjugal relationship is another option suggested by the participants. Why is this option limited solely to common-law and legally married spouses? Conversely, we should also ask why two people would conclude an economic solidarity pact. What interest is there in agreeing to meet the essential needs of others in place of the government? However, there can be no doubt that the movement to privatize government support will answer these questions in the near future.

4.7 Conclusion

Following the consultations with lesbian rights advocacy groups in Quebec and Francophone Ontario, their expectations and needs can be summarized in the form of four observations. First, in terms of democracy, lesbians wish to be consulted by government before any reform is undertaken that would give their relationships legal status. They also wish to be informed about legislative changes that are under way and their economic and legal effects.

As regards the content of these reforms, lesbians demand the abolition of any distinction in conjugal status based on the sex or sexual orientation of the partners. They want access to the same types of conjugal status as opposite-sex couples, namely, the right to marry or to establish a common-law partnership. Legal recognition of parental status for co-mothers as well as legal recognition of same-sex families in social policies should go hand in hand with recognition of same-sex couples.

Lesbians, however, want to see either a mechanism for the voluntary registration of conjugal cohabitation relationships or a mechanism for opting out of this regime requiring the informed consent of the parties. Lesbians living in Quebec should not be deprived of the progress made in these areas merely because they are subject to the *Civil Code*. Furthermore, they ask that governments respect the freedom of choice of couples where conjugality is concerned, including the possibility of living together in an open, unregulated relationship.

Finally, they propose certain conditions for applying legal recognition of same-sex couples, namely, confidentiality of personal information, distribution of information concerning their new rights, and a public campaign against homophobia. They urge governments not to limit recognition to the legal dimension but to move beyond and recognize homosexuality and homosexuals in all their social policies.

Note to Chapter 4

[1] Odile Dhavernas, *Droits des femmes, pouvoir des hommes,* Paris, édition du Seuil, 1978, p. 329.

5: MODELS FOR AND APPROACHES TO THE LEGAL RECOGNITION OF SAME-SEX COUPLES

Confronted more and more frequently with demands by gays and lesbians for equality, many countries have over the last decade provided legal recognition for same-sex couples. In the first part of this chapter, we shall describe the different models of registered partnership that exist in the western world as of June 2000. These types of partnership give same-sex couples rights and obligations that are sometimes the same as and sometimes different from those given to opposite-sex couples who are married or who live in a common-law relationship. With the exception of the Netherlands, which enacted legislation in September 2000 to give lesbian and gay couples the right to marry, no country has given same-sex couples the same rights as are enjoyed by married couples, including filiation. Couples are accordingly still treated differently, depending on the sexual orientation of the partners. Despite the substantial advances made in the last ten years, it must be observed that the goal of legal equality for same-sex couples has not yet been achieved.

Ten countries have currently implemented some type of domestic partnership that is open to lesbian and gay couples. We have divided these partnership models into three classes on the basis of whether they apply solely to same-sex couples — the most important numerically — to same- and opposite-sex couples, or to any cohabitants who are also economically interdependent. We shall briefly set out the criteria governing eligibility and exclusion, the conditions governing registration and termination as well as the rights and obligations associated with the various formulas existing in each country. Our approach here is essentially descriptive and cannot claim to provide an exhaustive or detailed analysis. An overview of the models of domestic partnership will at the very least allow us to provide a context for the position taken by the Canadian government and the provinces on the recognition of same-sex couples. Because we prepared our list as of June 2000, we were unable to include in our analysis all the legal changes made since then.

The second part of the chapter analyses the approaches to equality that influenced the establishment of the various models that exist in Canada and abroad. We shall ask which approach to equality is promoted by a particular form of legal recognition for same-sex couples. On what principles is this approach based? In what way would the approach be acceptable or not in the Canadian context if the objective is to ensure equality without distinction or exclusion for all citizens? Our analysis will clarify our thinking about which approach to recommend for eliminating the ongoing discrimination against lesbian couples that we shall examine in the next chapter.

5.1 Models for recognition from other countries

5.1.1 Models of domestic partnership for same-sex couples only

In this section we shall examine the formulas for registering marriage-like relationships that apply solely to same-sex couples. Denmark, Norway, Sweden, Iceland and the state of

Vermont in the United States have in the last decade passed legislation on registered partnerships for same-sex couples.

Denmark

In 1989, Denmark was the first country to implement a formula for the legal recognition of same-sex couples. The *Registered Partnership Act*, which came into force on October 1, 1989, permits gay and lesbian couples to register their relationships.[1] Inspired by the Danish model, Norway, Sweden and Iceland soon followed suit. What motivated the adoption of this pioneering legislation? First of all, we should recall that AIDS had become a veritable pandemic in the 1980s revealing most dramatically the consequences of the lack of legal protection for homosexuals. There was no right to bereavement leave or to a survivor's pension; the family could seize the joint property if there was no legal will. The list went on, and there was no longer any doubt about the vulnerability of gay partners. The urgent need to protect intimate relationships between two persons of the same sex was thus historically a result of the AIDS epidemic.

In addition to this objective, Linda Nielsen (1990, p. 298) reports other related goals. The law was designed to create a legal institution that would enable same-sex couples to regulate their lives together while protecting the vulnerable party. A domestic partnership was considered necessary in order to provide these couples with the same rights and obligations as married couples. On the basis of the principles of autonomy and equality, the Danish legislation provided that homosexual couples, like heterosexual couples, should have the right to choose whether or not to make their relationships official, hence the principle of voluntary registration. This formula was preferred to *de facto* or automatic recognition of common-law partnerships. Finally, the legislators anticipated that the legal recognition of same-sex couples would increase the stability of their relationships. By giving them legitimacy and promoting a more positive attitude toward them, the hoped-for effect was a reduction in the spread of HIV infection.

From the beginning, registered partnership in Denmark was an institution available only to same-sex couples. In this way, as article 1 of the act states, it would not conflict or compete with marriage. The provisions governing the creation and dissolution of the partnership are the same as those that exist for marriage: the partners must have attained the age of majority, not be married or in a registered partnership, and not be too closely related by blood.[2] The procedures for separation are the same as those applying to divorce.[3] Furthermore, at least one of the partners must be Danish and have elected domicile in Denmark in order to be able to register the partnership, a condition that does not apply to marriage.[4] In June 1999, however, new legislation respecting the status of the parties to the partnership came into effect. It is now possible to register a partnership in Denmark if at least one of the partners is a citizen of one of the Nordic countries that already recognize registered partnerships of same-sex couples (Iceland, Norway and Sweden). For example if she were a permanent resident of Denmark, a Swede could register herself and her partner as a couple in Denmark. The legislation also permits two permanent residents of Denmark to register their partnership, regardless of their nationality (Forder, 1999b, p. 63-64).

As far as the rights and obligations of the partners are concerned, a domestic partnership has the same effects as marriage,[5] with the exception of rights relating to adoption and joint custody of children.[6] The partners enjoy the same rights of inheritance and have the same duty to support each other as married spouses. They are subject to the same provisions respecting, for example, the division of family property and taxation (Hurley, 1994, p. 2).

Same-sex couples who choose not to register their partnership are treated in the same way as opposite-sex couples who choose not to marry. We should note that, in 1987, the Danish Parliament passed a resolution urging the government to replace the "family (or household) principle" with the "individual principle" in social assistance programs. A number of laws, including social assistance, were changed so that the common-law spouse's income would not be taken into account in calculating benefits. In comparison with the situation in Canada, Danish social policies refer much less to the conjugal status of the beneficiaries and do more to promote universal access. However, according to Martha Bailey (1999), the move toward adoption of the individual principle in social policies seems to be stagnating and Denmark is apparently now re-examining the possibility of providing recognition for common-law spouses in its family legislation.

Ten years after the *Registered Partnership Act* was passed, Denmark innovated again by introducing measures to strengthen the legal relationship between gay or lesbian parents and their children. Since July 1, 1999, same-sex partners have been able to adopt their partner's children unless they were originally adopted in a foreign country. On July 8, 1999, legislation designed to permit same-sex couples to adopt children passed second reading (Forder, 1999b, p. 68-69). We should also note that in Denmark lesbians have access to artificial insemination.

As at December 31, 1997, Denmark's statistics indicate that 3,451 same-sex couples had entered into registered their partnerships and 540 unions had been dissolved. Many more gay men than lesbians decided to register, namely 4,550 compared with 2,532. Since 1993, fewer than 300 gay and lesbian couples have registered each year, a figure that seems low in proportion to the population of Denmark. Finally, we should note that 562 children were living with their lesbian or gay parents within a registered partnership.[7]

Table 1: Same-sex couples registered in Denmark from 1989 to 1997

Year	Female couples			Male couples			Children	Total
	registered	separated	deceased	registered	separated	deceased	number	registered couples
1989	122	0	1	518	1	3	10	**640**
1990	211	8	3	584	5	34	27	**795**
1991	158	14	2	298	20	24	41	**456**
1992	135	16	6	202	41	35	46	**337**
1993	78	41	2	175	38	34	49	**253**
1994	158	23	2	121	57	31	59	**279**
1995	99	45	5	152	48	37	81	**251**
1996	146	33	6	144	45	22	91	**290**
1997	159	38	4	81	67	5	148	**240**
Total	**1,266**	**218**	**31**	**2,275**	**322**	**225**	**562**	**3,541**

Source:
Danish Partnership Statistics, "Gays Lose Interest Lesbians Keep On Coming", <http://www.lbl.dk/partstat.htm>, consulted on February 4, 2000.

Norway

In 1993, it was Norway's turn to adopt legislation on registered partnerships for same-sex couples.[8] It had already decriminalized male homosexuality in 1972 and prohibited discrimination and hate propaganda against gays and lesbians in 1981.[9] Four years after Denmark, this law was enacted by a large majority of parliamentarians over the opposition of bishops and church organizations. In the view of the latter, the proposed legislation went too far in providing same-sex couples with rights and obligations similar to those of married couples which they felt would undermine the status of marriage.[10]

Like the Danish model, a registered partnership in Norway is available only to same-sex couples. One of the partners must be a permanent resident or citizen of the country in order to register, even though no such condition applies to couples wishing to marry. The provisions governing the creation and dissolution of the partnership are identical to those applying to marriage. The partners must have attained the age of majority, not be married or in a registered partnership, and not be too closely related to each other by blood. The separation procedures are the same as for divorce. Registration has virtually the same legal consequences as marriage except for the right to adopt a child jointly.[11] In 1999, lesbians were still not eligible for publicly funded artificial insemination services.[12]

Under the law, registered partners enjoy the same rights and have the same duties as married spouses in terms of inheritance, family property or the duty to support each other. They are subject to the same provisions as married persons in terms of tax and social laws. Since 1995, Denmark, Norway, Sweden and Iceland have agreed to recognize partnerships registered in each other's countries. Thus, in terms of private international law, the recognition of registered partnerships is limited to the Scandinavian countries.

We do not know the exact number of lesbian and gay couples who have chosen to register in Norway. Same-sex couples who are not registered still enjoy the same treatment as opposite-sex couples who cohabit. In Norway, the partners in cohabiting couples, regardless of their sexual orientation, are treated as single persons and most of the laws do not impose mutual rights and obligations on them (Bailey, 1999, p. 104). However, in 1992, Norway passed a law respecting cohabitees. The *Joint Household Act* provided a certain degree of legal protection for any group of persons who have lived together in the same household for at least two years, especially with respect to their right to remain in the residence in the event that one party dies or the parties separate.[13] We shall examine this law in the section on partnership models for people who live together and are economically interdependent.

It is interesting to consider the reasoning behind the Norwegian legislation on registered partnerships, as set out by the Ministry of Children and the Family. The arguments put forward were based on the similarities between same-sex couples and married couples in terms of their situations:

> The economic conditions under which homosexual couples live are of the same nature as those for married couples apart from those concerning responsibility for children. Gay and lesbian couples have the same emotional

> and practical reasons for desiring reciprocal rights and obligations, and there is the same need to protect the weaker party (Lϕdrup, 1995, p. 388, cited in Bailey, 1999, p. 105).

The Ministry added that the right to conclude a private contract governing, for example, the ownership of property and inheritance rights, does not provide an adequate legal framework for relationships between persons of the same sex. Indeed, it explained that "like cohabiting heterosexual couples, very few homosexual partners make use of the opportunity to enter into such agreements, partly because they do not foresee the need for them in case of a crisis, such as the death of one of the couple or the dissolution of the relationship in other ways" (Lϕdrup, 1995, p. 389, cited in Bailey, 1999, p. 106). In addition to these arguments, the Norwegian Ministry categorically expressed the need for public acceptance of conjugal relationships between persons of the same sex by providing legal recognition for them. One of the purposes of the measure was therefore to encourage gays and lesbians to come out of the closet, to become visible and less isolated.

Sweden

In Sweden, two explicitly labelled laws provide legal recognition for same-sex couples: *The Homosexual Cohabitees Act* and the *Registered Partnership Act*. Under these statutes, same-sex couples are recognized as domestic partners or registered partners. Gay and lesbian couples, like opposite-sex couples who cohabit, may elect to be excluded from the application of certain provisions governing cohabitees by signing a joint declaration to this effect (opting out mechanism).

The *Cohabitees (Joint Home) Act*, passed in 1988, governs the rights and obligations of heterosexual common-law couples. Rather than including same-sex couples in the definition of cohabitation, the Swedish parliament preferred to enact another law governing their rights and responsibilities: *The Homosexual Cohabitees Act*. Both acts on cohabitees were passed at the same time. Heterosexual and homosexual couples do not have a choice as to whether or not the laws on cohabitation will apply to them as the allocation of rights and obligations applies without requiring any action such as registration. Recognition is *de facto* or automatic. In the case of heterosexual couples, the law applies "whenever an unmarried man and an unmarried woman live together in circumstances resembling marriage" (Forder, 1999b, p. 1). In the case of same-sex couples, the legislation applies if two persons live together in a homosexual or lesbian relationship.[14] In both cases, no minimum period of cohabitation is prescribed. Both statutes are designed to protect the more vulnerable party in the couple.

The *Homosexual Cohabitees Act* concerns primarily the residence and the furniture acquired during the relationship for joint use; cars and second residences are explicitly excluded. One partner may not dispose of this property without the consent of the other. If they separate, either party may request the division of the property unless they have signed an agreement excluding the division of this property. Similarly, if one of the partners dies, the survivor may request his or her share of the joint property before the estate is distributed among the testamentary heirs. The principal residence and household property are considered to be joint property, regardless of which partner is the nominal owner. However, property acquired prior

to the union is not considered in the same way, even if used for common purposes. In the case of a house, improvements made during the relationship will create a joint asset that can be divided. Aside from joint ownership, cohabitation does not create any support obligation or inheritance rights. However, the status of cohabitee (domestic partner) is recognized in many statutory laws.

The *Homosexual Cohabitees Act* includes the same provisions concerning the ownership of property and protection of the principal residence. However, various statutes have imposed many restrictions from the outset on homosexual cohabitees. Court challenges were brought to eliminate the differences in treatment accorded on the basis of the sexual orientation of the partners so that gradually many of these distinctions have been eliminated, with the exception of those relating to children. Under the law, homosexual cohabitees may not be appointed jointly as guardians or tutors of a child. They may not jointly adopt a child and one cohabitee may not adopt the child of the other. Lesbians are not entitled to public artificial insemination services; those who want a child must either consult a doctor in private practice or go abroad, especially to Denmark. Gay and lesbian cohabitees have no financial obligations toward the children of their spouses unless they have children together. Since the Act makes it impossible for a gay or lesbian couple to have children together (except in the rare cases of foreign adoption), it does not impose this financial obligation. In 1999, a parliamentary committee examined the legitimacy of this double standard and the *Homosexual Cohabitees Act* will probably be reformed in this respect.

In 1995, Sweden passed the *Registered Partnership Act* that applies solely to homosexual couples.[15] The Act gives same-sex couples the right to form a partnership that has the same legal effects as marriage, except for the recognition of parenthood.[16] One of the two partners must be a citizen and resident of the country in order to be able to benefit. The partners must have attained the age of majority, not be married or in a registered partnership, and not be too closely related by blood.[17] The partnership must be registered with the civil authorities in a brief ceremony prescribed by law. Separation procedures are the same as for divorce. Registration has the same consequences as marriage, including those relating to the division of family property when the relationship breaks down, as well as support obligations and inheritance rights. As a rule, any property that does not belong exclusively to one of the partners is considered to be joint property. Individual property is that which belonged to one of the partners at the time the partnership was registered (Forder, 1999b, p. 12). It also includes gifts and legacies and the proceeds of an insurance or pension plan. It is possible for a couple to regard all its assets as being separate property and indivisible. The courts become involved only where there is disagreement. As far as support is concerned, the Swedish courts award it between adults only in exceptional circumstances and usually for a limited period. However, if the relationship was of long duration and one of the partners is disabled or unable to earn a living for other reasons (too many children or a disabled child, for example), support may be granted for an indefinite period.

Compared with Canada's tax system and income-security programs, marriage or recognition as a cohabiting partner in Sweden has few financial consequences except for those relating to support obligations and the division of family property referred to earlier. Sweden's tax system

is based on the individual and there are no exemptions or credits for a spouse. There are few selective programs involving an income test and this helps to minimize the disadvantages of obtaining legal recognition as a partner.

Some provisions of the law governing the sex of married persons, for example the right to a widow's pension or the presumption of paternal filiation, do not apply to registered partners.[18] The other exceptions relate to children and are also being reviewed by a parliamentary committee. At the present time, registered partners may not adopt children alone or jointly or be appointed jointly as the guardians or tutors of a minor child. Paradoxically, registration is more restrictive than cohabitation because a homosexual cohabitee has the legal right to adopt a child alone (assuming that the adoption is authorized by the social services). As in the case of the *Homosexual Cohabitees Act*, lesbians living in a registered partnership are not eligible for artificial insemination services.

Registered partners, however, have financial obligations to the children of their partner, as is the case for married persons. It is also interesting to note that any parent may take paid leave and receive 80 per cent of her salary to care for a sick child (up to 60 days per year per child and per parent for a total of 120 days). Since 1995, partners have had the right to transfer this leave to another person taking care of the child (Swedish Institute, 1997, p. 3-4). Thus, a lesbian mother who is a cohabitee or in a registered partnership may ask her partner to take paid leave to take care of her sick child.

In 1996, approximately 550,000 couples, 250,000 of them with children, were living together without being married in Sweden. In the same year there were approximately 1,450,000 married couples (Forder, 1999b, p. 7). In 1995, the year in which Sweden introduced the *Registered Partnerships Act*, 249 men and 83 women registered but in 1998, only 79 men and 46 women did so.[19] Between 1995 and 1999, 507 men and 240 women registered; female partnerships accordingly account for about one-third of the total. It must be concluded therefore that this formula is not very popular in Sweden any more than it is in the other Scandinavian countries. However, only a detailed study would enable us to determine the reasons why same-sex couples are reluctant to conclude such a contract.

Iceland

In 1996, one year after Sweden, Iceland in turn enacted registered partnership legislation. As in the other Scandinavian countries, this formula is available only to same-sex couples.[20] Here too, the law gives gay and lesbian couples the same rights and obligations as are created by marriage. Partners are considered similar to spouses except with respect to the right to joint adoption, artificial insemination and widow's pensions.[21] Partners enjoy the same rights as spouses with respect to family property, inheritance and tax law and they have the same mutual support obligations.

Unlike registered partnerships in Sweden, Denmark or Norway, those in Iceland entitle the partners to share parental authority. The limited data available concerning limited partnerships in Iceland unfortunately do not tell us how many gay and lesbian couples have taken advantage of the legislation.

United States (State of Vermont)
Following the decision in *Baker* v. *State*, the Vermont Supreme Court ruled in 1999 that the State's marriage law discriminated against same-sex couples. Rather than allowing same-sex couples to marry, the Court proposed a separate registered partnership regime for homosexual couples. In its decision, the Court repeated that the Vermont marriage law must be interpreted as the exclusive union between a man and a woman.[22] However, the Court relied on the principles of equality of all citizens, the promotion of family stability and the protection of vulnerable persons to order the legislators to establish a regime of civil unions in which same-sex couples could enjoy the same rights and obligations as married spouses. Bill 91 on civil unions was passed on April 26, 2000.[23] Vermont thus became the first American state to offer same-sex couples equality in terms of marriage rights. It should be noted that the State of Vermont had already passed a law in 1992 prohibiting discrimination based on sexual orientation and in 1996 it had amended its adoption legislation to widen access to gay and lesbian couples.

Copied from the Scandinavian model, only same-sex couples may contract a civil union.[24] The provisions governing the creation of a civil union are as follows. The partners must have attained the age of majority, not be married and not already in a civil union contract and not be too closely related by blood.[25] The creation of a civil union also requires registration at the town hall of the municipality in which the partners reside. If the couple meets the conditions for the creation of a civil union, they are first given a licence. Within 60 days of the issuance of the licence, the couple must have the licence certified by a judge, a justice of the peace or a member of the clergy, otherwise it may be revoked.[26] The provisions governing the dissolution of a civil union are identical to those prescribed for marriage.[27]

Under the law, the partners in a civil union enjoy the same rights and protections and have the same obligations as married spouses in terms of the place of residence, family property, inheritance rights and the duty to support each other.[28] An interesting point is that the legislature also gives the parties parental rights identical to those conferred on married persons in terms of filiation, adoption and child custody.[29] The partners are subject to the same provisions as married persons concerning social and tax legislation in Vermont. However, the rights and obligations of the partners in a civil union are not recognized under federal law in the U.S. at this time. Same-sex couples who elect not to contract a civil union are considered in public plans to be single persons living together.

Bill 91 concerning civil unions also includes provisions respecting related persons (by blood or by adoption) who provide each other with mutual assistance without living in a conjugal or marital relationship.[30] We shall consider the rights and obligations available to these households in the section on registered partnership models for cohabitees who support each other.

5.1.2 Models of registered partnership for same- and opposite-sex couples
In this section, we describe the laws of the Netherlands and France, both of which have created registered partnership formulas for same- and opposite-sex couples. We have also added a section on Hungary because that country has just amended some of the provisions of its Civil Code to include same-sex couples. What is involved is not a registered partnership as

such but a legislative provision which lesbian and gay couples may use if they wish to protect certain aspects of their relationship.

Netherlands

Whereas Denmark, Norway, Sweden and Iceland limit registered partnerships to same-sex couples, in the Netherlands the formula is available to both homosexual and heterosexual couples.[31] The registered partnership legislation came into force in the Netherlands on January 1, 1998. As of that date, lesbian and gay couples wishing to make their relationship official in the eyes of the law could choose between a registered partnership and a cohabitation contract. However, beginning on January 1, 2001, they also have the right to contract marriage, which includes filiation and the possibility of adopting a child. Homosexual and heterosexual couples accordingly have access to the same types of conjugal status.

Eligibility for registered partnerships for opposite-sex couples has, however, provoked disapproving reactions in other European countries, which, by and large, favour the Scandinavian model of separate equality. A number of countries have asserted that by including heterosexual couples, the Dutch model of a registered partnership could compete with marriage (Bailey, 1999, p. 111). In the Netherlands, the question was debated at length when the proposed partnership legislation was tabled in 1995 (Forder, 1999b, p. 61). In the final analysis, it was the argument concerning equality for same-sex couples that won the day for this formula. As Caroline Forder reports:

> The intention was not primarily to give opposite sex couples the same rights as same sex couples, but rather to emphasize that the institution of registered partnership was designed to protect the emotional relationship of a couple, quite regardless of sex. The decision thus reflected a desire to demonstrate the neutrality regarding sexuality of the partners, of the institution (1999b, p. 61).

However, the institution has enjoyed a certain popularity among heterosexual couples living together. Between January and November 1998, 11 months after the law came into force, 4,237 couples had registered and one-third of them (1,353) were unmarried heterosexual couples (Table 2). Note that the difference in the numbers of gay and lesbian couples registered is much smaller in the Netherlands than in Denmark. Moreover, it took only one year to achieve the level of 1,200 registrations of female couples, whereas it took six years to reach this number[32] in Denmark.

Table 2: Number of registered partnerships in the Netherlands, November 1998

Registered partnerships	Number of relationships
Male/male	1,577
Female/female	1,307
Female/male	1,353
Total	**4,237**

Source:
Netherlands Ministry of Justice, *Registered Partnership in the Netherlands: A Quick Scan*, The Hague: WODC, 1999, p. 13.

The reasons why opposite-sex couples opt for a registered partnership rather than marriage are not clear; a detailed study might eventually suggest some answers. However, a survey conducted by the Netherlands Ministry of Justice of 153 registered couples, of which 51 were heterosexual, showed that the reasons given most frequently related to the right to receive a survivor's pension, to inherit and to jointly own the residence.[33] These, however, are all rights that can be obtained by contracting marriage. It may accordingly be assumed that the couples in question reject the symbolism of marriage, even in its civil form, since a registered partnership offers essentially the same rights and obligations and is a reflection of the same ideology. As far as emotional considerations are concerned, it is surprising to note that mutual recognition was more important for heterosexual couples. Among the same-sex couples questioned, recognition by society was also a major emotional factor, especially for female couples.[34] Almost 80 per cent of the gay and lesbian partners also pointed out that they would have opted for marriage if it had been possible and 62 per cent indicated that they planned to convert their registered partnership into marriage as soon as they could.[35] Almost 30 per cent of the couples surveyed had children.

The requirements in force in the Netherlands for the creation and dissolution of a registered partnership are the same as for marriage: the partners must have attained the age of majority, not be married or in a registered partnership, and may not be too closely related by blood.[36] A registered partnership is available only to citizens and permanent residents of the Netherlands. Dissolution of the partnership may be achieved by a mutual agreement between the two partners whereas divorce must always be obtained through the courts.[37] However, the conditions for dissolving the relationship must be approved by a lawyer or a notary and the agreement must be registered in the Register of Births, Marriages and Deaths. The partners sign an agreement providing for the division of family property, pensions, and debts and for support, if appropriate. Only in the event of disagreement will the courts be asked to render a decision.[38]

In terms of rights and obligations, a registered partnership and marriage are virtually the same in the Netherlands and the Scandinavian countries.[39] Since the partners owe each other help and assistance, the duty to provide support applies automatically. A registered partnership is a community of property regime that provides for the protection of the residence and the division of family property as well as the pension if the relationship breaks down. While the relationship exists, one party may not make decisions concerning the family property without the consent of the other.[40] A registered partnership does not create a legal relationship between a lesbian partner and the child of her partner. However, she may adopt her partner's child whether or not the relationship is a registered partnership. Since January 1998, under an amendment to the law governing the joint custody of children, the partner of a homosexual parent may obtain joint custody.[41] In that case, the partner of a lesbian mother has support obligations toward the child that continue even after the partnership is dissolved. Furthermore, the child may take the name of this mother. However, an award of custody does not permit the co-parent to exercise all parental rights; the rights to inherit, for example, may not be transferred to the child (Forder, 1999b, p. 67).

On September 12, 2000, the government of the Netherlands passed a law giving homosexual couples the right to marry. The law came into effect on January 1, 2001. Besides the right to

contract civil marriage, filiation and adoption are now possible for same-sex couples.[42] Following the recommendations of the Kortmann Commission, draft legislation to this effect was tabled in 1999. A press release dated June 27, 1999, indicated that registered partnerships would not be abolished, even after marriage between homosexual persons became possible. The partnerships will continue to exist alongside marriage for at least five years.[43]

France

It took ten years of debate before France passed a bill providing legal protection for same-sex couples. Nowhere else in Europe did the question of a legal regime for cohabiting opposite- or same-sex couples provoke so much reflection and elicit so many proposals and objections among the gay and lesbian communities, the general public and politicians. From 1989 to 1999, no fewer than six pieces of draft legislation were tabled, all referred to by their acronyms: CUS (Contrat d'union sociale) [social union contract], CUC (Contrat d'union civile) [civil union contract], CUL (Contrat d'union libre) [free union contract], CUCS (Contrat d'union civile et sociale) [social and civil union contract], PIC (Pacte d'intérêt commun) [common interest agreement] and, finally, PACS (Pacte civil de solidarité) [civil solidarity agreement]. This does not even include the proposals designed to introduce a legal definition of "*concubinage"* ("conjugal cohabitation outside marriage") in the *Civil Code* and, later, to broaden this definition to include same-sex couples. In short, it was difficult in France to win over a majority for any one proposal.

From the start, various formulas proposed to provide a legal framework were designed to give persons who had no conjugal relationship the rights and social benefits that had previously been available only to heterosexual couples. Bold and pioneering, the CUC, CUS and CUCS were designed to govern the relationships between all persons (with the exception of ascendants and descendants) who had chosen to build a life together, by providing them with a minimum level of protection in terms, among other things, of occupancy of their residence and certain social benefits provided by the laws (health insurance, leave, etc.) (Pouliquen, 1997, p. 54). The people who made the various proposals might have been won over by the idea of a registered partnership along Scandinavian lines. Since particularism is shunned in France, however, it was unlikely that the proposals would receive substantial support from the gay and lesbian communities. These communities preferred a formula that was open to all, which some people criticized as being an attempt to introduce gay marriage under the disguise of neutral packaging (Weill, 1998, p. 43). Gay and lesbian lobby groups were quick to answer this charge as follows:

> [TRANSLATION]
> Despite the charges of communitarianism, the homosexual organizations have always been opposed to a specific form of partnership into which the "experts" have attempted to confine them because they are different. They have always demanded a PACS that is open to all, homosexual and heterosexual couples alike. Our logic is egalitarian and universalistic. (Observatoire du PACS, 1999).

> This is the first time, I believe, that homosexuals and lesbians are proposing something for society as a whole that they are not claiming only for themselves. In terms of social recognition, I think this is much more important than obtaining something for one's own group.[44]

Some of the proposals were tabled in the French National Assembly but did not result in the passing of any law. The more time passed, the more the idea of offering rights, obligations and benefits only to couples, to the detriment of non-conjugal pairs, gained support. It must be noted that before the PACS was adopted, the *Civil Code* did not accord legal status to heterosexuals who lived together as concubines (in *de facto* unions). Thus, a registered partnership was designed to provide a certain amount of protection for the five million French couples in that situation, not counting lesbian and gay couples (Guigou, 1998). The proposal concerning the PACS was designed both to give legal status to conjugal cohabitation outside marriage ("*concubinage"*)[45] and to create a legal framework for couples wanting more protection than cohabitation offered. However, we shall see that the scope of these rights and obligations is limited in comparison with those resulting from the conclusion of a registered partnership in the Netherlands and the Scandinavian countries. Table 3 summarizes the main proposals relating to the legal framework for same-sex unions in France from 1989 to 1999 and how the question evolved generally.[46]

Let's back up a little. In the fall of 1998, the National Assembly debated a proposal to create a legal framework for unmarried couples: the *Pacte de solidarité civile et sociale*. Despite several years of discussion as to whether it was appropriate to grant legal status to spouses who live together without marrying, the PACS initiative provoked strong public reaction. The conservatives, in particular, voiced their disagreement quite loudly.[47] Moreover, reaction was such that a motion of inadmissibility was introduced at the end of the first reading in the National Assembly in October 1998. Then, in December of the same year, there was a dramatic development: first reading was postponed because too many Socialist members of the Assembly preferred to be absent when the vote was taken on the bill, even though it had been tabled by their own governing party. Finally, the PACS was not promulgated until November 15, 1999.[48]

The PACS is a contract concluded by two adults of the opposite sex or of the same sex for the purpose of organizing their life together ("*vie commune"*).[49] The concept of life together is known to the law as the presumption of a [TRANSLATION] "community of roof and bed" ("*communauté de toit et de lit*", Guigou, 1998). Unlike earlier projects such as the CUCS, the PACS excludes ascendants and descendants or collateral relatives (brothers and sisters).[50] Partners wishing to conclude a PACS must draft and sign an agreement in which they freely set out the conditions governing their life together, subject to the obligations prescribed by the law. In order for the PACS to have legal effect, a joint declaration must be made in the registry of the court of first instance.[51]

Table 3: Registered partnership proposals in France (1989-1999)

	Civil union contract CUC (No 3066)	Social union contract CUS (No 3315)	Social and civil union contract CUCS (No 88)
Who?	• 2 persons, regardless of sex	• 2 persons who have chosen to build a life together	• 2 persons who have chosen to build a life together
Exclusions	• Married persons • Ascendants, descendants • Persons already in another contract	• Married persons • Ascendants, descendants • Persons already in another contract • Brothers, sisters	• Married persons • Ascendants, descendants • Persons already in another contract
Formalities	• Contract concluded before an officer of civil status • Registration in the civil union register • Indication in margin of birth certificate	• Joint declaration before an officer of civil status • Registration	• Joint declaration before an officer of civil status • Registration • Officer of civil status informs the parties of their rights and obligations (as for marriage)
Formalities for termination	• Unilateral termination: possible before officer of civil status, notice of termination served on other party by officer of civil status • Judicial termination: only in case of challenge; judge then orders termination and imposes accompanying measures	• No unilateral termination • Joint termination: by joint declaration or acceptance by other party before officer of civil status • Written agreement governing consequences of termination • Judicial termination: yes, if disagreement or at request of only one party	• No unilateral termination • Joint termination: by joint declaration or acceptance by other party before officer of civil status • Submission of notarized agreement governing division of family property • Judicial termination: if disagreement or at request of only one party
Obligations	• Help and assistance • Joint and separate liability for contracts relating to common needs • Nothing stated about community of living	• Moral and material support • Joint and separate liability for debts contracted for household needs • Nothing stated about community of living	• Moral and material support • Joint and separate liability for debts contracted for household needs • Nothing stated about community of living
Property regimes	• Community reduced to acquests, unless authentic act states otherwise	• Special agreement before a notary	• Community reduced to acquests, unless notarized act states otherwise • Possibility of changing contract while in force
Transfer of lease	• Right to remain on premises if dwelling was shared	• Immediate transfer of lease on death or departure of tenant	• Immediate transfer of lease on death or departure of tenant
Inheritance	• Application of provisions of Civil Code concerning estates, gifts and legacies between spouses	• Application of provisions of Civil Code concerning gifts and legacies between spouses • Application of provisions of Civil Code concerning inheritance in full ownership; otherwise usufructuary right	• Application of provisions of Civil Code concerning estates, gifts and legacies between spouses
Adoption and artificial insemina-tion	• Nothing provided but joint exercise of parental authority	• Nothing provided	• Nothing provided

Table 3: Registered partnership proposals in France (1989-1999) (cont'd)

	Common interest agreement PIC	Civil solidarity agreement PACS
Who?	• 2 persons wishing to organize all or some of their financial and property relationships to undertake community of living	• 2 persons cohabiting, regardless of sex, for the purpose of sharing their lives (art. 515-1)
Exclusions	• Persons already in another PIC	• Married persons • Ascendants, descendants • Persons already in another contract (art. 515-2)
Formalities	• Private agreement that may be concluded for a fixed period • Presumption of an indefinite period	• Joint declaration in registry of magistrates' court • Transcription in special register • Filing of agreement in court registry • In the event of changes, same procedure applies (art. 515-3)
Formalities for termination	• Joint private termination with agreement in form of notarized act resolving consequences of termination • Judicial termination: only where challenged • Judge orders termination and imposes related measures.	• If termination joint, PACS expires immediately; otherwise termination effective 3 months. after service on other partner • Partners themselves wind up rights and obligations resulting from agreement; if no agreement, judge rules on consequences of termination with respect to property • Judicial termination: only if disputed; where termination unreasonable, judge may award damages (art. 515-7)
Obligations	• Community of living • Other obligations determined by partners	• Mutual and material assistance • Joint and separate liability for debts contracted by either party for common needs and expenses and those relating to shared accommodation (art. 51-54)
Property regimes	• Determined by partners	• Indicated in agreement filed in registry; otherwise presumed joint property shared equally (art. 515-5)
Transfer of lease	• Immediate transfer of lease on death or departure of tenant	• Right to remain on premises if dwelling was shared
Inheritance	• Nothing provided	• Unless specific provision made, property of deceased partner goes to descendants, ascendants and collateral relatives
Adoption and artificial insemina-tion	• Adoption possible if partners of the opposite sex	• Nothing provided

The PACS terminates with the death or marriage of one of the partners or simply at the request of both or one of the parties. In other words, one of the parties can unilaterally terminate the PACS. In that case, the termination takes effect only three months after notice has been served on the other partner.[52] If the decision to terminate is made jointly, the PACS ends immediately.

The partners themselves will see to dissolving the rights and obligations resulting from the agreement; only in the event of dispute will a judge be asked to rule on the consequences of the termination with respect to property.[53]

As far as rights and obligations are concerned, the PACS provides that the partners will provide each other aid and material assistance and determine the conditions relating thereto.[54] They are jointly and separately liable for debts contracted by either of them to meet the ongoing needs of their household as well as expenses relating to their shared dwelling.[55] The task of determining a property regime is left to the partners but, if their agreement contains no provisions on this subject, property is deemed to be jointly and equally owned.[56] However, the PACS does not include any inheritance rights: if there is no legal will, the property of the deceased partner will go to his or her descendants, ascendants and collateral relatives. If one of the partners dies, the surviving partner who receives a legacy by legal will enjoys certain tax benefits if the parties had been subject to a PACS for at least two years. If the spouses were married, these tax benefits apply immediately. If the holder of a lease dies or leaves the home, the contract of tenancy continues in effect or is transferred to the partner for the scheduled term of the lease.

As far as public law is concerned, the partners are subject to joint taxation after the third anniversary of the registration of the PACS.[57] However, a partner who is not covered in his or her own right by health, maternity or death insurance is eligible for social protection immediately if his or her partner is insured. The right to receive a family support allowance or a widow's allowance ceases when a PACS is concluded. The partners may ask to take their annual vacation leave at the same time and are entitled to exceptional leave if one or the other partner dies. If one of the partners is employed in the public service, they may be entitled to obtain positions closer geographically if they are located far apart (French Ministry of Justice, 1999). Finally, the PACS does not change any of the rules of filiation and parental authority. It does not give same-sex couples the right to adopt a child jointly or to receive services for medically assisted procreation.

The PACS was not well received by many gay and lesbian organizations, which felt that the rights granted are too restrictive compared with those acquired by marriage or that the time period before a couple can benefit from joint taxation or tax rules relating to inherited property is too long.[58] The PACS also leaves gay and lesbian "co-parents" in a legal vacuum, although their advocacy groups had placed a great deal of emphasis on this issue in the debates. Finally, for some people, the PACS does not really offer a solution to the problem of relationships outside marriage because it allows partners to terminate the relationship unilaterally regardless of the other partner's wishes. This led many to say that the PACS is little different from an unregulated union (*"union libre")* (Théry *in* Malaurie, 1998, p. 13).

Despite these criticisms, 6,211 couples registered their relationships between November 15 and December 31, 1999. The Collectif pour le PACS estimates that 75 per cent of the partnerships registered in the Paris region involved same-sex couples although the proportion in the provinces was only 40 per cent. Since the law protects privacy, it is impossible to estimate with certainty the number of same-sex couples among those who have made use of the PACS (Holtz, 2000).

Hungary

Finally, in Hungary, a provision of the *Civil Code* governs the disposal of property acquired during cohabitation when a relationship breaks down. Previously this provision applied to couples who lived together as husband and wife but, since 1996, it has also included same-sex couples.[59] The provision is designed to protect the vulnerable party in a couple in the case of breakdown in order to avoid unjust enrichment of the other party. Ownership of property is acquired in proportion to each person's contribution to its acquisition. Furthermore, domestic work is considered to be a contribution to the household.[60] One spouse may not dispose of the common property without the other's consent. If the parties are unable to determine each party's contribution, the property is divided equally.

Compared with the Netherlands and France, the impact of the provisions in Hungary are still timid. We should also note that in Hungary same-sex couples do not enjoy legal recognition in social legislation and income-security programs.

5.1.3 Models of registered partnerships for cohabitees who support each other

In this section we shall consider those countries that provide legal protection for same-sex and opposite-sex couples as well as for non-conjugal partners who live together and provide each other with mutual support. These are the States of Hawaii and Vermont in the U.S., Belgium, Spanish Catalonia and Norway.

United States (Hawaii and Vermont)

In the United States, the right to marry lies at the heart of the debates on equality between homosexual and heterosexual couples. Supported in their efforts by gay and lesbian organizations, same-sex couples have made use of the courts in an effort to broaden access to marriage. On the other hand, powerful religious organizations and private interest groups have demanded that marriage be reserved exclusively to heterosexual couples. On this topic, their voices are more strident than in any other country (Bailey, 1999, p. 123).

In the United States, it is the states that exercise jurisdiction over the solemnization of marriage. Under the U.S. Constitution, a marriage solemnized in one state must be honoured in the others. In September 1996, during the Clinton presidency, the federal government enacted the *Defense of Marriage Act*. The Act defines marriage as the exclusive union of a man and a woman. It was designed to forearm the states against the duty to recognize marriages between persons of the same sex as a result of the so-called total recognition clause in the American Constitution.[61] Since 1995, 30 states have enacted legislation expressly limiting marriage to opposite-sex couples (Bailey, 1998).

The debate had roused passions a few years earlier when the Hawaii Supreme Court considered the constitutional validity of the ban on marriage for same-sex couples.[62] In 1991, three gay couples whose application to marry was refused brought an action against the State of Hawaii. The State's main argument was that same-sex couples must be excluded from marriage because it was not in the interests of a child to be raised by such couples. Having examined in detail the evidence of experts called to testify concerning the consequences for children, Justice Chang of the Hawaii Supreme Court concluded that there was no basis for the State's argument. He

declared the exclusion of same-sex couples from the *Marriage Act* unconstitutional. The case was still on appeal in June 2000, when this report was written.

However, the appeal will have a limited impact because in 1997 Hawaii enacted the *Reciprocal Beneficiaries Act*,[63] a kind of registered partnership whose legal impacts are less encompassing than those of the Scandinavian countries. The Act applies "to couples consisting of two persons who may not legally marry".[64] Its intention was thus to create an institution for same-sex couples but also to give non-conjugal pairs, such as two sisters, protection under the law (Bailey, 1998, p. 165). Common-law heterosexual couples cannot make use of this Act because they are able to marry.[65]

The *Reciprocal Beneficiaries Act* gives couples who register some sixty or so rights that are generally limited to married couples.[66] These rights and obligations are all within the jurisdiction of the State and their application is accordingly limited to Hawaii (Burnette, 1998-1999, p. 81). For example, the Act provides for the extension of health insurance plans and insurance policies to cover the reciprocal beneficiary, the right to consent to medical treatment, family leave, survivor benefits for state government employees, inheritance rights and the same tax benefits as are enjoyed by married spouses (Burnette, 1998-1999, p. 81; Bailey, 1999, p. 129). Unlike the registered partnerships in the Scandinavian countries, the Act does not contain any provisions governing the ownership of property, the division of family property and the right to support. The only provision concerning children is the inclusion of minor dependent children of a reciprocal beneficiary in the family coverage of a health insurance plan and in insurance policies.

In short, the *Reciprocal Beneficiaries Act* keeps the institution of marriage intact while granting certain rights to same-sex couples and those involved in non-conjugal relationships. Since it came into force, few same-sex couples have taken advantage of it (Burnette, 1998-1999, p. 13).

The State of Vermont has also enacted legislation governing households consisting of two persons who are related (by blood or adoption) and provide support for each other. Based on the statute enacted in Hawaii, Bill 91 respecting civil unions between persons of the same sex also provides a number of rights, protections and obligations for reciprocal beneficiaries.[67] These rights and responsibilities were previously granted only to married spouses, although they are limited to the field of health, namely hospital visits and health care decisions, decisions concerning organ donations in the case of incapacity and concerning the disposition of remains, power of attorney in case of inaptitude, a patients' bill of rights, a bill of rights for nursing home residents and abuse prevention.[68] These provisions are designed to protect persons who are disabled, impaired or sick or who have lost their independence as well as the relatives who care for them.

The establishment of a reciprocal beneficiaries relationship requires that both parties be at least 18 years of age, that they be related by blood or adoption and that they not be linked by a marriage contract, civil union or any other reciprocal beneficiaries contract.[69] If one of the parties marries or enters a civil union, the reciprocal beneficiaries relationship is terminated automatically and the beneficiaries are no longer entitled to the protection, benefits and

responsibilities conferred by the Act. In addition, each person must consent to a reciprocal beneficiaries relationship without force, fraud or duress; otherwise the contract may be revoked. Persons who meet these conditions may establish a reciprocal beneficiaries relationship by submitting a notarized declaration to the Commissioner of Health, who will file it. The presentation of a notarized declaration is also required in order to terminate a relationship.

The State of Vermont accordingly opted to provide same-sex couples with an opportunity to obtain rights equivalent to those conferred by marriage and in the same Act to provide protection in the health field for households made up of two blood relatives who are economically interdependent.

In conclusion, we should note that a number of municipalities in the U.S., including San Francisco and New York, have also created rules governing the registration of same-sex relationships in areas falling within their jurisdiction. This applies, for example, to housing, benefits for municipal employees and the conditions governing parties who submit tenders for municipal contracts (Bailey, 1999, p. 127).

Belgium

Refusing to amend its *Civil Code* to give lesbian and gay couples conjugal status, Belgium nevertheless changed the part that relates to property so that two people, whose relationship may or may not be of a marital nature, can declare themselves to be partners. The *Loi instaurant la cohabitation légale*,[70] [law instituting legal cohabitation], which was passed in November 1998, allows two persons, regardless of their sex, to make an official declaration of cohabitation and accordingly to enjoy minimal legal protection. In an abstract provision devoid of normative content,[71] the Act defines legal cohabitation as [TRANSLATION] "the situation in which two persons live together and make a declaration" in the form of a document filed with the officer of civil status.[72]

During the period of cohabitation, the partners are required to make every effort to share the costs of living together.[73] The debts contracted by one to meet their joint needs or those of their children are binding on the other.[74] Furthermore, the principal residence may not be sold, bequeathed or mortgaged without the agreement of both parties.[75] On the other hand, cohabitation does not create a community of property; each partner remains the owner of his or her own property and income.[76] However, property that cannot be proved to be exclusive property is deemed to be jointly owned. A notarized agreement will allow the partners who so wish to provide for additional measures.

Legal cohabitation may cease either by joint agreement or on the unilateral initiative of one of the parties. In both cases, a declaration of cessation is filed with the officer of civil status.[77] After the cessation of cohabitation, a justice of the peace may, at the request of either party, order [TRANSLATION] "temporary urgent measures justified by this cessation". These measures relate to the right to remain in the place of residence and the division of property. The legislation does not provide any right to receive support or to inherit. Compared with the French PACS, the provisions of the Belgian *Code civil* establish much more limited rights and

obligations. This said, for cohabitees involved in a non-conjugal relationship, these new measures provide a certain amount of legal protection, especially where the residence is concerned.

Spain

Finally, in Catalonia, an autonomous region of Spain, the law respecting stable couples[78] grants certain rights to, and imposes certain obligations on, registered opposite- and same-sex couples. It applies automatically to opposite-sex couples after two years of cohabitation whereas same-sex couples must sign a notarized agreement to this effect.[79] This possibility is also available to opposite-sex couples wishing to take advantage of the law before the prescribed two-year period. However, the law applies immediately if a child is born of the union.[80]

With respect to private law, the *Stable Couples Act* confers rights relating to the occupancy of the residence[81] and joint liability for debts contracted for the needs of the family.[82] It also provides certain social benefits to a partner who works for the Catalan government. As far as public law is concerned, however, the Act has no legal effect in areas such as social assistance or employment insurance, which are not under Catalan jurisdiction.

In December 1998, Catalonia also promulgated a law on cohabitation for persons who assist each other mutually without living in a conjugal or marital relationship.[83] The *Mutual Assistance Act* applies to non-conjugal but emotionally close interdependent relationships between adults such as two brothers, an adult who takes care of a relative or an elderly person or friends who support each other. It is designed to protect the situation of a senior who requires care and who lives with a helper in exchange for lodging and money. The Catalan statistics show that at least 54,000 people live in this situation (Forder, 1999b, p. 81). Chapter 4 of the Act contains provisions designed to protect households of this kind and Chapter 3 provides a legal framework for households in which two adults are economically interdependent. In order to benefit from the provisions of the Act, the parties must have established their union by notarized contract or have lived together for at least three years. The Act provides certain rights and imposes certain obligations concerning support, the occupancy of the house on the death of the owner, the division of property and compensation for what might constitute unjust enrichment.

For example, in the event that the cohabitee dies, the party who is not the lessee has a period of one year in which to leave the premises.[84] If one of the cohabitees dies without providing financial compensation for the person who took care of him or her, that person may claim compensation. However, this support obligation may be waived by contract between the parties. The provisions governing adults who care for elderly persons apply solely to two cohabitees of 65 years of age and older or between whom the age difference is at least 50 years. Such a union requires a contribution from each person to the household, that is, the provision of housing by one and care by the other.[85]

According to Bailey (1999, p. 119), the *Mutual Assistance Act* is designed to create a certain degree of fairness in situations of financial dependence. The legal framework of these unions is not an option for the parties; as we indicated earlier, the Act applies automatically after three

years of cohabitation. Catalonia is the most progressive jurisdiction in terms of the rights granted to households in which people support each other.

Norway

Finally, as we noted earlier, Norway enacted legislation in 1992 on cohabitees in the form of the *Joint Household Act*.[86] The Act provides a certain amount of legal protection for any group of persons who have lived together for at least two years, especially with respect to the right to remain in the residence if one of the members of the household dies or the relationship is ended. The Act provides that, if the relationship is terminated by death or breakdown, one of the parties may acquire the right to continue to occupy the shared residence or to use the immovable property. Norway is the only Scandinavian country whose legislation on cohabitees includes persons in non-conjugal unions.

5.2 Types of approaches

After this survey of the laws providing recognition for same-sex couples in Europe and the United States, we shall now analyse the approaches that influenced the development of the models used in these countries and in Canada. They can be divided into five categories: the formal equality approach; the partial formal equality approach; the separate equality approach; the socializing approach; and the substantive equality approach. Any exercise in categorization obviously involves a risk of reductionism and the blurring of some differences. However, the proposed typology may help to cast light on the underlying principles and the issues raised by the legal recognition of lesbian couples at the present time. We have accordingly listed under each of these approaches the measures that have already been taken and those that are still at the draft stage or the object of lobbying efforts.

5.2.1 Formal equality approach

The formal equality approach requires that no distinction be made in the forms of recognition given to gay and lesbian couples, on the one hand, and heterosexual couples, on the other. According to this approach, the institutions and rules that provide a framework for conjugal and family relationships of heterosexuals are the norm to which gays and lesbians should have access. The sexual orientation of the partners would no longer be relevant as a distinguishing factor. If this approach were taken, same-sex couples could select the kind of legal framework that best reflects their conjugal needs, whether it be marriage or a common-law partnership. They would be able to exercise the rights relating to filiation and to adoption and artificial insemination services without discrimination. We have shown in the first section of this chapter that, despite the progress made in terms of equality, no country with the exception of the Netherlands has applied the formal equality approach for same-sex couples. We shall see in more detail in the next section that, even though Canada tends to adopt a formal equality approach to providing rights for lesbians and gays, same-sex couples have to date achieved only very partial recognition of their conjugal unions and families.

Formal equality implies, among other things, the right of same-sex couples to marry. Marriage is the pivot in this approach because it is around this institution that all “family” regimes have been organized. Even *de facto* conjugality is measured by the yardstick of marriage. Thus, the

rights and obligations of married spouses have historically and gradually been extended to common-law spouses because their relationships were thought to be analogous to those of married couples.[87] In *Miron* v. *Trudel*, which involved heterosexual *de facto* partners, Justice McLachlin stated the following:

> Of late, legislators and jurists throughout our country have recognized that distinguishing between cohabiting couples on the basis of whether they are legally married or not fails to accord with current social values or realities. As the *amicus curiae* has pointed out, 63 Ontario statutes currently make no distinction between married partners and unmarried partners who have cohabited in a conjugal relationship.... In the judicial domain, judges have recognized the right of unmarried spouses to share in family property through the doctrine of unjust enrichment: Pettkus v. Becker, [1980] 2 S.C.R. 834; Peter v. Beblow, [1993] 1 S.C.R. 980. All this suggests recognition of the fact that it is often wrong to deny equal benefit of the law because a person is not married.[88]

Given the substantive and symbolic role played by marriage in family law, organizations such as EGALE, the Coalition pour la reconnaissance des conjoints et conjointes de même sexe (Quebec), the Association des mères lesbiennes (Quebec) and lawyers such as K. Lahey (1999) and M. McCarthy (1999) feel that, in order to eliminate discrimination based on sexual orientation, legal recognition of the right to marry must be extended to same-sex couples. This measure would have the effect of eliminating the need to create complex registered partnership regimes, none of which currently offers the same status as that conferred by marriage, as we have shown in the first part of this Chapter. If these regimes actually provided the same rights and obligations, they would be redundant and their relevance open to question. The creation of a parallel regime for unions between persons of the same sex merely perpetuates discrimination, especially with respect to filiation and the recognition of gays and lesbians as parents. According to Lahey (1999b) and McCarthy (1999), registered partnership regimes are subterfuges designed to divert gays and lesbians from demanding the right to marry. They were created, among other things, to satisfy the political right wing and the churches when the state was faced with the demands of the gay and lesbian movements.

As Canadian law now stands, denying lesbian couples the possibility of marriage also has consequences in terms of rights and obligations relating to property, since legislative provision is made for the division of family property only in the case of married spouses. This situation is enshrined in the new federal bill entitled the *Modernization of Benefits and Obligations Act*,[89] especially with respect to the division of credits in the Canada Pension Plan[90] and in private pension plans for the employees of federally regulated companies.[91] We should also note that the ability to marry would make it possible for the partners to avoid the need to live together. This is required for common-law spouses but not for married spouses.

Lawyer W. Holland (1999) acknowledges that, in the case of heterosexuals, the question of whether to marry or enter into a common-law partnership is a matter of choice. For gays and lesbians, however, this choice does not exist. Holland admits that the absence of choice and

the resulting discrimination are factors that cannot be blithely ignored. However, she goes further and questions the central role of marriage and conjugality in general and the privileged status they confer. In her view, the objectives of the rules based on marital status must be rethought. Among other things, she suggests that these rules be redesigned to remedy the inequity caused by the division of parental responsibilities rather than to confer privileged status on spouses. With this change in perspective, couples without children, whether or not they are married, would not be subject to the same rules as couples with children. In some respects, Holland's position is the same as our own, as can be seen in the recommendations in Chapter 6. Her position is also very close to that of a number of feminist lesbian authors[92] who fear that the formal equality strategy will simply strengthen the patriarchal foundations of marriage instead of calling them into question. These authors are also afraid that this strategy will impede the development of egalitarian models of relationships, including those where there is not necessarily cohabitation or monogamy (LEAF, 1993).

Despite her criticisms of marriage and marital status, Holland is of the opinion that the reform of matrimonial regimes must come after the rules of eligibility to marry have been broadened in order to eliminate discrimination against gays and lesbians. For this reason, and from a similar perspective, LEAF intervened in the case of *M.* v. *H.* to support the claim for inclusion of gay and lesbian couples in the Ontario legislation providing a right to alimony for common-law spouses. It seems therefore that there is agreement among a growing number of feminist jurists on the question of the right of lesbian and gay couples to marry. Their view could be summarized as follows:

> The issue is not whether marriage is good, but rather whether it may be used to deny equal treatment to people on grounds which have nothing to do with their true worth or entitlement due to circumstance.[93]

Having said this, we must now make a distinction between the approach used to understand the problem of inequality experienced by lesbian couples and the proposed solution for this problem if we want the results to reflect our feminist aims. Thus, the right of same-sex couples to marry can be defended from the perspective of formal equality but also from a perspective of substantive or more socializing equality, as we shall see later. In our opinion, the formal equality approach is problematic for a number of reasons. Let us remember that over the last fifteen years women have invested a substantial amount of energy in attempting to undermine the domination of this paradigm, which the courts have used to understand and deal with the problem of women's rights. The analysis developed by feminist jurists and women's groups across the country could apply to the question of the right of lesbians and gays to equality.

According to Brodsky and Day (1989, p. 147), "[f]ormal equality means equality in the form of the law, and it requires that laws treat similarly persons who are similarly situated". As they point out, the theory of formal equality presupposes that "equality is a question of sameness and difference in the form of the law, rather than a question of dominance and subordination between groups" (Brodsky and Day, 1989, p. 149). From this perspective, lesbian couples are viewed as being similar to heterosexual couples who are married or live "common-law", and their problem results from the fact that they are treated differently under the law. This

observation is based on studies that tend to assert, for example, that the partners in same-sex couples are engaged in a stable or monogamous relationship, that they have acquired joint property and that they share a bank account. In short, that they are in every respect the same as heterosexual couples and that they are even more *straight* than these couples. When it comes to a solution, it is assumed that these couples want, with a few variations, to be treated in the same way as heterosexual couples since they are essentially the same.

The consultations we held enabled us to confirm that lesbians have a much more global and socializing approach to equality that is not limited to the criterion of similarity in demanding the elimination of discrimination against them. Many lesbians have said that they are concerned by the fact that the paradigm of formal equality makes it possible:

- to exclude lesbian couples who do not pass the test for the legal definition of common-law partnership, namely, cohabitation, economic interdependence of the partners, and public acknowledgment of the relationship;
- to marginalize lesbians whose conjugal arrangements are not similar to those of stable monogamous heterosexual couples;
- to unfairly refuse to people who do not live together as a couple — whether they be lesbian, gay or heterosexual — entitlement to legislated social benefits, especially if they have sacrificed income in order to take care of a dependent child or adult;
- as a corollary, to adhere to the principle that sexual relations are the legitimate basis for entitlement to legislated social benefits; and
- to overshadow and waylay more radical and feminist attempts to problematize heterosexuality and challenge the legal underpinnings of the patriarchal family.

By pointing out these exclusions, the lesbians consulted challenge the idea that only same-sex couples with conjugal and family arrangements similar to those of heterosexual couples are entitled to equality. Their concerns also reveal a critical vision of the functionalist approach used in the laws to define conjugality and family.

The formal equality approach imposes a second level of limitations that caused concern for the lesbians with whom we spoke, namely, the fact that this approach "is inadequate to the task of creating real equality because it does not encompass or even acknowledge inequality of condition" (Brodsky and Day, 1989, p. 150). As Brodsky and Day point out, this occurs because the standard of entitlement to equality is determined on the basis of the situation of the favoured group. To the extent that lesbian couples are not in a situation that resembles heterosexual conjugality, they cannot achieve equality simply by attaining formal equality. We dealt in the previous chapter with the profound concerns expressed by a majority of the respondents with the automatic recognition of lesbian couples and the obligation it involves to disclose one's sexual orientation to government or to an employer. This situation clearly illustrates how the standard that gives the right to equal treatment — here, the obligation to disclose one's partner's sex in order to receive the benefits associated with recognition as a couple — may be difficult if not impossible to achieve if it does not take into account the

stigmatization experienced by lesbians. In short, the formal equality approach does not come to grips with the real inequalities to which lesbians are subjected and that have no counterpart among heterosexuals. At best, this approach will secure equality for lesbians in the statutes of law but not in their material living conditions. Legislative reform along the lines of the formal equality approach can therefore produce only partial results.

5.2.2 Partial formal equality approach

As its name indicates, this approach is one in which all couples receive, for certain purposes, the same treatment without any distinction based on the sex of the partners, whereas for other purposes same-sex couples are not recognized. We might think here of the registered partnership formula adopted in France. This form of partnership is available to all couples without regard to the sexual orientation of the partners. However, France permits heterosexual couples to marry or to benefit from the rules of filiation or parental authority but does not give these rights to lesbians and gays. In Canada, the Quebec regime and all the regimes in the common-law provinces, even those that have carried out the most far-reaching reforms such as British Columbia, also follow this model.

For example, since the adoption of Bill 32 Quebec no longer makes a distinction among common-law spouses on the basis of sexual orientation in any of its laws except for the *Civil Code*. This means that, for the purpose of so-called private relations (property, support, inheritance), gay and lesbian relationships, like heterosexual common-law relationships, do not enjoy legal protection. The exclusive protection given to heterosexuals, who can choose to marry, perpetuates discrimination in two ways: first, it maintains the idea that same-sex couples are inferior and, second, it deprives the children of these relationships of the recognition of one of their parents.

In British Columbia, despite major reforms, marriage is still not possible for gays and lesbians. It should also be noted that Bill 100, *The Definition of Spouse Amendment Act*,[94] was not yet in effect in June 2000. For this reason, as far as inheritance is concerned, gay and lesbian couples and their children do not benefit from the provisions applying to heterosexual common-law spouses. In Ontario, the reform of November 1999 is inspired by the separate equality approach discussed below. Moreover, a significant number of laws, for example those dealing with inheritance and family property, as well as certain provisions of the *Family Services Act*,[95] have not changed and continue to apply only to married persons. In a context in which lesbians and gays still do not have the right to marry, the scope of the distinctions between spouses and opposite-sex partners is not negligible. One cannot claim therefore that equality has been achieved. The formal but partial equality approach is clearly unacceptable since it maintains a hierarchy based on sexual orientation in legal, political, symbolic and substantive terms.

5.2.3 Separate equality approach

This approach refers to the measures that give same-sex partners the substantive benefits and obligations enjoyed by opposite-sex spouses but as part of a separate regime. At the present time, however, no country gives same-sex couples all the rights of opposite-sex couples in a separate regime. The regimes that do exist may grant same-sex spouses most of the rights

enjoyed by married persons (Denmark, Norway, Sweden, and Iceland) or some of the rights enjoyed by common-law spouses (France, Belgium and Hungary).

Regardless of the extent of the substantive rights granted, the main feature of the separate equality approach is to distinguish in legal and symbolic terms between heterosexual persons and homosexual persons. In strictly legal terms, we can categorize under this approach most of the registered partnership models available solely to same-sex couples such as those in Sweden, Denmark, Norway and Iceland. However, if we consider what motivated their adoption, all the registered partnership models belong to the separate equality approach although some of them — such as those in France and the Netherlands — are also available to unmarried heterosexual couples. In fact, the obvious reason behind these partnerships is to reserve the right to marry to male-female couples by creating a parallel regime that grants most substantive rights to same-sex couples but nevertheless maintains segregated regimes, thereby reinforcing the idea that homosexual couples are inferior. In Canada, this separate equality approach was recently chosen by the government of Ontario in response to the decision in *M.* v. *H.*

Since the early 1990s, the registered partnership model has been in vogue as it spreads among the countries of Europe and now appears to have gained favour in some U.S. states such as Hawaii and Vermont. In Canada, the Ontario Law Reform Commission in 1993 and the British Columbia Law Institute in November 1998,[96] each in turn, proposed the adoption of a registered partnership regime that could be used by same-sex or opposite-sex couples as well as some non-conjugal pairs wanting similar rights and obligations. Registered partnerships were also the subject of a conference sponsored by the Law Commission of Canada from October 21 to 23, 1999, at Queen's University in Kingston, Ontario. The conference brought together jurists, lawyers and specialists in family law to examine the potential of a registered partnership regime. The enthusiasm for this legal alternative to marriage seems to have waned in Canada, however, primarily because all models of registered partnership fail to give same-sex spouses the same rights as are enjoyed by heterosexual spouses. While the adoption of a registered partnership regime has been viewed as a step toward the eventual recognition of the right to marry, it is more in the nature of a fallback solution that, in the opinion of Lahey (1999b), would represent a step backward for Canada. The recent decision of the Supreme Court of Vermont and the initiative of the State of Hawaii clearly show that registered partnerships are not a solution that meets the needs of same-sex spouses but rather a way to avoid demands for the right to marry.

Beyond the intention to keep marriage as the sole preserve of heterosexuals, the measures belonging to the separate equality approach also aim to maintain discrimination on the basis of whether or not common-law spouses are of the same or opposite sex. In this respect the case of Ontario is particularly pernicious. The very name of the legislation, *Amendments Because of the Supreme Court of Canada Decision in M. v. H. Act*, suggests equality with a vengeance. Rather than amending the definition of the expression "spouse" to eliminate the reference to sex, the Ontario government created a third kind of conjugal status, that of "same-sex partner". In addition, while some laws were ignored (e.g. those relating to inheritance), others received particular attention (e.g. the provisions governing conflicts of

interest) thus creating an imbalance between rights and obligations. For example, the provisions on family property were not broadened but landlords may now seize the property of same-sex spouses in payment of rent.[97] Even though same-sex spouses are not placed on an equal footing with heterosexual spouses in terms of child custody and access rights, the only change made to the *Children's Law Reform Act* added "same-sex partners" to the provision requiring that violence against the spouse be taken into account when custody and access rights are awarded.[98] Not only are these amendments only partial but they also reflect and strengthen the stereotypes of abuse, violence and dishonesty ascribed to gays and lesbians.

The amendment made by the Government of Ontario in November 1999 clearly falls within the separate equality approach. On the one hand, it does not give gay and lesbian couples the same rights and obligations as heterosexual couples, and in this sense there is no equivalence. On the other hand, the terms used in drafting the statute reflect a hierarchy based on sexual orientation. They uphold an essentialist vision, according to which conjugality between a man and a woman is normal but that between persons of the same sex is merely tolerated.

For the reasons stated in Chapter 1, the theory of separate equality has been rejected in Canada and in the United States where it is reminiscent of the measures of racial segregation that were finally abolished in 1954.[99] It is to be hoped that this theory will not be revived by the courts, which might view it as a way to eliminate the elements of substantive discrimination with respect to the rights and obligations while keeping marriage as the exclusive preserve of heterosexuals. The recent decision of the Supreme Court of Vermont unfortunately raises this spectre. In fact, the majority strives to limit the impact of its findings with respect to the constitutional invalidity of the *Marriage Act*. It makes a simple judicial declaration that does not involve any relief and even adds that a "parallel" registered partnership regime might be sufficient. In response to the minority opinion, which likened the position of the majority to one on racial segregation, the majority stated:

> The analogy is flawed. We do not confront in this case the evil that was institutionalized racism, an evil that was widely recognized well before the Court's decision in Watson and its more famous predecessor … Plaintiffs have not demonstrated that the exclusion of same-sex couples from the definition of marriage was intended to discriminate against women or lesbians and gay men, as racial segregation was designed to maintain the pernicious doctrine of white supremacy.[100]

The majority added that the decision in *Watson* denouncing segregation was rendered after eight years of procrastination by the municipality that had been ordered to change its segregationist policies, whereas in the more recent case, "[u]nlike Watson, our decision declares decidedly new doctrine".[101]

Although Canada's courts are not immune to illogicality and inconsistency, they would, in our judgment, find it difficult to reproduce this reasoning. Since the 1989 decision in *Andrews*,[102] intention is no longer a relevant element of the analysis and the government cannot get off the

hook by claiming that the creation of a separate model for gay and lesbian couples is not based on segregationist reasoning. Only the effects of such a model are relevant. The novelty argument, for its part, was raised in the 1995 case of *Egan* by the majority of the Supreme Court of Canada (a very slim majority, needless to say). However, it is clear in the subsequent comments of Justice Iacobucci, speaking for the majority, that the factor to be considered is not novelty but rather "[i]f the legislature refuses to act so as to evolve towards Charter compliance".[103] Incrementalism cannot be used as a justification if the demands for similar and non-discriminatory treatment do not require the spending of public funds:

> … there is no concern regarding the financial implications of extending benefits to gay men and lesbians in the case at bar. As already pointed out, rather than increasing the strain on the public coffers, the extension will likely go some way toward alleviating those concerns because same-sex couples as a group will be less reliant on government welfare if the support program is available to them. Thus, I conclude that government incrementalism cannot constitute a reason to show deference to the legislature in the present case.[104]

The Ontario reform of November 1999 requires little or no public spending. On the contrary, by recognizing the obligation of spouses to support each other, it actually releases government from its income-security obligations. In the final analysis, use of the concept of novelty is as indirect way to establish a hierarchy among groups that have historically been disadvantaged. It seems that some groups, for example women and racial and religious minorities, are entitled to immediate relief. In the case of groups for whom oppression is commonplace and accepted as normal, the fact that public awareness is slow in awakening is used to justify maintaining a discriminatory approach. However, the constitutional guarantees do not provide that some are more equal than others. Moreover, the concept of novelty is a ruse that conceals an attitude of deference to what is felt to be the resistance of the majority. However, there is nothing to prove that this is so. What is more, it contradicts the very reason for the provisions outlawing discrimination, which is to protect minorities against the majority. It is likely that the Ontario legislation would not stand up to a court challenge. Nevertheless, we question the attitude of legislators who refuse to act to put an end to discrimination and, in addition, act spitefully by reinforcing discriminatory stereotypes and forcing lesbians and gays to return to court, at great expense, to secure the substantive equality prescribed by the *Canadian Charter*. Segregationist separate equality, however, should not be confused with substantive equality, which we will examine below.

5.2.4 Socializing approach

Taking up the argument of Margrit Eichler (1988), the socializing approach advocates that private relationships between individuals be regulated by contract and by legal will. The provisions under these domestic contracts would not create any distinction based on the partners' sexual orientation or conjugal status, whether it is marital in nature or not. This single legal framework formula would make it possible to do away with the privileged status given to conjugality and to protect a broad range of household types in which the partners are economically interdependent. For example, this might resemble the various statutes concerning cohabitees enacted in Norway and Belgium and those concerning mutual

assistance enacted in Hawaii or Catalonia, and it could of course be enhanced. As far as public programs are concerned, the socializing approach seeks to abolish the positive or negative economic consequences of recognizing conjugal status so that the decision to create a union is made on the basis of the emotional and moral commitment of the partners and not on financial considerations. Under this approach, access to social programs and income-security plans would be universal and based on individual rights. It also presumes that the objectives of these schemes will be refocused to meet the needs of dependants (children, seniors or disabled persons) and to give support to those who care for them.

Most of the laws that give common-law spouses rights and duties usually require cohabitation for a certain period of time together with the existence of a conjugal type of relationship marked by public acknowledgment and mutual support. In short, *de facto* conjugality exists if the relationship is similar to that between married persons, even though cohabitation is not required of married persons.[105] The conjugality requirement is reflected in the expressions "living in a *de facto* union", which was used in Bill 32 in Quebec, "a conjugal relationship outside marriage" used in Bill 5 in Ontario, "marriage-like relationship" used in British Columbia and "relationship of a conjugal nature" used in the federal legislation on public service pensions.[106]

Just as some people criticize the privileged status given to marriage, it may be asked why a conjugal relationship, whether heterosexual or homosexual, should be preferred over other interpersonal relationships between adults. The Conseil du statut de la femme du Québec (1999) asked the question as follows:

> [TRANSLATION]
> … given the growing number of people who live alone, the increase in childless couples, the valuing of personal autonomy, even within couples, the frequency of divorce and separation in our society, can our social legislation be constructed essentially around the couple? At the same time, is it possible to ignore this solidarity between the members of a couple?[107]

In its decision in *Egan*, the Supreme Court of Canada considered the relationships between non-conjugal partners as follows:

> The singling out of legally married and common-law couples as the recipients of benefits necessarily excludes all sorts of other couples living together such as brothers and sisters or other relatives, regardless of sex, and others who are not related, whatever reasons these other couples may have for doing so and whatever their sexual orientation. Mahoney J.A., at p. 412 of his reasons in the Court of Appeal, lucidly describes these various couples in the following passage:
>
> Many couples live together in relationships excluded from the definition. Cohabitation by siblings is a commonplace example; persons otherwise related by blood or marriage do so as well and so do persons not related. They do so

> for countless personal reasons and combinations thereof, for example: mere convenience, the advantage of pooling resources, shared interests, congeniality, friendship and affection not involving sexual attraction, to have someone with them in disability, failing health or in fear of it, or simply to avoid loneliness and seclusion.[108]

Although this observation offered a pretext to dismiss Egan's action, it is impossible to deny the existence of these cohabitation relationships and the mutual support provided by the partners. There is no doubt that the privileged status given to married spouses can constitute discrimination based on marital status or family status. Nor is it possible to deny that, as public plans now exist, support by a 56-year-old older sister, for example, absolves the state of its duty to meet the needs of the younger sister.

In Europe, a number of governments, namely Belgium, Norway and the autonomous region of Spanish Catalonia, have attempted to allay concerns aroused by the expansion of family rights to include other couples. The Norwegian provision is similar to article 1938 of the *Civil Code of Quebec,* which provides a right to remain in leased premises after cohabitation ceases (because of death or separation) not merely for a common-law spouse but also for a person related by blood or marriage (Forder, 1999a). As for Belgium, while it refused to amend its *Code civil* to give lesbian and gay couples conjugal status, it nevertheless amended the part relating to property. Two people may now declare themselves to be partners,[109] whether or not their relationship is marital in nature.

Extension of the rights and obligations to couples other than those joined in marriage has the merit of recognizing the diversity in types of households in which the partners support each other. This is a growing social phenomenon, especially at a time when new family and domestic configurations are emerging. In addition, as the Belgian example and the reasoning of Justice Laforest in *Egan* show, the issue of non-marital partnerships is often raised to prevent recognition of lesbian and gay couples. It accordingly serves as a screen for homophobia.

Since the expanded partnership model is not limited to people who have a conjugal relationship, it might offer a solution for those lesbians and gays who object to the disclosure of their relationships out of fear of possible reprisals. Despite their concerns about the mandatory disclosure of their sexual orientation, the lesbians consulted for our study strongly objected to this kind of approach, suspecting that it was designed mainly to camouflage homophobia. Finally and paradoxically, although the proposed expansion seems to correspond to a universalistic vision in that it is not limited to spouses, in its existing form it gives support to a movement toward the privatization of government support and postpones indefinitely the fulfillment of the promise of an egalitarian society.

In its comments on Bill 32, the Conseil du statut de la femme du Québec exhorted the government to:

> [TRANSLATION]
> ... grasp the opportunity to think more extensively about the objectives of our

> social legislation and our policies and the social values that they are supposed to reflect. While correcting the injustices of which same-sex spouses are the victims, adapting our laws to reflect recent social changes and the diversification of ways of life should also be a concern.[110]

Like the Conseil du statut de la femme du Québec, we believe that eliminating discrimination based on sexual orientation from the definition of various forms of conjugal status is an essential first step if same-sex couples are to be treated fairly. However, in our opinion, this is only one step in a much larger process whose objective is an overall reform of the recognition given to conjugal status in public programs. In this context, we showed in Chapter 3, the disparities that exist between the declared objectives of income-security programs, a large number of which claim to support families, and their actual results. For example, we should recall that the recognition of a spouse in social assistance programs results in a major loss of income to female beneficiaries and discourages the creation of families, especially where there are children. However, the Spouse's Allowance or survivor pensions, which are in principle designed to provide income to families in which the women elect not to join the work force in order to do stay at home and care for the children, in fact extend benefits to childless couples. And yet, these benefits are refused to single-parent mothers, who are among the poorest of the poor.

Given the diversification and the fluidity of the ways in which both heterosexuals and homosexuals live, the increase in single-parent and blended families, and the obvious dissociation this creates between conjugal and parental status, it is important to reconsider the relevance of conjugality as the point of reference in public so-called family plans. Under the socializing approach that we advocate, conjugality would be abandoned as a criterion for eligibility in income-security programs in favour of an individual right. Furthermore, the objectives of these plans must, in our judgment, be refocused on the needs of dependants (children, seniors or the disabled) and those of their caregivers.

5.2.5 Substantive equality approach

Unlike the approaches listed above, the substantive equality approach has not been widely discussed by jurists and activists interested in legal recognition of same-sex couples in Canada, although it has been adopted by the Supreme Court of Canada. We find, however, that the approaches and the means used for attaining real equality were at the heart of the concerns expressed by the lesbians we consulted. In this respect, their ideas concerning the stigmatization borne by lesbians as an impediment to the concrete exercise of the right to equality are without a doubt one of the most important contributions of this research.

In Denmark, the stigmatization of lesbians and gays was at the heart of the discussions that preceded the adoption of the first draft legislation on registered partnerships in Europe. Because it took this stigmatization into account, Denmark promoted voluntary rather than *de facto* recognition of same-sex couples. Since then, all the countries that have opted for legal recognition of same-sex couples, with the exception of Canada, have taken this route.

Formal equality requires that the laws give identical treatment to all persons who are in an identical situation. Substantive equality, on the other hand, considers that the same treatment can sometimes lead to discrimination because of the specific conditions of the oppressed group. To use the expression of Catherine MacKinnon (1987, p. 32-45), substantive equality recognizes social inequalities first and then develops the means to overcome them.

To put an end to discrimination based on sexual orientation, we must first examine the social context of inequality in which gays and lesbians live in order to determine their specific needs and then propose the necessary measures. Without excluding the other special characteristics[111] of lesbians and gays, it was clear in the consultations presented in Chapter 4 that homophobia and heterosexism still exist. We also found that disclosure of a person's sexual orientation still has consequences in the workplace and public institutions, not only for lesbians, but also for their children. According to the substantive equality approach, any reform designed to recognize lesbian couples must therefore take into consideration the impact of the disclosure requirement and, more generally, the context of stigmatization. It follows, for example, that when the concept of common-law spouses is broadened to include same-sex spouses, the context of opposite-sex spouses cannot simply be applied to same-sex spouses. Consequently, the measures adopted cannot be the same. Taking possible homophobic reprisals into account requires the development of specific rules recognizing that the public acknowledgment criterion will have a different impact on same-sex spouses. It also requires recognition of the fact that confidentiality of information pertaining to conjugal status is of prime importance. We propose such rules in the next chapter.

Moreover, although more detailed research would be required to show this, it can be assumed that lesbians and gays have for so long been kept in the margin of family law that they are not familiar with its finer details. If this surmise is correct, as our consultations seem to indicate, the substantive equality approach would require us to accompany the expansion of rights with a substantial and concerted effort to inform and educate lesbians and gays. This aspect is also examined in the next chapter.

5.3 Conclusion

In the first part of this chapter, we reviewed the different models of registered partnership that now exist in the western world in order to better understand the background against which the federal and provincial governments have taken positions on the issue of the recognition of same-sex couples. In the second part, we dealt with the approaches to equality on which legislative reform in this area has been and could in future be based. As a result of our analysis, we are of the opinion that the separate equality and partial formal equality approaches, by virtue of their principles and ultimate aims, are inadequate as a means of eliminating discrimination based on sexual orientation in the definition of various forms of conjugal status. As for the formal equality approach, it seems to us to be insufficient because it does not come to grips with the real inequalities suffered by lesbians, inequalities such as homophobia and the resulting stigmatization that have no counterpart in the case of heterosexuals. Consequently, we advocate a dual approach to equality for same-sex couples. Any legislative reform should take a substantive

equality approach to the legal recognition of same-sex couples and a socializing approach to the reform of social programs.

In most northern European countries, legal recognition of same-sex couples resulted primarily from public consultations and legislative reforms carried out by government rather than from legal challenges. In contrast, in Canada governments have tended to react to court challenges rather than taking a leadership role in reforming the law.[112] Almost 20 years after the *Canadian Charter of Rights and Freedoms* came into effect, it is high time that the federal government and the provinces apply the principle of equality without distinction and undertake legislative reforms aimed at ensuring substantive equality for lesbian and gay couples.

Nevertheless, we are aware that the main gay and lesbian organizations in Canada have sought only formal equality for homosexuals. Their approach has more to do with *realpolitik* than with a genuine plan for a just and equitable society based on citizenship and the redistribution of wealth. The strategies chosen are, for the most part, modeled on the prescriptions of the *art of the possible*. The concessions made by the federal and provincial governments have most often reflected electoral expediency and public opinion polls. In this context, any demand which has a broader goal of promoting a society geared to solidarity and universal social support is dismissed as utopian. Consequently, it is urgent to vigorously demand changes in Canada's income-security programs (both federal and provincial) that make rights and obligations dependent on conjugality rather than on parental status and the provision of support for dependent adults. In the following chapter we set out some general principles and make some recommendations in this regard.

Notes to Chapter 5

[1] *Registered Partnership Act*, Law No. 373, June 1, 1989.

[2] *Ibid.*, s. 5(1).

[3] *Ibid.*

[4] *Ibid.*, s. 2(2).

[5] *Ibid*., s. 3(1).

[6] *Ibid*., ss. 4(1) and 4(2).

[7] See "Gays Lose Interest Lesbians Keep On Coming", <http://www.lbl.dk/partstat.htm>, consulted on February 4, 2000, and Martha Bailey (1999, p. 103).

[8] *Act on Registered Partnership for Homosexual Couples*, Law No. 40, April 30, 1993, in force on August 1, 1993.

[9] The report of the International Lesbian and Gay Association may be consulted on this point, <http://www.ilga.org/Information/legal_survey/europe/norway.htm>; consulted on September 12, 2000.

[10] *Ibid.*

[11] *Act on Registered Partnership for Homosexual Couples*, *op. cit.*, section 4.

[12] See <http://www.ilga.org/Information/legal_survey/europe/norway.htm>, consulted on September 12, 2000.

[13] *Joint Household Act*, Law No. 45, July 1992.

[14] Section 1 of the *Homosexual Cohabitees Act*: "If two persons are living together in a homosexual relationship, the provisions of the following laws and regulations concerning cohabitees shall also apply to them as homosexual cohabitees."

[15] The *Registered Partnership (Family Law) Act*, enacted June 23, 1994 and in force on January 1, 1995.

[16] *Registered Partnership Act*, c. 3, sections 2-4.

[17] *Ibid.*, c. 1, section 3.

[18] *Ibid.*, c. 3, section 3.

[19] Information provided by the Swedish Federation for Gay and Lesbian Rights (Riksförbundet För Sexuellt Likaberättigande, RFSL). The figures refer to individuals who are citizens of Sweden and not to couples. The odd number of individuals may result from the fact that some partners are not Swedish citizens and were therefore not counted.

[20] *Recognized Partnership Act*, Law No. 564, 1996.

[21] *Ibid.*, section 6.

[22] As mentioned in *An Act Relating To Civil Unions*, Law No. 91, April 26, 2000, section 1, article 4.

[23] *An Act Relating To Civil Unions*, Law No. 91, April 26, 2000.

[24] *Ibid.*, section 1, article 11.

[25] *Ibid.*, chapter 23, section 1202.

[26] *Ibid.*, chapter 106, sections 5160 and 5161.

[27] *Ibid.*, chapter 23, section 1206.

[28] *Ibid.*, chapter 23, section 1204.

[29] *Ibid.*

[30] *Ibid.*, chapter 25, section 1302.

[31] *Act of 5th July 1997 to amend Book 1 Civil Code and the Code of Civil Procedure in order to introduce provisions regarding registration of partnership*, Staatsblad, 1997. To a large extent, the information in this section is taken from the pamphlet published by the Dutch Justice Ministry entitled *Registered Partnership, Marriage and Cohabitation Contract*, <http://www.xs4all.nl/~nvihcoc/regpartner.html>, consulted on February 5, 2000.

[32] The statistics concerning registered partnerships in the Netherlands can be obtained from the Dutch Central Bureau for Statistics, <www.cbs.nl/nl/cijfers/kerncijfers/sbv0603a.htm>, consulted on February 5, 2000. Denmark's statistics can be found at <www.lbl.dk/ partstat.htm>, consulted on February 4, 2000.

[33] Netherlands Ministry of Justice, *Registered Partnership in the Netherlands: A Quick Scan*, The Hague, WODC, 1999, Table 9.

[34] *Ibid*., pp. 27-28.

[35] *Ibid.*, p. 30.

[36] Netherlands Ministry of Justice, *Registered Partnership, Marriage and Cohabitation Contract*, Pamphlet, p. 2, <http://www.xs4all.nl/~nvihcoc/regpartner.html>, consulted on February 5, 2000.

[37] *Ibid*., p. 5, under the heading *When does the registered partnership end?*

[38] *Ibid.*

[39] *Ibid.*, p. 4, under the heading *Rights and Obligations.*

[40] *Ibid.*

[41] *Shared Custody And Guardianship Act Of 24th December 1997*, Staatsblad, 1997, 772, referred to in Forder (1999b, p. 67).

[42] See <http://coc.guts.nl/index.html?file=marriage>, consulted on November 10, 2000. Since the Act had not yet been translated into English, we could not provide the exact reference when this report was written.

[43] See "The Latest about Lifting the Ban on Marriage for Same-Sex Couples in the Netherlands", NVIH-COC, <http://coc.guts.nl/index.html?file=marriage>, consulted on November 10, 2000.

[44] *Deuxième congrès national du collectif pour le contrat d'union civile et sociale*, <http://perso.club-internet.fr/ccucs/docu/congres1998.html>, consulted on December 10, 2000.

[45] Section 515-8 of the *Code civil* now provides that: [TRANSLATION] "*Concubinage"* is a *de facto* relationship, characterized by stability and continuity, between two persons of the opposite or the same sex who live together as a couple.

[46] For critiques of the different issues and limitations of the various models, see Théry (1998), Grosjean (1998), Waigi (1998) and Groupe de réflexion: conséquences financières de la séparation des couples (1998).

[47] See in this regard the work of Christine Boutin (1998), which is representative of the position maintaining that the PACS would harm the family as an institution. For a chronology of the movements opposing or supporting the PACS, read the report by the Observatoire du PACS, <http://www.chez.com/obspacs/rapport_observatoire_du_pacs_1999.htm>, consulted on December 10, 1999.

[48] *Loi du 15/11/99 relative au pacte civil de solidarité*, No. 99-944. The information concerning PACS is taken from the pamphlet issued by the French Ministry of Justice, *Pacte Civil de Solidarité (PACS), Mode d'emploi*, <http://www.justice.gouv.fr/justicef/pacs2.html>, consulted on February 6, 2000.

[49] S. 515-1 of the *Code civil*.

[50] S. 515-2 of the *Code civil*.

[51] S. 515-3 of the *Code civil*.

[52] S. 515-7 of the *Code civil*.

[53] *Ibid.*

[54] S. 515-4 of the *Code civil*.

[55] *Ibid.*

[56] S. 515-5 of the *Code civil.*

[57] S. 4, paragraph I of the *Code civil.*

[58] Criticisms of the PACS compiled by the Observatoire du PACS, and may be consulted at <http://www.chez.com/obspacs/rapport_observatoire_du_pacs_1999.htm>; consulted on December 10, 1999.

[59] Hungarian Civil Code, s. 578g, paragraph 22, referred to in Forder (1999a, p. 46).

[60] Hungarian Civil Code, s. 578g, paragraph 1.

[61] Martha Bailey (1999, p. 125) refers to section (2a) of the Act, which provides that: "No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship".

[62] See in this regard *Baehr* v. *Miike*, 1996 WL 694235 (Haw. Circ. Ct.).

[63] *An Act relating to Unmarried Couples*, 1997 HI H.B. 118, in force on July 1, 1997.

[64] *Ibid.*, s. 2.

[65] Referred to in Martha Bailey (1999, p. 128): "Section 5 of the Act imposes the following requirements on those who want to enter into a reciprocal beneficiary relationship: each party must be at least 18 years old; neither party may be married or a party to another reciprocal beneficiary relationship; the parties must be legally prohibited from marrying one another; each party must have freely consented to the reciprocal beneficiary relationship, without force, duress, or fraud; and each party must sign a declaration of reciprocal beneficiary relationship."

[66] *Le Contrat d'Union Civile et Sociale, Rapport de législation comparée*, p. 39, <http://www.france.qrd.org/texts/partnership/france-senat-97-lc28-fr.html>, consulted On February 7, 2000.

[67] *An Act Relating To Civil Unions*, Law No. 91, April 26, 2000, chapter 25, s. 1301.

[68] *Ibid.*

[69] *Ibid.*, chapter 25, section 1303.

[70] Enacted November 23, 1998, the law came into force on January 1, 2000.

[71] See in this regard the interpretation offered by Leleu, Couquelet and von Frenckell (1999).

[72] S. 1476, par. 1 of the *Code civil*.

[73] S. 1477, par. 3 of the *Code civil*.

[74] *Ibid*., par. 4.

[75] *Ibid*., par. 2.

[76] S. 1478 of the *Code civil*.

[77] S. 1476, par. 2 of the *Code civil*.

[78] Enacted on July 15, 1998, the *Stable Couples Act* came into force on October 23, 1998.

[79] *Stable Couples Act,* s. 21, referred to in Forder (1999b, p. 52-53).

[80] *Stable Couples Act,* s. 1.2.

[81] *Ibid.,* ss. 11 and 28.

[82] *Ibid.,* ss. 4 and 23.

[83] *Mutual Assistance Act,* Statute 19/1998, in force in 1999.

[84] *Ibid.,* c. 3, s. 35.

[85] *Ibid.,* c. 4, s. 45.

[86] *Joint Household Act,* Law No. 45, July 4, 1992.

[87] We mentioned earlier in Chapter 2 that the situation is different in Quebec. Under pressure from women's groups, the lawmakers preferred to keep *de facto* spouses outside the framework of private family law as governed by the *Civil Code*. *De facto* opposite- and same-sex spouses do not accordingly have access to rights relating to the family residence, division of the family property when the relationship breaks down, the duty to support the partner, intestate inheritance and consent to treatment when one partner lacks legal capacity. All these rights are restricted to married spouses in Quebec.

[88] *Miron* v. *Trudel*, [1995] 2 S.C.R. 418, par. 155.

[89] Bill C-23, Royal sanction, June 14, 2000.

[90] *Ibid*., subs. 48(2).

[91] *Ibid*., subs. 259(1).

[92] See Chapter 1 on this topic, especially the section on the unease felt with respect to adherence to the model of the patriarchal family.

[93] This was stated by Justice Claire L'Heureux-Dubé in *Canada (Attorney General)* v. *Mossop*, [1993] 1 S.C.R. 554, p. 634.

[94] *Law 100, The Definition of Spouse Amendment Act, op. cit.*

[95] *Family Services Act, op. cit.*

[96] British Columbia Law Institute, *Report on Recognition of Spousal and Family Status*, Vancouver, November 1999.

[97] *Amendments Because of the Supreme Court of Canada Decision in M.v. H. Act, op. cit.*, s. 9.

[98] *Ibid.*, s. 7.

[99] *Brown* v. *Board of Education*, 347 U.S. 483 (1954).

[100] *Baker* v. *State*, Vt. 98-032 (decision dated December 20, 1999), at p. 42.

[101] *Ibid.*

[102] *Andrews, op. cit.*

[103] *M.* v. *H., op. cit.*, par. 129.

[104] *Ibid.*, par. 130.

[105] This distinction could be explained by the fact that, as a result of the marriage ceremony, married persons have made a public commitment, whereas in the case of *de facto* spouses no public formalities occur. This would explain the need to base the determination on concrete actions.

[106] S.C.1999, c.34, subs. 25(4).

[107] Conseil du statut de la femme du Québec, *Commentaires sur le projet de loi concernant les conjoints de fait de même sexe*, p. 30.

[108] *Egan, op. cit.*, par. 19 (Laforest J.).

[109] Forder (1991a). However, the partnership may be terminated by a simple unilateral declaration by one of the parties, and no right to support or inheritance is provided. During the term of the partnership, each partner is responsible for the debts of the other and the home in which the partners live may not be transferred by one without the consent of the other, even

though separate ownership rights are maintained. Catalonia, for its part, adopted a law in 1998 that governs the relations between persons who live together and support each other. The application of the rights and obligations requires either that the partners have cohabited for a minimum of three years or that they have established their partnership by a notarized agreement. There are distinctions depending on whether there is an economically interdependent partnership or whether care is provided for a senior by a younger person. As a rule, however, the law primarily provides rights for the surviving cohabitee when the other cohabitee dies. This may include a right to remain in the home, to financial support and to part or all of the estate if there is no will.

[110] Conseil du statut de la femme du Québec, *op. cit.*

[111] Counsel for the defendant in *M.* v. *H.* attempted to persuade the Supreme Court of Canada that relationships between lesbians are based on a dynamic of equality. They argued that the model for these relationships was not the dependence that provides a foundation for family law, the purpose of which is to mitigate inequality by imposing a redistribution of wealth and resources when relationships break down. While accepting that there is evidence to support this argument, the Supreme Court held that the special conditions in which lesbians live does not completely preclude them from claiming support and the Court distinguished between the right to claim support and the right to obtain it. See *M* v. *H.*, *op. cit.*, par. 110.

[112] See on this point Martha Bailey (1999, p. 94-95).

6: DIRECTIONS FOR REFORM AND RECOMMENDATIONS

In this final chapter, we outline a number of directions for reform with a view to providing a more adequate response to the problems identified by our research. We make 13 recommendations with the objective of providing lesbians with an unequivocal right to equality, respect and dignity. Our examination of the legal recognition of same-sex couples and its consequences for Canadian income-security and tax programs has also led us to ask more fundamental questions about the criteria on which the recognition of various forms of conjugal status are based, their use in public programs and their exclusionary effects on households that do not meet these criteria. For this reason, the recommendations in this report go beyond simply extending to same-sex couples the rights and obligations associated with marriage and common-law partnerships. They invite a complete rethinking of conjugal regimes in both private law and Canadian income-security and taxation policies in order to adapt them to the diversity in the organization of domestic relationships and the fluidity of conjugal and family status that exist today.

The proposals made in this study are of two kinds. They are designed, on the one hand, to ensure real equality for all couples, whether those couples consist of two women, two men or a man and a woman. They are also designed to eliminate the existing hierarchy in forms of conjugal status based on both the sex and the sexual orientation of the partners. In our opinion, the law should not seek to reinforce the difference between the sexes by giving superior legal status to heterosexual conjugal relationships and to the institutions that maintain this differentiation and the resulting domination. Rather, it should seek to actively combat social hierarchies or at least to neutralize their effects. Enacting laws that reflect the diversity in gender-based models of conjugal relations will serve to gradually deconstruct the idea that heterosexuality is the only model for the organization of sexuality and human relations that is capable of providing a foundation for society and for insuring its continuation.

Above and beyond extending to same-sex couples the rights and obligations associated with marriage and common-law partnerships, the federal and provincial governments should ask whether attaching advantages to conjugal relationships in certain programs is compatible with the fluidity and diversity of household composition. Over the last thirty years the increase in the number of divorces, common-law relationships, blended families and births out of wedlock reflects profound changes in the institution of marriage and its importance. The rigid code governing Christian marriage and the conjugal family is no longer the norm it once was. Couples that have adopted new ways of life instead of marriage no longer face general disapproval as they once did, and traditional standards are often regarded as outdated. These changes, combined with the increase in the number of people who live alone, greater acceptance of same-sex couples and the increase in the number of non-conjugal households in which the partners are economically interdependent, are helping to redefine the family. They should also lead to changes in the laws as well as in social and tax policies in order to better reflect contemporary domestic realities. To this end, governments should promote values such as equity, equality, freedom of choice, mutual affection, autonomy of the partners and the

protection of vulnerable persons, all of which underlie the public debate on conjugality (Bailey, 1999, p. 13). At the present time, neither family law nor the related policies reflect these fundamental values and the changing customs and practices relating to conjugality.

Given the benefits and exclusions that depend on conjugal status, our recommendations are aimed, on the other hand, at restricting the use of conjugality as a criterion in Canadian tax and income-security programs. To better reflect the diversity in ways of domestic life and to meet individual needs in a fair manner, these programs should be reoriented in such a way as to respect the principle of universality and to provide support for children, other persons with special needs (e.g. the disabled, sick or elderly), and their unpaid caregivers.

In this research, which was necessarily limited, we have not attempted to set out proposals for an in-depth reform of treatment of conjugal status in private law or in Canadian income-security and tax programs. We believe, on the contrary, that this should be the object of a major social debate involving many stakeholders, specialists and experts, in particular feminist organizations and gay and lesbian groups from across the country. We believe the federal government should provide a forum for this debate in the near future. We accordingly propose the establishment of a Commission of Inquiry into the Transformation of the Family, with a mandate to examine the status of couples and families in private law as well as in Canadian social and tax policies. The proposed terms of reference for this commission are outlined in Recommendation 13 of this report.

However, we are also of the opinion that the provincial and federal governments should not wait for the findings of a possible Commission of Inquiry but, rather, should adopt the measures necessary to eliminate discrimination based on the sex of spouses as soon as possible. Thus, Recommendations 1 to 4 should be implemented in the short term to ensure that same-sex couples enjoy equality of status with married couples in terms of rights and obligations. These recommendations do not, in our view, create any condition that is likely to impede the attainment of the objectives that an eventual Commission of Inquiry might propose. To presume otherwise would suggest that the people of Quebec and Canada do not support the constitutional guarantees of equality for the gays and lesbians of this country.

Four principles could serve to guide governments in their implementation of reforms designed to provide substantive equality for same-sex couples and, more generally, for *de facto* spouses, as well as a better distribution of wealth among Canadian households, namely:

- eliminate from Canada's laws any distinction based on the sex of the partners in the rules governing eligibility for conjugal status and the provisions respecting filiation;
- in order to achieve substantive equality, take into account the stigmatization experienced by lesbians and gays when making the legislative changes required to give legal recognition to their unions;
- reform the legal framework of non-marital conjugality in order to respect freedom of choice and the autonomy of the partners and to protect vulnerable persons;

- reduce as much as possible the positive or negative financial consequences of conjugal status in Canada's tax system and income-security programs so that the decision to create a union is made on the basis of the emotional and moral commitment between the partners and not on financial considerations.

As we bring our study to a close, we must conclude that same-sex couples, like opposite-sex couples, have differing needs for legal recognition of their unions. For many reasons, which are set out in Chapter 4, a number of lesbians, like many heterosexual women, would like to maintain the unregulated character of their relationships and avoid any form of legal framework. They would gladly waive their rights and obligations as common-law spouses. Others, who are more numerous, would like to see recognition as common-law spouses given to all same-sex couples in Canada, which is not the case at the present time. Yet others would like to see a broader legal recognition of the status of spouse, making them eligible for some of the rights conferred by the *Civil Code of Quebec,* for example, consent to treatment when one of the partners lacks legal capacity, the right to inheritance in the absence of a will, access to adoption services for same-sex couples and to artificial insemination for lesbians. Finally, others would like to be able to marry or to obtain the rights and obligations that are conferred by marriage especially as concerns family property, alimony, the right of filiation for same-sex parents who adopt and for the partner of a lesbian mother who acts as a co-parent. In order to meet these needs, it is important to establish legal recognition of same-sex spouses with variations to reflect the diversity in their ways of conjugal life.

6.1 Eliminate discrimination based on the sex of the partners

6.1.1 Include same-sex couples in the legal definition of a common-law partnership

As of October 2000, six provinces had not yet initiated any reforms to give same-sex couples the same rights and obligations as unmarried heterosexual couples. This legal situation persists even though the laws governing families in those provinces are not substantially different from those in Ontario that the courts, including the Supreme Court of Canada in *M.* v. H.,[1] found to be discriminatory. Nova Scotia, in October 2000, was examining a bill that would recognize same-sex relationships in a registered partnership regime that would be available to all couples living in marriage-like relationships. Although three provinces (British Columbia, Ontario and Quebec) have already amended some of their statutes to eliminate discrimination based on sexual orientation, distinctions still exist. In the short term, the provinces and territories that have not already done so should redefine *de facto* conjugality to include same-sex couples. This reform would have legal effects in both private and public law, for example in terms of social insurance, public assistance and taxation.

Recommendation 1: We recommend that the provinces and territories immediately amend all their statutes conferring rights and obligations on *de facto* spouses so as to eliminate any distinction based on the sex of the partners. In so doing, the terminology adopted in Ontario in the *Amendments Because of the Supreme Court of Canada Decision in M. v. H. Act* should not be used because it entails a distinction based on sex. The provinces and territories should instead use the terminology put forward by Quebec in Bill 32 or by the federal government in Bill C-23.

6.1.2 Give gays and lesbians the right to marry

Limiting the institution of marriage to couples consisting of a man and a woman is still tantamount to an assertion of a social hierarchy based on the sex and sexual orientation of the partners. According to the anthropologist Renée B. Dandurand, marriage has been the institution par excellence for the social standardization of relations between the sexes:

> [TRANSLATION]
> … to formalize the sexual division of labour, to control the exercise of sexuality and procreation, to legitimize children and, above all, to give them a father, marriage has played a fundamental role in the history of humanity (Dandurand, 1988, p. 13).

This social arrangement, which meant that marriage, family and the unit of subsistence were one and the same, has changed profoundly in modern times. The social functions of marriage, including procreation and the care of children, have changed even more over the last 30 years of the post-modern era. These traditional functions can no longer logically serve today to deny same-sex couples the right to marry. In a report submitted to the Law Commission of Canada, Martha Bailey (1999, p. 138) even goes so far as to suggest the gradual elimination of civil marriage and its replacement by a regime of registered civil unions conferring rights and obligations similar to those that marriage provided in the past and leaving the celebration of marriage to religious organizations. This is a proposal that we support, although we feel that it is realistic only in the long term.[2]

In the meantime, the federal government must act to eliminate discrimination based on the sex of the partners with respect to access to conjugal status and give lesbians and gays the legal right to marry. Following the reasoning of the Supreme Court of Canada in *Vriend*, it is possible to argue that, if the federal government refuses to legislate to extend the right to marry to lesbians and gays, it is violating section 15 of the *Canadian Charter*.[3] If this argument were accepted, the battles being initiated province by province to obtain the right to marry would no longer be necessary. Martha Bailey (1999, p. 60-61) suggests that it would be preferable for the federal government to enact such legislation rather than to leave matters yet again to the courts. Although we support this proposal, we feel that the federal government should not initially take unilateral action out of respect for Quebec's distinctiveness and the coherence of its legal regime.

It should be evident that we are not in favour of creating a separate registered partnership regime for same-sex couples, even if it were to confer the same rights and obligations as marriage. In our opinion, the doctrine of separate equality applied to same-sex unions is a manifestation of heterosexism and lends it support. We showed in Chapter 5 that registered partnerships were established as alternatives to the right to marry for lesbians and gays. Registered partnership models also have shortcomings with respect to the legal recognition of two-parent gay and lesbian families. While the greatest benefit of this formula is the breach it creates in the dominant heterosexist discourse in family law, refusal of the right to marry nevertheless perpetuates the idea that gays and lesbians are less capable of establishing stable couples and families than heterosexuals (McCarthy and Radbord, 1998, p. 120; Lahey, 1999a;

EGALE, 1999). This analysis is widely shared by the lesbians we consulted as part of our research. In their view, recognition of the right to marry would give them a choice, and, for those wishing to exercise this right, it would also resolve many questions relating to property, taxation and the custody and adoption of children.

Finally, if registered partnership regimes were adopted in Canada, they would necessarily vary according to when they were adopted, the jurisdiction in which they were adopted and their content, thus giving rise to potential difficulties of recognition from one province to another. Since mechanisms for interprovincial recognition already exist for marriage, access to marriage would eliminate many complications (Bailey, 1999; Bala, 1999).

The consultations held with lesbians produced the same conclusion. A majority of the people of Canada share this view.[4] If the federal and provincial governments truly feel that same-sex couples should be treated with as much respect, consideration and dignity as opposite-sex couples, they should grant them the unequivocal right to the same choice of conjugal status. If substantive equality is to be achieved, the right to marry should be available to same-sex couples, as it already is for other couples.

Recommendation 2: We recommend that the federal government take the initiative by convening a conference of all the provinces and territories and urging them to legislate so as to permit marriage between persons of the same sex. If this does not occur, we recommend that the government use its constitutional power to enact legislation allowing same-sex couples to marry.

6.1.3 Give parental rights to same-sex co-parents

These legislative reforms would, however, be incomplete if they did not also include parental rights for same-sex partners. We did not examine this question in detail because it was not the central focus of our study. We are aware that a reform proposal to this effect would require further research into male and female two-parent families and the welfare of children who have one or two homosexual parents. However, we observe that the desire to give birth to a child and to create a family is a healthy and normal desire that cuts across all sexual orientations. We also observe that the fact that a child is raised with one or more homosexual parents does not jeopardize the child's development, as demonstrated in the many studies surveyed by Julien, Dubé and Gagnon (1994) in a review article published in the *Revue québécoise de psychologie* and by recent court decisions in Ontario and Alberta.

Consequently, we recommend that the provinces and territories examine this issue and amend their laws and related regulations to eliminate discrimination based on sexual orientation with regard to eligibility for adoption services. We recommend that they assess candidates by applying the usual criteria of adoption services that take into account the personal situation and parenting ability. Ontario, British Columbia and Newfoundland have already implemented this reform with respect to adoption and Saskatchewan is preparing a bill on the subject. These are steps in the right direction. In addition, the provinces and territories of Canada should, in the interests of the child, permit the partner of a lesbian mother who is committed to having a family and who acts to all intents and purposes as the child's co-parent, to adopt the child.

The same should be possible for the spouse of a gay father who is a child's "psychological father". This right would give the child's "psychological" mother or father parental authority and a filial link. In fact, this right already exists in Ontario, Alberta and British Columbia. In line with the recommendations of the Royal Commission of Inquiry on New Reproductive Technologies and on the basis of the studies referred to earlier, which show that having two parents of the same sex does not harm a child's psycho-social development, we also recommend that lesbian couples wishing to have a child together be eligible for artificial insemination services and that the non-biological mother be allowed to register as the second parent at birth.

Recommendation 3: We recommend that the provinces and territories amend their statutes and regulations so as to eliminate discrimination based on sexual orientation with regard to eligibility for adoption services and artificial insemination. In the case of adoption, candidates should be assessed according to the usual criteria of personal situation and parenting ability.

Recommendation 4: We recommend that, in the interest of the child, the provinces and territories amend their statutes and regulations governing filiation and adoption in order to allow the spouse of a lesbian mother to be registered as the parent of a child at the time of birth. In addition, the spouse of a lesbian mother or a gay father should have the right to adopt the child of his or her partner, as is already the case for heterosexual couples when the child does not already have a second parent or when the parental authority of this person has been removed.

Once implemented, these four reforms would allow same-sex couples to enjoy legal equality with opposite-sex couples in Canada. These legislative amendments cannot be considered to be unrealistic or utopian since the Netherlands, a country with a civil-law tradition, has recently carried out such a reform and several other countries have already given same-sex couples parental rights. In this context, elimination of all distinctions based on sexual orientation with regard to access to conjugal status and the provisions governing filiation essentially requires the political will to act in accordance with the spirit and the principles of equality set out in the *Canadian Charter*.

6.2 Rethink the legal framework of conjugality outside marriage

The lesbians consulted during our study expressed strong resistance to the "default" rules governing common-law partnerships in Canada that would force them to declare their conjugal status against their will. As we saw in Chapter 4. some of their objections relate to the stigmatization experienced by homosexual persons. Because lesbians (and gays) do not in practice have the same freedom as heterosexual persons to affirm their sexual orientation and their conjugal status without running the risk of prejudice, many of them will find it difficult to meet this requirement of the law. As things now stand, *de facto* or automatic recognition of same-sex, common-law unions could have the effect, for many lesbians, of confirming the clandestine nature of their intimate relationships rather than reinforcing their legitimacy. This situation would be contrary to the primary purpose of the legislative reforms designed to bring about equality. A little later we will propose a series of concrete measures designed to

mitigate some of these problems and to promote the exercise by same-sex couples of their right to equality.

The other aspect of the objections raised by the lesbians consulted relates to the mutual support obligation that would result from legal recognition as a common-law spouse. In Chapter 3, we saw that this recognition in specific laws gives rise to rights and obligations that are translated into various economic advantages and disadvantages. It is a matter of concern that the poorest same-sex spouses and lesbian mothers are those most likely to suffer disadvantages because, for them, equality will result not in improvements to their standard of living but in a loss of economic rights. This loss, let us recall, results from the presumption that spouses are economically interdependent, a presumption which is currently the basis for most public income-security programs. This measure, which is geared to the historic dependence of wives in a marriage, accordingly deprives those people, whatever their sexual orientation, who are economically independent with respect to their partner of financial assistance from the state to ensure their basic needs.

Because of discrimination based on sex and sexual orientation in employment and the costs associated with the presence of children, lesbians have to depend more than gays on public income-security programs. We are especially afraid that lesbian mothers living with their spouses will have to choose, as do many heterosexual women, between social recognition of their couple and their financial interest in not disclosing their conjugal situation. We shall deal with these questions and the reforms proposed to remedy them in greater detail in the section concerning the creation of a Commission of Inquiry.

A dilemma is then faced by all couples in which the partners enjoy financial autonomy: either the partners are recognized as spouses and enjoy protections while losing the benefits of certain government support measures, or they are treated as independent persons for the purpose of government programs and for matrimonial regimes but have no protection when the relationship breaks down or one of the partners dies. Throughout this study we have been discussing rights but we are aware that these rights also involve responsibilities. For that reason, we cannot accept that lesbian partners, no more than other spouses, should be able to claim this status solely for the purposes that would benefit them and refuse it for the purposes that would place them at a disadvantage. Nevertheless, it seems essential to us that values such as independence and freedom of choice — to which the people of Canada adhere in the field of family law — be respected. Adherence to these values leads us to question the existing legal framework for *de facto* conjugality.

6.2.1 Rethink the rights and responsibilities relating to the status of common-law spouse

Lesbian couples as well as many heterosexual couples and mothers living in blended families express dissatisfaction with the current common-law union regime that does not adequately reflect the changes in how they live as families and the variability of the economic support provided by their new partner. Having noted these expressions of dissatisfaction, we feel that it is important to rethink the status given to conjugality outside marriage.

In-depth reform that would eventually transform the existing regime could be implemented in several stages. In the short term, we think the first step should be to enlarge the legal framework for a common-law partnership and seek as far as possible to standardize the rights and responsibilities that go with it and the criteria governing its recognition. At the present time, recognition of *de facto* conjugality, including that of opposite-sex couples, is still partial and differs greatly across the various regimes and jurisdictions. There are in fact major differences in the rights and obligations conferred on married persons and those given to common-law spouses in terms of support, joint property, inheritance, consent to care, domestic contracts and, in government programs, in terms of taxation, as well as insurance and assistance programs. We must re-examine the reasons for this hierarchy of rights accorded on the basis of marital status and review their relevance in light of the decision of many couples not to marry.

At the outset, it must be recognized that common-law relationships vary to a certain extent in terms of stability, and that some are the result of a decision by the partners to "try out" living together. Marriage is, at least in theory, the result of a conscious and planned choice. This situation might justify a policy in which the rights and obligations relating to *de facto* conjugality are not a mere copy of those conferred by marriage. Although it is likely that at the start of a new relationship, the partners do not necessarily think of the consequences of a certain pooling of their resources or the need to support each other, the more time passes the more probable it is that the assets and property of the partners become combined and that the expectations of the partners for the protection of their resources increase. After a certain point, these expectations are no different from those held by couples who chose to marry.

In Quebec, when the *Civil Code* was last reformed, a significant number of groups, including the Conseil sur le statut de la femme, concluded that it was preferable to keep non-marital relationships outside the *Civil Code* in order to respect the partners' freedom of choice. As a result, couples in a *de facto* relationship are not automatically able to enjoy certain rights such as spousal support, consent to treatment where one of the partners does not have legal capacity, the rules governing the division of family property in the event of separation, and inheritance in the absence of a will. It must be recognized that this decision by the legislators has created an incongruous situation because *de facto* conjugality has since been recognized for the purposes of insurance, assistance and tax programs on the presumption that there is mutual support and that resources are pooled. On the other hand, for the purposes of private law, the presumption of independence is maintained. This inequity between public and private law creates a situation of factual inequality between married and unmarried spouses.

It should also be noted that more than ten years have now passed since the work of the Commission responsible for reforming the *Civil Code* and the question of the rights of same-sex couples was never on the agenda. Since then, thinking has changed and homosexuals and their couples have been given fundamental and constitutional rights. Quebec has enacted Bill 32, which recognizes same-sex spouses in the province's statutory law and, at the same time, it has adopted the concept of *de facto* conjugality. Since the Government of Quebec has decided to impose conjugal status on unmarried couples under public law, it can no longer argue that the silence of the *Civil Code* is legitimate and justified by the need to respect the freedom of choice of those who do not wish to marry. The question remains: should

common-law spouses be given the same rights and obligations as married couples in Quebec and in the rest of Canada? It is assumed, in the process we are proposing, that same-sex couples would already have been given access to both forms of conjugal status in all provinces. In our judgment, whether or not a decision is made to retain a distinction between the rights and obligations conferred on some as opposed to others, this question requires an in-depth examination and public debate in which gay and lesbian organizations across the country should be significantly involved.

As we indicated in Chapter 2, the cohabitation test was thought to be essential to the legal definition of common-law partnerships. The minimum duration of cohabitation currently required to gain this status varies from one program to another and from one jurisdiction to another, although it is generally between one and three years. With Bill C-23, the federal government standardized this test in all its statutes by requiring a minimum period of one year's cohabitation. We find this condition reasonable with respect to government programs. However, the requirement of a longer period of cohabitation for all programs subject to private and public law (for example, a minimum period of three years' cohabitation) might better reflect the less definite commitment of couples living together on a trial basis. Moreover, regardless of the duration of the cohabitation that governments require in their definition of *de facto* conjugality, it is preferable that this criterion be the same in all the statutes, provinces and territories, and within the federal government's jurisdiction. To achieve this, the federal government should invite the provinces and territories to negotiate an agreement which would standardize the legal definition of a common-law partnership, together with the content of the related rights and obligations. This having been said, the desired uniformity could well clash with the historical asymmetry of the system of private law in Canada, governed as it is by both common law and the Quebec *Civil Code*.

Recommendation 5: We recommend that the federal, provincial and territorial governments undertake as soon as possible a reform of the laws governing the rights and obligations attached to the status of *de facto* spouse, as well as the criteria governing recognition of this status, without making any distinctions based on the sex of the partners. Changes must be made to private and government programs, as well as to specific measures such as consent to treatment where one party lacks legal capacity, and inheritance in the absence of a will. In doing so, governments, including that of Quebec, should make every effort possible to agree on a definition of common-law partnerships or *de facto* unions and to ensure as much uniformity as possible among programs, on the one hand, and among jurisdictions, on the other.

6.2.2 Make the principle of automatic recognition of spouses more flexible

Because *de facto* conjugality is a status that is imposed on people who cohabit and who meet certain other criteria, and because this status by default violates freedom of choice, a question arises: is there a better legal framework which would respect freedom of choice? Should there be an "opting in" or an "opting out" formula for the partners in a regime governing common-law partnerships?

We pointed out earlier in Chapter 2 of this report that the Law Reform Commission of Nova Scotia discussed this issue as part of its review of the conditions under which a couple living

together could register or be registered for regimes governing matrimonial property. We may recall that the Commission chose opting out as the mechanism that best respected the autonomy and freedom of choice of unmarried partners. In the Commission's view, many people are unaware of the legal consequences of their non-marital union and learn of them, to their own expense, only when the relationship breaks down. The Commission concluded that a formula allowing spouses to opt into matrimonial regimes is based on a false premise of autonomy. This was also the conclusion drawn by Justice L'Heureux-Dubé in *Miron* v. *Trudel*[5] when she stated that a free union is not necessarily the choice of both partners (in the case of opposite-sex couples), but can be the result of a choice by only one partner and lead to exploitation of the other.[6]

According to the Commission, the opting out mechanism has the merit of protecting the more vulnerable party in a couple and encouraging spouses to pay greater attention to the economic consequences of their union. Furthermore, it permits these couples to avoid a legal vacuum and to be treated in the same way as married persons who also have the right to opt out of the private family law regime by concluding a domestic contract. We should note, however, that the Nova Scotia Commission did not examine the interaction between private family law and public regimes, in this case tax and public income-security programs. If a couple decides to opt out of the application of the private regime, for example, the division of the family property or the provision of support, it does not follow that social assistance programs will treat them as though they were single.

It might be tempting to assume that the extension of the right to marry without distinction based on the sex of the partners would solve this problem for lesbian and gay couples. By marrying, the partners would opt in whereas, by refraining from marrying, they would opt out. However, this solution does not take into account the fact that some people will elect not to marry because of their personal or fundamental values such as religious beliefs or reasons of conscience. Many lesbians (and gays) will refuse to marry because they consider this institution to be patriarchal, as do many heterosexual women who have turned their back on it by choosing simply to cohabit. Consequently, the liberalization of marriage will not resolve this problem.

In our opinion, the principle of freedom of choice is not the only criterion for deciding this question. The protection of vulnerable persons must also be considered because not all conjugal relations between persons of the opposite sex or the same sex are as egalitarian as we might wish. For this reason, we prefer a mechanism for opting out of a common-law partnership. This would obviously require that both partners in a couple agree on this decision. It should not be forgotten that very few heterosexual couples living in *de facto* relationships avail themselves of the opportunity to conclude a domestic contract even though such contracts are authorized by the legislation governing matrimonial property. It is a good bet that lesbian and gay couples will not protect themselves any better in the event of the death of one of the partners or the breakdown of their relationship. Out of negligence, many couples will simply postpone the registration of their participation in a cohabitation relationship and, as a result, when the union breaks down, they will find themselves with no protection. The voluntary opting-out option has the merit of offering a certain degree of

protection when the couple fails to take concrete action. The need to protect vulnerable persons also includes the protection of children. Consequently, in the greater interest of the child, opting-out should not have any legal consequences for the rights and responsibilities of the parents.

Moreover, if we respect the independence and freedom of choice of the parties, it would be logical that those couples who decide not to marry and opt out of the regime governing common-law partnerships not have any of the rights, benefits and obligations linked to marriage or to common-law status. For example, they would not be eligible for the Spouse's Allowance since there would be no presumption of mutual assistance and support. In order to protect vulnerable parties, however, some rights and obligations could be granted to partners who opt out of the regime of common-law relationships, such as joint ownership of certain property and the right to remain in the place of residence. These minimal rights and obligations could also be extended to all people who share lodging.

While wishing to respect the independence and freedom of choice of the parties, we must recognize that, from the standpoint of equity and social justice, this individual freedom cannot be exercised selectively: all those who opt for a particular status should have the same advantages and disadvantages. Thus, whether the opting-in or opting-out option is adopted, a central national register should be created. When the partners in a same-sex or opposite-sex couple agree to register their withdrawal from the common-law regime, they would be giving notice of their status to all the authorities concerned, whether government agencies responsible for administering taxation, insurance or assistance programs or the courts that might be asked to decide on disputes involving matrimonial property, inheritance or alimony, or private companies in the areas of insurance or retirement plans.

Since one of the objectives of registering withdrawals is to ensure that people do not change their status according to the advantages and disadvantages involved at a particular moment in time, it might be tempting to make this opting-out irrevocable for the duration of the relationship. Imposition of such a condition would not, however, take account of the constant changes that occur in conjugal life. Conjugal relations change over time in response to the arrival of children, the occurrence of illness or accidents, the changing economic circumstances of the partners, and the stability of their relationship. This is why we feel it would be appropriate for the couple to have an opportunity at regular intervals to rescind its withdrawal. The intervals between these opportunities could be, for example, four or five years. Although the details of this model need to be better defined, it has the merit of not definitively determining the legal framework of a conjugal relationship while ensuring that people do not pick and choose their changes of status on the basis of the specific advantages and disadvantages involved.

Recommendation 6: We recommend that the federal government, the provinces and the territories create a central register of withdrawals from the regime governing common-law partnerships. This centralized mechanism would allow opposite- or same-sex spouses wishing to live outside the framework of the common-law regime to register their joint desire to renounce spousal status. This opting out would have the effect of absolving the parties, for a fixed period of time, of the benefits and obligations linked to *de facto* conjugality, whether

under private law, taxation, social assistance, insurance or income-security programs. However, in the greater interest of children, this exclusion would not have any legal effect on parental rights and obligations.

Once the reforms eliminating discrimination based on the sex and sexual orientation of the partners are in place, same-sex and opposite-sex couples would have the choice between a relationship model that has no official recognition, a common-law union regime from which they could exclude themselves, or a matrimonial regime.

6.3 Fight stigmatization with positive actions

The consultations held with lesbian groups clearly showed the insufficiency of the formal equality approach. Even if the federal, provincial and territorial governments eliminated all discrimination against same-sex couples from their laws, many lesbian respondents asserted that they would continue to hide their conjugal status from government or their employer out of fear of reprisals. Let's not forget that our respondents are involved in their community, and that they are not vulnerable or isolated lesbians. This attitude would have been even more widespread if we had consulted lesbians who are personally less assertive or less committed socially, older or Aboriginal lesbians, those from minority ethnocultural communities or lesbians living in rural or isolated areas, in other words lesbians who have to deal with more traditional and more homophobic communities.

If the federal government takes the formal equality approach, it will have accomplished only part of the objective to be attained. Institutional heterosexism and homophobia appear to be so ubiquitous that a majority of lesbians would prefer not to receive the benefits that recognition of their conjugal status would bring if it requires them to disclose their sexual orientation. What is the point of a right if it cannot be exercised? What purpose will the last twenty years of struggle for the right to equality for same-sex couples[7] have served if the results achieved benefit only a minority of couples who already enjoy a certain recognition from the people around them?

We know how secrecy or lies are strategies that keep lesbians from realizing their full potential. We believe that the federal and provincial governments should commit themselves to actively changing this situation and to offering true equality by creating a climate of trust from the outset. However, we must not forget the historic role of the Canadian government in criminalizing homosexuality, nor ignore the fierce resistance of some authorities to the elimination of discrimination based on sexual orientation, even though it is prohibited by the *Canadian Charter*. These practices and the accompanying discourse have for decades undermined the confidence of lesbians and gays in the government and the services it provides. In the eyes of many of the lesbians we consulted, the federal government is not an ally in the struggle to obtain fair and equitable treatment. Rather, they see it as an adversary and a supporter of institutionalized heterosexism, closer to the homophobic discourse of the right than to the New Democratic left.

On the individual level, to be sure, some lesbians have developed a positive view of the Canadian government's role in the struggle for equality. In our opinion, the lack of trust occurs at the community level. It manifests itself in, among other things, a fear of having a file on homosexual persons in Canada, a negative perception of the ability of government services to adapt, and because of a lack of information concerning their new rights as spouses in Quebec, Ontario and at the federal level. Our observations suggest that many lesbians feel that government services are not adapted to their circumstances and their need for security, especially with respect to the confidentiality of personal information.

What can be done to change this situation? How can the Canadian government succeed in creating a relationship of trust with the lesbian and gay communities in this country? It seems to us to be a particularly arduous task because no relationship has ever really existed. Even in the recent parliamentary debate on Bill C-23, the federal government did not actively advocate equality for same-sex couples. Afraid to alienate more traditional voters and lose their support, it preferred to say as little as possible about the scope of the Bill and instead to remain vague. The media were accordingly more likely to report homophobic statements by M.P.s from the Reform Party and right-wing organizations than the government's arguments in favour of equality for same-sex couples. By not openly standing up for the rights of lesbians and gays, the federal government sent ambivalent messages that, in the finally analysis, gave silent approval to homophobia. Rather than seeking to camouflage its support for the enactment of Bill C-23, it should have openly celebrated this victory that testifies to the attachment of the majority of Canadians to the values of equality and social justice for all people, including homosexuals.

Creating the trust that would permit lesbians to identify their conjugal status without risk of prejudice requires action at several levels. Thus, the federal government must publicly support equality for lesbians and gays but, more importantly, it must express its solidarity with this minority in its struggle against discrimination. By taking a stand against institutionalized heterosexism in its social policies, by providing fair treatment for lesbians and gays, the federal government and the provinces can help to transform the distrust that prevails in those communities.

The federal government should also reassure lesbian and gay communities of its intention not to create a central file on homosexuals. In fact, all the groups we met with said that they were afraid that if a right-wing party came to power in Canada, the government could use such a file to suspend the fundamental rights and freedoms of the homosexual citizens of the country. This fear is genuine. Our recommendation may seem ridiculous to some decision-makers, but unfortunately the history of Nazism in Europe and, closer to home, the treatment of homosexuals in the Canadian army and the federal public service during the 1950s and 1960s support the sceptics (Kinsman and Gentile, 1998). The Canadian government accordingly has an interest in not ignoring the traumatic effects of a century of repression of homosexuals if it wants gays and lesbians to respect the laws requiring a declaration of conjugal status.

Furthermore, the federal government should take the necessary steps to ensure that personal information concerning sexual orientation remains confidential and to inform the gay and

lesbian communities of this fact. This recommendation is one of the key factors that would reassure lesbians and gays and encourage them to exercise their rights. The federal government, the provinces and the territories must play a leadership role in this area and ensure that employers and insurers also respect the rules of confidentiality. Officials in government departments and agencies responsible for applying the legislative changes relating to legal recognition of same-sex couples must be given adequate training concerning heterosexism and the realities faced by gays and lesbians to ensure that they serve this new clientele more effectively.

Recommendation 7: We recommend that the federal government, the provinces and the territories issue a confidentiality of information directive underlining the duty, on the part of public service employees, government agencies, employers, insurance companies and other agencies responsible for applying the legislative changes relating to recognition of legal status for same-sex couples, to keep the information received confidential. If repeated breaches of confidentiality occur, the two levels of government should amend their privacy laws to impose substantial fines on anyone who fails to comply strictly with the legislation in place.

Recommendation 8: We recommend that public service employees working for the government departments and agencies responsible for applying the legislative changes relating to recognition of legal status for same-sex couples receive adequate training on the subject of heterosexism and the realities faced by gays and lesbians in order to serve this clientele more effectively. Because disclosure of sexual orientation can sometimes lead to reprisals and material harm, employees should be flexible and act with discretion, discernment and sensitivity toward lesbians and gays in applying the new provisions.

Because they were excluded for so long from the laws governing conjugality and the family, lesbians and gays have learned not to concern themselves much with these questions. Given the significant legislative changes which have already happened and which are likely to occur in the near future, the federal and provincial governments should finance the production and distribution of material informing lesbians and gays about their new rights.

Recommendation 9: We recommend that the federal, provincial and territorial governments subsidize the production and distribution of promotional materials and organize information sessions to inform lesbians and gays of their new rights as well as to encourage them to exercise these rights. The sessions and materials in question should be designed in co-operation with lesbian and gay organizations. Adequate funding should be provided so the sessions can be organized on the basis of the participants' specific needs such as their sex, ethnic or Aboriginal origin, language, province and their rural or urban place of residence.

[TRANSLATION] "Having more rights does not mean that people will stop being prejudiced", one lesbian respondent in our survey accurately observed. Consequently, it is important that the federal government organize an extensive public education campaign to counteract homophobia, as it has done very effectively against smoking. In fact, it is the responsibility of the federal government, which has jurisdiction over the implementation of the *Canadian Charter*, to launch

a media campaign to increase awareness of the effects of homophobia and discrimination in the workplace and with regard to access to public services.

Recommendation 10: We recommend that the federal government implement a public education campaign in the media to counteract homophobia and discrimination against lesbians, gays, and homosexual couples in the workplace and with regard to access to public services.

We should stress that those provinces and territories that have not yet taken significant steps to reform their family law are in a certain sense forcing lesbians and gays to institute legal challenges. From this perspective, discrimination will have to be fought province by province, statute by statute. The waste of public money in defending discriminatory legislation cannot reasonably be justified by the need to appease the homophobic right whose ranks are in decline. The more governments delay before amending their legislation, the more lesbians and gays will be justified in claiming punitive damages and repayment by the government of the costs they incur.

Recommendation 11: We recommend that the federal government extend, by derogation, the criteria governing the application of the Court Challenges Program so as to provide lesbian and gay organizations with the financial resources they require to challenge discriminatory laws in those provinces and territories that have not yet amended their legislation relating to families.

Finally, many respondents stressed repeatedly that the question of equality for lesbians and gays should not be limited to the legislative arena. All the proposals made to date should be considered to be but the prelude to more extensive government action designed to revise social policies and ministerial policy directives in order to eliminate any trace of discrimination against and exclusion of homosexuals.

Recommendation 12: In order to ensure that lesbians and gays enjoy the right to equality and fair treatment in all areas of federal jurisdiction, we recommend that the federal government not restrict its intervention to the legislative field but that it review its social policies and ministerial policy directives so as to eliminate any trace of discrimination against and exclusion of homosexuals.

These recommendations will not involve exorbitant costs for the federal government, the provinces or the territories. However, their implementation could radically transform the distrust of government harboured by lesbians. This is why we feel, based on our study, that these recommendations are essential to the achievement of true equality for same-sex couples in Canada. All that is lacking is the political will among decision-makers to implement them quickly.

6.4 A Commission of Inquiry for in-depth reform

Once the federal government and the provinces have eliminated discrimination based on sexual orientation with regard to eligibility for the different types of conjugal status and once they have changed the legal framework for conjugal relationships outside marriage in order to

respect freedom of choice, we recommend that they undertake, in the third stage, an in-depth analysis of the role of conjugality in social assistance and social insurance programs as well as in Canada's tax system. This examination could be entrusted to a Commission of Inquiry whose mandate would be to review the objectives and eligibility criteria for income-security programs in Canada and certain provisions of the tax system with a view to adapting them to the diversity of ways of domestic life and the fluidity of conjugal and family status.

Thirty years after the Royal Commission on the Status of Women in Canada, it is high time that the federal government thoroughly examine the changes that have occurred in conjugality and the family and their impact in private law and on eligibility for income-security and taxation programs. The Bird Commission, named for its Chairwoman, noted at the time that wives were assuming virtually all family responsibilities and that, in most cases, this role helped keep them dependent on their husbands. The Commission recommended the most stringent equality between spouses while at the same time recognizing that such equality depended on economic independence. Along the lines of this recommendation, the proposed Commission of Inquiry could focus on values such as the autonomy of the partners, freedom of choice, mutual support, protection of vulnerable persons, fairness among households, and equality of opposite- and same sex spouses.

Why do we suggest a measure of such scope? We showed in Chapter 3 that many programs in which eligibility is based on the criterion of conjugal status are inherently discriminatory. Originally, these programs were intended to support marriage and the family; among other objectives, they were designed to promote procreation and provide for the financial protection of children. Increasingly, there is no connection between having a spouse and being a parent. On the one hand, many couples have no children and never will have any. On the other hand, an impressive number of parents live alone or with a partner who does not assume any parental role toward their children. If this is true, why should certain privileges such as a surviving spouse's pension be given to the first group when there is no pension income supplement for people who have raised children? Why is financial support not provided for a mother whose new partner of either sex does not bear any of the financial costs associated with the support and welfare of her children?

The unfairness resulting from the fallacious association between conjugality and parental status in taxation and income-security programs becomes even clearer when we consider the situation of same-sex couples. Within lesbian and gay couples, there is, in fact, greater real equality in the division of domestic duties and the economic autonomy of the partners. These couples are also less likely to live with children and, when they do, they usually live in blended families without any economic dependence between the spouses. Government imposes on the partners in these couples the obligation to provide financial support to the children, an obligation that derives from a fundamentally inegalitarian conjugal model where one partner delegates his family responsibilities in exchange for a widely varying ability to provide material and economic support for the family. This relationship of inequality and dependence does not correspond to most of the domestic arrangements made by same-sex couples.[8]

Given these facts, the government should, in our judgment, stop giving or withdrawing benefits on the basis of conjugal status. However, as we noted at the beginning of this chapter, it is not up to us to define the conditions for this overall reform of public welfare plans. Such a reform requires a broad social debate.

Recommendation 13: We recommend that the federal government create a Commission of Inquiry into the Transformation of the Family and its effects on entitlement to Canadian social benefits. The Commission would have a dual mandate:

- to conduct an in-depth analysis of conjugal regimes in private law as well as in income-security programs and the Canadian tax system;
- to propose reforms to the objectives and eligibility criteria of these public programs so that they take account of the diversity in ways of domestic life and the fluidity of conjugal and marital status.

As part of this approach, the Commission should consult the Canadian public while reserving a special place for feminist organizations and the lesbian and gay communities.

At the same time, we would like to suggest questions and principles that might guide the government in designing these reforms. Given the complexity of the problem, this list is far from being complete. We have grouped these principles under three headings: expanding the number of programs where access is universal and based on the individual; protection of children and dependants and support for their caregivers; and reexamination of the objectives for the recognition of spousal status in programs and the implementation of appropriate measures to attain these objectives.

6.4.1 Expansion of universal programs where eligibility is based on the individual

By definition, a universal scheme is for all persons, regardless of their sexual orientation or their family status. It conveys the idea that all members of society are equal and are entitled to certain services and programs required for their health, well-being and fulfillment. It reflects a principle of social solidarity among all elements of the population.

Since the implementation of public health and hospital insurance programs in the 1960s, Canada has considered universal free access to these programs to be a fundamental human right. It is acknowledged that it costs more to take care of people whose health has deteriorated than to take preventive action. However, some services are not currently covered by the public scheme or are covered only in certain provinces. Furthermore, certain health services[9] are provided free of charge only to certain classes of person (children, seniors, social assistance recipients, etc.). In addition, some individuals and their spouses and children are entitled to more services because they are covered by a private health insurance plan. Rather than attempting to strengthen the universal nature of the health system by expanding the scope of the public plans, the federal government and the provinces have moved in the direction of privatization. The deficits recorded by various levels of government have helped to legitimize this approach. We know, however, that in the United States, the only industrialized country without a public health

insurance system, the health system costs much more than it does in Canada, even though approximately 15 per cent of people there have no coverage.[10]

We believe that it is necessary to change course and to broaden eligibility for social programs on an individual and universal basis in order to combat poverty as well as to respect freedom of choice in terms of conjugality and the autonomy of the partners. By way of illustration, we shall discuss with student financial aid programs, certain tax credits, the Spouse's Allowance and the Canada Pension Plan.

Recognizing the importance of education in a modern economy, governments have created a number of programs to help young people and adults pursue their studies. However, a person who is married or has a common-law partner may become ineligible for the bursaries and loans program if the income of his or her spouse is too high. If the spouse does not wish to share the related costs, the person will be unable to return to school. Should we not allow each individual to decide to study and assume the financial consequences of this decision without having to request support from the spouse? How far should the presumption of financial solidarity between spouses go?

Several tax benefits relating to essential needs are transferable to the spouse when a person does not have sufficient income to claim them. These include credits for a spouse, because of age or disability, for tuition fees or education and for pension income. Each individual could be permitted to benefit from the tax measures intended for him or her by converting these non-refundable credits into refundable tax credits. The cost to government would be relatively small because most adults already receive the value of these credits directly, in the form of a tax reduction, or indirectly, when this tax reduction goes to the spouse. Single people whose income is too low to benefit from these credits are generally eligible for some kind of public welfare scheme such as social assistance, student aid or the Guaranteed Income Supplement, and accordingly they receive the equivalent of the value of these credits through other mechanisms. Once again, why not encourage personal independence rather than enriching the spouse?

Growing numbers of people are now retiring before they reach the age of 65, to a large extent because of high unemployment and the tendency of companies to keep the number of their employees as low as possible. In 1927, the federal government created an assistance program for people who were at least 70 years at age and living in poverty. In 1951, the age at which people were eligible for the program was reduced to 65. The Spouse's Allowance program represents the first extension of public retirement income to poor people between the ages of 60 and 64; however, it is available only to certain people on the basis of need but also conjugal status. Should this program not be expanded to include any person between 60 and 64 who is in need, regardless of that person's conjugal status? Given the wide diversity in ways of domestic life, why should people who live as a couple receive preferential treatment over mothers who are not part of a couple and who have previously sacrificed income in order to raise children? Who is supposed to be protected under the existing program?

Very few Canadians are covered by a registered pension plan for sufficient time to be able to maintain their standard of living after they retire. Tax measures designed to encourage savings

through RRSPs primarily benefit richer taxpayers. Consequently, a large number of middle- or low-income individuals live in reduced circumstances during their old age. Poverty is especially widespread among elderly heterosexual women who live alone because they can no longer rely on the income of a spouse, although they organized their lives around this model. As far as elderly lesbians are concerned, it is primarily their status in the labour force that penalizes them once they retire, as is the case for heterosexual women who earned their own living. In order to reduce poverty among seniors as a whole, should we not seek to strengthen public pension plans, especially the CPP and the QPP, and basic programs such as the Old Age Security pension and the Guaranteed Income Supplement? These programs apply to all Canadians, regardless of their marital status and the ability of a particular employer to offer a supplementary pension plan.

6.4.2 Protection of children and dependants and support for caregivers

In Chapter 3, we saw that a number of income-security plans and tax measures include a subsidy from government, an employer or other contributors. Some of these subsidies apply to children while others apply to the spouses of those participating in the plans. It is important for the federal government to increase its support for children and people who do socially useful work by caring for them. Children truly are dependants, and families with children have greater essential needs than people living alone or childless couples. In addition, children represent a future value for society and it is only natural that society should contribute to their well-being.

Historically, spousal subsidies, particularly surviving spouse's pensions,[11] were designed to provide income to people, especially women, who had sacrificed income and the ability to save for retirement in order to take care of children and a husband in return for his financial support. However, as we have seen, conjugality is a very imperfect criterion for measuring the time spent educating and caring for children. Some couples who acquire the right to a surviving spouse's pension have never had children whereas those who head single-parent families and who have probably invested the most energy, are not entitled to receive one. Furthermore, as the population grows older and with the cuts in public services, increasing numbers of women are sacrificing income in order to care for elderly parents or other adults who are sick, disabled or unable to live independently. These unpaid activities are a major contribution to the wellbeing of society.

Instead of giving a disguised subsidy to a provider husband who benefits from the services of a stay-at-home spouse, what kind of measures would be more effective in supporting the real dependants and their caregivers? A first step would be to restore universal family allowances in order to recognize the basic needs of all children, regardless of their parents' income. However, an additional allowance should also be provided for the poorest families and it should reflect the real cost of caring for children and correspond at least to the poverty threshold. The government could also strengthen the mechanisms for ensuring the payment of child support and do away with those tax measures that make the new partner of a parent who has custody of children financially responsible for them. Presuming that a person accepts financial responsibility for a child because he or she establishes a conjugal relationship with the mother or father is not in the child's interest.

Another measure that could be explored is the replacement of the surviving spouse's pension in the social insurance system with a more generous orphan's pension. Consideration should also be given to making a public contribution to CPP and QPP pension credits for people who take care of their very young children either part time or full time. However, a temporary surviving spouse's pension would ease the adjustment to the new situation following the death of a spouse.

As for the people who take care of elderly parents or other adults who are sick or disabled or who have lost their ability to live independently, a possible measure would be to pay them a salary accompanied by the standard benefits (employment insurance, CPP or QPP, workers' compensation contributions and so on). After all, if these persons did not take on this task voluntarily, the government would be forced to provide home-care or institutional services. It should obviously provide adequate training to the persons providing the care and take measures to avoid abuses.

6.4.3 Reexamination of the objectives of spousal recognition in programs and adoption of measures designed to attain these objectives

Whether or not children are involved, the decision made by adults to marry and to support each other involves a form of co-ownership of certain assets. The provisions of family law that protect family property reflect the presumption that both spouses have contributed equally, with time or money, to the creation of this property. If the relationship is terminated through divorce, separation or death, the ownership of certain assets — particularly the principal and secondary residences, public and private pension credits as well as sums invested in RRSPs — may be transferred to the spouse. Some of the tax provisions discussed in Chapter 3 are designed to exempt these transactions from tax or to defer the taxation of capital gains. If the transaction occurs between common-law partners in Quebec or between any two persons who were living together and supporting each other in any province, the capital gains are subject to taxation immediately.

These provisions should be the object of a detailed examination to determine whether they reflect a legitimate function of the marital relationship and accordingly deserve to be maintained. The federal government and Quebec could also decide to extend these provisions to other classes of person, for example *de facto* spouses or cohabitees who are economically interdependent, or simply abolish them.

The obligation or the possibility to include one's spouse in a private health insurance or pension plan is another kind of measure that reflects the presumption of mutual support. However, the question should be asked as to whether the person contributing to the plan should pay the entire cost of coverage or whether this should be partly subsidized by the employer or other contributors, as is often the case at present. Also, should these plans make a distinction based on whether there are dependant children or not?

For our part, we prefer an approach that would not provide any greater social or tax benefits for married persons than for those who have opted for a common-law partnership. Furthermore, in order to better respect the autonomy of the partners and the fluidity of contemporary lifestyles,

it is preferable, in our opinion, to avoid using conjugal status as a criterion for allocating benefits and imposing disadvantages. At the same time, the challenge is to find ways to adequately recognize the costs related to children and the assumption of family responsibilities while respecting individual autonomy and the diversity of household structures.

6.5 Conclusion

The approaches for reform and the 13 recommendations contained in this report require action in both the short and the medium term by the federal government and the provinces. The proposed approach can be seen as a three-stage strategy. First, with a view to achieving substantive equality, all distinctions based on the sex of the partners in determining eligibility for the existing forms of conjugal status and the provisions governing filiation must be eradicated from Canadian law. Once this step has been taken, a reform of the legal framework of conjugality outside marriage, for both heterosexual and homosexual couples, should be undertaken with the objectives of respecting freedom of choice and the independence of each partner, and of protecting vulnerable persons. Finally, a Commission of Inquiry should be mandated to undertake a thorough analysis of the objectives of income-security programs and the tax system and the way they treat conjugality, with a view to introducing reforms so that these programs will better reflect the diversity of domestic lifestyles and the fluidity of conjugal and family status that characterize Canadian society today.

Some of the recommendations echo the historical demands of the gay and lesbian communities on their long march toward equality. Others, in contrast, are more innovative in nature and may surprise by their content and their connections with broader social issues such as equality of the sexes, fairness among couples and households, and a more equitable redistribution of society's wealth with a view to social solidarity. The achievement of real equality for same-sex couples cannot, in our view, be dissociated from a major revision of private family law and the public programs that use conjugality as their criterion for eligibility.

We hope that these recommendations will help to solve the problem of the discrimination faced by lesbians and gays in their daily lives and will stimulate thought and action designed to create a more just and equitable society.

Notes to Chapter 6

[1] *M.* v. *H., op. cit.*

[2] From this perspective, it would be possible, for example, to replace the civil marriage and common-law union regimes with a single registered civil union regime that would involve various standard contract formulas for the purpose of regulating joint domestic life. At one end of the continuum, there could be a marriage-like contract that includes rights, protections, and obligations similar to those currently enjoyed by married spouses. At the other end, there might be a minimalist contract for spouses or cohabitees wishing to provide each other with mutual protections concerning the right to remain in the home and the division of certain property in the event of separation. Intermediate between these two poles, other standard contracts could

be created. The implementation of such a regime would have the advantage of establishing a uniform legal framework, modulated according to the diversity in modes of conjugal and domestic life, rather than the current regime in which distinct hierarchical status is given to marriage and common-law partnerships.

[3] It will be recalled that, in *Vriend*, the Supreme Court of Canada concluded that a law that is excessively restrictive because of an omission may be found to be discriminatory if, as a result of its restrictive scope, it creates a distinction based on sexual orientation that denies a right to the same benefit and same protection of the law as well as to substantive equality.

[4] According to a poll conducted by the Angus Reid organization in May 1999, 53 per cent of Canadians were in favour of the legalisation of marriage for same-sex couples while 44 per cent were opposed. The largest percentage in favour was 61 per cent in Quebec. Women were more like to be in favour (56 per cent) than men (50 per cent). The survey also revealed differences on the basis of age: 66 per cent of young people between 18 and 34 were in favour of permitting same-sex couples to marry while the figure for respondents 55 or older fell to 32 per cent. See Anne McIlroy, "Most in Poll Want Gay Marriages Legalized", *The Globe and Mail*, June 10, 1999, p. A-1.

[5] *Miron* v. *Trudel*, *op. cit.*

[6] *Ibid*, at paragraphs 95-97.

[7] In Quebec at least, the demand for legal recognition of same-sex couples dates back to 1979. See on this point I. Demczuk and F. Remiggi (1998).

[8] This type of conjugal arrangement is probably no longer chosen today by a great many heterosexual couples who have children. Thus, when women care full time for very young children, most now do so for a short period only. However, financial inequality between the partners and the material dependence to which it leads remains the norm for heterosexual couples because a major difference in salary between men and women is still common. This gender-based difference in salary obviously does not have the same impact on lesbian and gay couples.

[9] We are thinking in particular of dental and optometric services, drug insurance and eligibility for prostheses.

[10] According to a document issued by the Quebec department of health and social services available on line at <www.msss.gouv.qc.ca/f/statistiques/index.htm>, which we consulted on October 24, 2000, Canada spent $2,102 per person for health care in 1997, or 9 per cent of the gross domestic product, whereas the United States spent $4,090 per person or 14 per cent of gross domestic product. These figures are expressed in U.S. dollars at purchasing power parity. In 1994, moreover, 40.6 million Americans, or 15.4 per cent of the population, had no health insurance and were not eligible for government Medicaid programs. See on this point "À propos… de l'assurance-santé aux États-Unis", *Le Devoir*, June 17, 1998, p. A-8.

[11] We should not forget that originally these were widow's pensions. A gender-neutral name was substituted in 1975 in response to women's demands. They maintained that they contributed at the same rate as men but could not offer their spouses and children protection. In addition, a widow's pension presumes that only women take care of children, although the feminist movement has been fighting to get men to do their share of this work.

SUMMARY OF RECOMMENDATIONS

Recommendation 1: We recommend that the provinces and territories immediately amend all their statutes conferring rights and obligations on *de facto* spouses so as to eliminate any distinction based on the sex of the partners. In so doing, the terminology adopted in Ontario in the *Amendments Because of the Supreme Court of Canada Decision in M. v. H. Act* should not be used because it entails a distinction based on sex. The provinces and territories should instead use the terminology put forward by Quebec in Bill 32 or by the federal government in Bill C-23.

Recommendation 2: We recommend that the federal government take the initiative by convening a conference of all the provinces and territories and urging them to legislate so as to permit marriage between persons of the same sex. If this does not occur, we recommend that the government use its constitutional power to enact legislation allowing same-sex couples to marry.

Recommendation 3: We recommend that the provinces and territories amend their statutes and regulations so as to eliminate discrimination based on sexual orientation with regard to eligibility for adoption services and artificial insemination. In the case of adoption, candidates should be assessed according to the usual criteria of personal situation and parenting ability.

Recommendation 4: We recommend that, in the interest of the child, the provinces and territories amend their statutes and regulations governing filiation and adoption in order to allow the spouse of a lesbian mother to be registered as the parent of a child at the time of birth. In addition, the spouse of a lesbian mother or a gay father should have the right to adopt the child of his or her partner, as is already the case for heterosexual couples when the child does not already have a second parent or when the parental authority of this person has been removed.

Recommendation 5: We recommend that the federal, provincial and territorial governments undertake as soon as possible a reform of the laws governing the rights and obligations attached to the status of *de facto* spouse, as well as the criteria governing recognition of this status, without making any distinctions based on the sex of the partners. Changes must be made to private and government programs, as well as to specific issues such as consent to treatment where one party lacks legal capacity, and the right to inherit in the absence of a will. In doing so, governments, including that of Quebec, should make every effort possible to agree on a definition of common-law partnerships or *de facto* unions and to ensure as much uniformity as possible among programs, on the one hand, and among jurisdictions, on the other.

Recommendation 6: We recommend that the federal government, the provinces and the territories create a central register of withdrawals from the regime governing common-law partnerships. This centralized mechanism would allow opposite- or same-sex spouses wishing to live outside the framework of the common-law regime to register their joint desire to renounce spousal status. This opting out would have the effect of absolving the parties, for a

fixed period of time, of the benefits and obligations linked to *de facto* conjugality, whether under private law, taxation, social assistance, insurance or income-security programs. However, in the greater interest of the children, this exclusion would not have any legal effect on parental rights and obligations.

Recommendation 7: We recommend that the federal government, the provinces and the territories issue a confidentiality of information directive underlining the duty, on the part of public service employees, government agencies, employers, insurance companies and other agencies responsible for applying the legislative changes relating to recognition of legal status for same-sex couples, to keep the information received confidential. If repeated breaches of confidentiality occur, the two levels of government should amend their privacy laws to impose substantial fines on anyone who fails to comply strictly with the legislation in place.

Recommendation 8: We recommend that public service employees working for the government departments and agencies responsible for applying the legislative changes relating to recognition of legal status for same-sex couples receive adequate training on the subject of heterosexism and the realities faced by gays and lesbians in order to serve this clientele more effectively. Because disclosure of sexual orientation can sometimes lead to reprisals and material harm, employees should be flexible and act with discretion, discernment and sensitivity toward lesbians and gays in applying the new provisions.

Recommendation 9: We recommend that the federal, provincial and territorial governments subsidize the production and distribution of promotional materials and organize information sessions to inform lesbians and gays of their new rights as well as to encourage them to exercise these rights. The sessions and materials in question should be designed in co-operation with lesbian and gay organizations. Adequate funding should be provided so the sessions can be organized on the basis of the participants' specific needs such as their sex, ethnic or Aboriginal origin, language, province, and their rural or urban place of residence.

Recommendation 10: We recommend that the federal government implement a public education campaign in the media to counteract homophobia and discrimination against lesbians, gays, and homosexual couples in the workplace and with regard to access to public services.

Recommendation 11: We recommend that the federal government extend, by derogation, the criteria governing the application of the Court Challenges Program so as to provide lesbian and gay organizations with the financial resources they require to challenge discriminatory laws in those provinces and territories that have not yet amended their legislation relating to families.

Recommendation 12: In order to ensure that lesbians and gays enjoy the right to equality and fair treatment in all areas of federal jurisdiction, we recommend that the federal government not restrict its intervention to the legislative field but that it review its social policies and ministerial policy directives so as to eliminate any trace of discrimination against and exclusion of homosexuals.

Recommendation 13: We recommend that the federal government create a Commission of Inquiry into the Transformation of the Family and its effects on entitlement to Canadian social benefits. The Commission would have a dual mandate:

- to conduct an in-depth analysis of conjugal regimes in private law as well as in income-security programs and the Canadian tax system;
- to propose reforms to the objectives and eligibility criteria of these public programs so that they take account of the diversity in ways of domestic life and the fluidity of conjugal and marital status.

APPENDIX 1: PRINCIPAL DECISIONS OF THE COURTS CONCERNING THE RIGHTS OF SAME-SEX COUPLES IN CANADA BETWEEN 1986 AND 1999

Principal decisions of the courts concerning the rights of same-sex couples in Canada between 1986 and 1999[1] (court of final instance)

***Anderson* v. *Luoma* (1986), 50 R.F.L. (2d) 126 (B.C.S.C.)**
Facts: When their relationship was terminated after ten years of conjugal life, one of the lesbian partners requested support for herself and her two children conceived by artificial insemination. She challenged the definition of "spouse" in the family law of British Columbia, arguing that this definition violated section 15 of the *Canadian Charter of Rights and Freedoms.*

Decision: The plaintiff was entitled to only a share of the property under the resulting trust because the provisions of the legislation governing support applied only to heterosexuals. The partner had no biological link to the children and had no obligation toward them. The Court dismissed the argument concerning the violation of section 15 of the *Canadian Charter* without explanation. It added briefly that, if there had been a violation, the discriminatory treatment would have been justified under section 1 of the *Canadian Charter*.

Note: The discriminatory treatment was considered to be so normal that no explanation was required.

***Andrews* v. *Ontario (Minister of Health)* (1988), 64 O.R. (2d) 258 (Ont. S.C.)**
Facts: Karen Andrews applied for family coverage under the Ontario Health Insurance Plan for her partner and the partner's two children. Although the Act and the relevant regulations did not define "spouse", the Ministry of Health refused her application on the ground that spouses must be of the opposite sex. Andrews argued that this interpretation was contrary to sections 15 and 7 (protection of life, liberty and security of the person) and paragraph 2(*d*) (freedom of association) of the *Canadian Charter of Rights and Freedoms*.

Decision: The Ministry's interpretation was justified because it was in line with the presumption of heterosexuality and the presumption enshrined in 79 Ontario statutes containing a definition of "spouse". Although section 15 of the *Canadian Charter* may prohibit discrimination based on sexual orientation (analogous ground), there was in that case no discrimination since the situation of same-sex spouses cannot be compared to that of heterosexual spouses because only the latter can procreate and raise children. Furthermore, there was no discrimination based on sexual orientation because Andrews and her partner were treated like all other single people. The Court rejected without discussion the arguments concerning paragraph 2(*d*) and section 7. Even if there had been discrimination, the violation would have been justified since the objective of the *Health Insurance Act* was to promote the family.

***Veysey* v. *Canada (Correctional Service)* (1989), 29 F.T.R. 74 (F.C.T.D.) / *Veysey* v. *Canada* (*Correctional Service*) (1990), 109 N.R. 300 (F.C.A.)**
Facts: Veysey, a gay prisoner, was refused the privilege of the family visits program for his partner.

Decision: The Federal Court Trial Division determined that the refusal based on sexual discrimination was discriminatory under section 15 of the *Canadian Charter of Rights and Freedoms*. The Federal Court of Appeal upheld this decision, but not on the basis of section 15. Rather, it relied on the rules of legislative interpretation, and this limited the scope of the judgment.

Note: The federal government conceded that sexual orientation was an analogous ground. This decision offered the first recognition of the relational aspect of lesbian and gay identities.

***Knodel* v. *British Columbia* (*Medical Services Commission*) (1991), 58 B.C.L.R. (2e) 356 (B.C.S.C.)**

Facts: Contributions to the British Columbia voluntary supplementary health-care plan are less for a couple than for two unmarried persons. In the rules and regulations governing the Plan, the term "spouse" is defined to include only persons of the opposite sex.

Decision: The Court held that the regulations violated section 15 of the *Canadian Charter of Rights and Freedoms*. The respondent conceded that, if there had been a violation of section 15, it was not justified by section 1. The Court accordingly ordered by way of relief that the term "spouse" in the rules and regulations be interpreted to include same-sex spouses.

Note: Knodel's collective agreement, which provided for group coverage under the supplementary health plan defined "spouse" inclusively. Knodel received the support of his union in his dealings with the employer and the managers of the plan.

***Leshner* v. *Ontario* (1992), 16 C.H.R.R. D/184 (Commission of Inquiry)**

Facts: Leshner, a Crown Attorney in Ontario, filed a complaint with the Ontario Human Rights Commission alleging that the employer's pension plan discriminated on the ground of sexual orientation since survivor benefits were available only to spouses of the opposite sex. The employer justified this approach on the grounds that: (1) federal tax legislation recognized, for purposes of tax exemption, solely those pension plans in which "spouse" was defined to include only opposite-sex spouses and (2) the provisions of the *Human Rights Code* authorized the adoption of rules and regulations that made a distinction between people on the basis of their marital status for the purpose of insurance plans. Marital status was defined exclusively despite the inclusion of the ground of sexual orientation in the *Code*.

Decision: The Board of Inquiry of the Ontario Human Rights Commission found that the employer could not divest itself of its responsibility by handing it off to the federal government. The provision authorizing the adoption of rules and regulations that distinguish between same-sex conjugality and opposite-sex conjugality was declared to be of no force or effect, since it violated section 15 of the *Canadian Charter* and was not justified under section 1. The Board invited the Ontario government to bring pressure to bear on the federal government to amend the *Income Tax Act*. However, acknowledging that it did not have jurisdiction over federal legislation, it ordered the Ontario government to create a parallel pension plan that was not discriminatory and to cover the additional cost of such a plan.

Note: The Government of Ontario obeyed and created a parallel plan. Six years later, when the federal government had still not amended the *Income Tax Act*, the question of additional costs was subject to a further challenge. See in this regard *Ontario Public Service Employees Union Pension Plan Trust Fund (Trustees of)* v. *Ontario (Management Board of Cabinet).*

***Vogel* v. *Manitoba* (1992), 16 C.H.R.R. D/242 (Man. Q.B.)**
Facts: In 1982, Vogel had filed with the Manitoba Human Rights Commission a complaint of discrimination against his employer, the Government of Manitoba, which refused to include his partner in the dental insurance plan. The complaint had been dismissed. Vogel tried again in 1992 after the ground of sexual orientation had been added to the Manitoba *Human Rights Code* in 1987. He argued that the refusal discriminated on the grounds of sex, marital status, family status and sexual orientation. He was supported in his claims by the Manitoba Human Rights Commission.

Decision: The Human Rights Tribunal rejected the arguments concerning the grounds of sex, marital status and family status. It felt that this new complaint on the same grounds was an abuse of process since the addition of the ground of sexual orientation did not in any way change the contents of these grounds. It also rejected the claim concerning sexual orientation since the family benefits under the dental plan were provided only for married persons and "a person could be married to a person of the opposite sex and still be a homosexual". The Manitoba Court of Queen's Bench upheld this decision, adding that the purpose of the dental plan was to protect spouses and their children and, since homosexuals could not be legal spouses, the distinction was based not on sexual orientation but on the fact that they were not spouses.

Note: The Human Rights Commission's support of the plaintiff was remarkable. However, the Tribunal's decision looked at each ground as though it existed in a watertight compartment with the result that marital status and sexual orientation were treated as being mutually exclusive. Thus, the ground of marital status would prohibit the making of distinctions between married and single persons, whereas the ground of sexual orientation would provide protection only against acts or omissions that were not related to conjugality, for example, access to employment.

***Layland* v. *Ontario* (*Minister of Consumer and Commercial Relations*) (1993), 14 O.R. (3^d) 658 (Ont. C. Gen. Div.)**
Facts: Layland and Beaulne, two gay men, were refused permission to marry. They claimed that this refusal violated section 15 of the *Canadian Charter of Rights and Freedoms.*

Decision: The Court confirmed that the common law limited marriage to unions of a man and a woman. It determined that this was not discrimination since it was always possible for the applicant to meet the requirements by marrying a woman. The *Canadian Charter* could not be used to change the definition of marriage.

Note: However, a dissenting judge concluded that the refusal was discriminatory since the right to choose whom to marry is a fundamental right that was denied under a prohibited

ground of discrimination. The judge added that, even though the government was justified in promoting family relations, it discriminated if it supported only traditional families.

***Nielsen* v. *Canada* (*Human Rights Commission*) (1992), F.C.J. No. 227 (F.C.T.D.)**
Facts: Nielsen, a federal government employee, filed a complaint with the Federal Human Rights Commission. The Commission refused to deal with the complaint on the ground that it had to await the outcome of the appeal to the Supreme Court of Canada in *Mossop*. Nielsen complained that her partner and the partner's child were not eligible for the employer's dental care plan because of the restrictive definition of "spouse". She asked the Federal Court to order the Commission to deal with her complaint, which was based on the grounds of marital status, sexual orientation and sex.

Decision: The Court refused to make the order requested. It admitted that it was not up to the Court to determine questions of substance when interpreting the grounds of sex and marital status. It concluded nevertheless that those grounds could not be interpreted to protect sexual orientation, which was not at that time a prohibited ground of discrimination in the *Canadian Human Rights Act*. The Court also rejected the possibility of including this ground in the *Act* under the *Canadian Charter of Rights and Freedoms*, on the ground that it was not up to the courts to legislate and thus to circumvent the elected Parliament, which would mean the abolition of the democratic rule of the majority.

Note: The Court denounced "judicial activism" at length and referred to the dangers of such interference: "So often in this century, impatience to circumvent the pace of democratically elected legislatures has led only to tyranny and violence, not the rule of law."

***Haig* v. *Canada* (1992), 9 O.R. (3^{d}) 495 (Ont. C.A.)** (also cited as *Haig and Birch*)
Facts: Birch was a member of the Canadian Armed Forces. Under a departmental directive, he would lose his right to promotions and assignments if he disclosed that he was gay. Since the *Canadian Human Rights Act* did not include sexual orientation, he requested that section 3 of the Act (which contains the list of prohibited grounds) be declared of no force or effect since it was contrary to the *Canadian Charter of Rights and Freedoms*.

Decision: The court of first instance declared this provision to be of no force or effect but stayed the declaration for a period of six months or until an appeal could be heard. The Ontario Court of Appeal decided that sexual orientation was an analogous ground and that this ground was protected by section 15 of the *Canadian Charter*. By not including this ground in the *Canadian Human Rights Act*, the federal government made a discriminatory distinction. It did not adduce any evidence to show that this discrimination was justified under section 1 of the *Canadian Charter*. The Court of Appeal, instead of relief in the form of a declaration that the Act was of no force or effect, substituted relief in the form of a broader interpretation that would interfere less and, while including sexual orientation, did not have the effect of eliminating protection for all the other groups.

Note: Generally, challenges to federal legislation are brought in the Federal Court but since that Court was not very receptive to the claims of gays and lesbians (*Egan*, *Nielsen*, *Mossop*,

but with the exception of *Veysey*), Haig and Birch applied a new tactic by applying to the courts of Ontario. This decision was important because it was rendered by a court that had a great deal of prestige and whose decisions are often accepted as precedents by the Supreme Court of Canada. Furthermore, it supported the argument concerning the inclusion of sexual orientation as an analogous ground in section 15 of the *Canadian Charter*. The decision also represented an incursion by a court of provincial jurisdiction into the area of human rights at the federal level. The federal government refused to include the ground of orientation. It did not appeal, thus indicating that it would obey the ruling, but it did not do so until 1996.

***Canada (Attorney General)* v. *Mossop* (1993), 1 S.C.R. 554 (S.C.C.)**
Facts: Mossop, a federal government employee, was refused bereavement leave, provided for in the collective agreement, to attend the funeral of his partner's father. His arguments were based solely on the *Canadian Human Rights Act* and not on the *Canadian Charter of Rights and Freedoms.* The Canadian Human Rights Tribunal found that there was a discriminatory act under the ground of "family status". The Federal Court of Appeal overturned the Tribunal's decision. The case was appealed to the Supreme Court of Canada.

Decision: The majority in the Supreme Court of Canada (four judges out of seven) found that at the time when the complainant was refused the right to take leave for reasons of bereavement, the *Canadian Human Rights Act* did not yet prohibit discrimination based on sexual orientation. It added that, since the complainant's sexual orientation was closely linked to the grounds that led to the refusal of the benefit, this refusal could not be struck down as constituting discrimination on the basis of "family status" without directly introducing into the Act the prohibition that Parliament specifically decided not to include. The three dissenting judges felt that the broad interpretation given by the Human Rights Tribunal to "family status" was reasonable in light of the general objectives of the Act (which are to eliminate discrimination) and because of changes in the social context that mean that the traditional family is no longer the only type of family.

Note: Despite the urging of the Court, Mossop had refused to amend his application to include a decision rendered six months earlier by the Ontario Court of Appeal in *Haig*. Chief Justice Lamer, who sided with the majority, suggested that the Decision might have been different if the *Canadian Charter* had been invoked.

***K. et al. (Re)* (1995), 23 O.R. (3^d) 679 (Ont.C.Prov. Div.)**
Facts: Three lesbian couples challenged the Ontario legislation governing adoptions because it limited adoptions to opposite-sex couples.

Decision: The *Child and Family Services Act* violates section 15 of the *Canadian Charter of Rights and Freedoms* and the violation was not justified under section 1. Because of this broad interpretation, the Act must be applied in a manner that is not discriminatory.

***C.E.G. (No. 2) (Re)* (1995), O.J. No. 4073 (Ont.C. Gen. Div.), on line: QL(OJ)**
Facts: Each of the partners in a lesbian couple gave birth to a child by artificial insemination. Each wished to adopt the biological child of the other by way of a joint adoption. The applicable law limited the right to joint adoption to opposite-sex couples.

Decision: The Act in question violated the sexual orientation provision in the *Canadian Charter of Rights and Freedoms*. The adoption order was granted.

***Egan* v. *Canada* (1995), 2 S.C.R. 513 (S.C.C.)**
Facts: When he reached the age of 65, Egan began to receive old age security benefits. When Norris, his partner, turned 60, he applied for the allowance to which a spouse aged between 60 and 64 is entitled when the couple's income is below a certain level. The application was rejected on the ground that their union was not covered by the definition of "spouse". The definition read in part "a person of the opposite sex who is living with that person, having lived with that person for at least one year, if the persons have publicly represented themselves as husband and wife". Egan and Norris argued that the definition violated subsection 15(1) of the *Canadian Charter of Rights and Freedoms* because it created discrimination based on sexual orientation. The Federal Court Trial Division and the Federal Court of Appeal rejected the appellants' claim and the case was therefore heard by the Supreme Court.

Decision: The Supreme Court of Canada unanimously declared that sexual orientation was an analogous ground and was subject to the protection provided by section 15 of the *Canadian Charter*. A majority of five judges out of nine held that section 15 had been violated in that case. However, one of the five judges, Justice Sopinka, joined the other side in concluding that the violation was justified under section 1 of the *Canadian Charter*. In Justice Sopinka's view, the discriminatory government measure was justified because it was designed to achieve an important social purpose, the reduction of poverty among elderly spouses, especially women who had foregone a salary in order to care for their children. Furthermore, the requirement of proportionality between the violation and the purpose of the discriminatory measures was met because, in his view, the recognition of same-sex spouses was relatively recent and the government must be able to include those requiring financial assistance progressively.

Note: The four judges who found that there was no violation of section 15 ruled that, because of its function of procreation, marriage is "by nature, heterosexual" and is a pillar of society. Justice L'Heureux-Dubé, in dissent, spoke out against the method of analysis used by these four judges: "We will never address the problem of discrimination completely, or ferret it out in all its forms, if we continue to focus on abstract categories and generalizations rather than on specific effects. By looking at the grounds for the distinction instead of at the impact of the distinction on particular groups, we risk undertaking an analysis that is distanced and desensitized from real people's real experiences. To make matters worse, in defining the appropriate categories upon which findings of discrimination may be based, we risk relying on conventions and stereotypes about individuals within these categories that, themselves, further entrench a discriminatory *status quo*. More often than not, disadvantage arises from the way in which society treats particular individuals, rather than from any characteristic inherent in those individuals." (paragraph 53 of decision).

***Kane* v. *Ontario* (1997), 152 D.L.R. (4th) 738**
Facts: Kane's partner was killed in a car accident. The insurer dismissed her claim because Kane did not meet the definition of "spouse", which applied only to heterosexual couples. Kane argued that the conditions of the insurance policy, which were set out in the standard automobile policy under the *Insurance Act*, discriminated against her and violated subsection 15(1) of the *Canadian Charter of Rights and Freedoms.*

Decision: The policy and the *Insurance Act* violated section 15. Contrary to the argument of the insurer and the Ontario government, which relied on section 1 of the *Canadian Charter*, the court asserted that the decision in *Egan* was not binding on the Court. The purpose of the Act was to reduce the number of disputes relating to car accidents by providing automatic no-fault benefits. The exclusion of same-sex spouses did not promote the attainment of this objective and the cost of including them was minimal. The Court accordingly ordered the insurer to pay the claim and the government to pay Kane's legal costs.

Note: The Ontario government argued that the purpose of the plan was to support and promote the heterosexual family based on procreation and care of children. The Court rejected this argument since there was nothing in the *Act* to confirm this intention, especially since same-sex couples can have children and the *Act* provides for a shorter period of cohabitation in the event that there are children. In the view of the Court, since the *Act* provided for the situation of childless spouses, the emphasis was not on children.

***Obringer* v. *Kennedy Estate* (1996), 16 E.T.R. (2d) 27 (Ont. Ct. Gen. Div.)**
Facts: Kennedy died without leaving a will and under the Ontario law governing intestate succession, a distant relative inherited the estate. Obringer, who had been her partner for more than 20 years, claimed part of the estate as a dependant. Her employment was in the United States while Kennedy worked in Canada. They got together every weekend and during vacations and, for this very purpose, had a joint bank account.

Decision: Only a spouse, father, mother, child, brother or sister may be recognized as a dependant. A spouse must either have been married or have lived in a conjugal union for at least three years or for a shorter period if they are the parents of a natural or adopted child. Since the couple's arrangements did not include cohabitation, Obringer was not permitted to inherit.

Note: The requirement of cohabitation for common-law spouses does not apply to married couples. See also *Modopoulos* v. *Breen Estate* (1996), 15 E.T.R. (2d) 128 (Ont. Ct. Gen. Div.).

***Buist* v. *Greaves* (1997), O.J. No. 2646 (Ont. C. Gen. Div.), on line: QL(OJ)**
Facts: Buist and Greaves were partners for seven years and during that time they decided that they wanted to have a child together. Greaves was the child's biological mother. When the relationship broke down, Buist maintained relations with the child who was five years old at the time the case was filed, but relations between Buist and Greaves grew acrimonious. Since Greaves intended to move to British Columbia, Buist applied for exclusive or shared custody of the child. She also requested a declaration that she was the child's mother.

Decision: The evidence showed that the relationship between the child and its biological mother, with whom it continued to live and who provided it with all necessary care, was closer than that with Buist. It was in the better interest of the child for custody to be awarded to Greaves. Shared custody was not realistic because of the disagreement between the two ex-partners. The Court approved the plan for visits and access by Buist. On the question of giving Buist status as the child's mother, the Court felt that it did not have the power to recognize two mothers and that, even if it had such power, it would not have done so because she had been unfaithful less than two years after the child's birth – which indicated a lack of commitment – and had left the conjugal home when the child was only two and a half years old.

***Vriend* v. *Alberta* (1998), 1 S.C.R. 493 (S.C.C.)**
Facts: Vriend was dismissed from his teaching job because he was gay. He complained to the Human Rights Commission, which ruled that it could not deal with the case since the *Alberta Human Rights Act* did not prohibit discrimination based on sexual orientation. Vriend argued that the Alberta legislation violated the *Canadian Charter of Rights and Freedoms* and asked the Court to order this ground included in the *Alberta Act*.

Decision: The Supreme Court of Canada ruled unanimously that the repeated refusal of the Government of Alberta since 1984 to act on the recommendations of the provincial Human Rights Commission, that had asked that the ground of sexual orientation be included and had even decided in 1992 to investigate complaints based on this ground, indicated that the reason was not an oversight but rather a deliberate omission. This deliberate exclusion from an act, the very purpose of which was to provide protection against discrimination, had discriminatory effects that were not justified. The Supreme Court of Canada ordered that the *Alberta Act* be read so as to include sexual orientation and rejected the incrementalist approach adopted by Sopinka in *Egan*: "...the need for governmental incrementalism was an inappropriate justification for Charter violations. I remain convinced that this approach is generally not suitable for that purpose, especially where, as here, the statute at issue is a comprehensive code of human rights provisions. In my opinion, groups that have historically been the target of discrimination cannot be expected to wait patiently for the protection of their human dignity and equal rights while governments move toward reform one step at a time. If the infringement of the rights and freedoms of these groups is permitted to persist while governments fail to pursue equality diligently, then the guarantees of the Charter will be reduced to little more than empty words" (paragraph 122 of decision).

***Rosenberg* v. *Canada (A.G.)* (1998), 38 O.R. (3^{d}) 577 (Ont.C.A.)**
Facts: The pension plan for the employees of the Canadian Union of Public Employees (CUPE/SCFP) was changed in 1992 to provide same-sex partners with the same benefits as opposite-sex spouses. The change was rejected by Revenue Canada because the definition of "spouse" did not reflect the exclusive definition in the *Income Tax Act* and consequently the CUPE plan could not be registered and benefit from tax exemptions. The plaintiffs were employees of CUPE and had been in a same-sex union for several years. They maintained that the *Income Tax Act* violated section 15 of the *Canadian Charter of Rights and Freedoms.* The court of first instance dismissed the application, primarily on the basis of *Egan*, which, in the court's view, was conclusive.

Decision: Since the federal government conceded that section 15 had been violated, the Ontario Court of Appeal focused its analysis on justifying the violation under section 1. The Court noted that the method of analysis with respect to section 1 had been changed by the Supreme Court of Canada in *Vriend*. Thus, in order to determine whether the objective is sufficiently important and urgent to justify the violation of section 15, rather than basing the analysis on the objective the program was designed to achieve as a whole (the *Canadian Human Rights Act*) the Supreme Court had stated that it was preferable to base the analysis on the objective of the violation (omission of the ground of sexual orientation). Consequently, the conclusions in *Egan* were now of little use. The Court of Appeal felt that, even though the survivor's benefits were originally designed to reduce poverty among women, this could not justify denying these benefits to lesbians and gays since there was no evidence that one prevented the other and because these benefits are available to both men and women without consideration of need. Even assuming that the government objective was valid, the ways to attain it (the exclusion of same-sex partners), like exclusion on the basis of race or membership in an ethnic group, have no rational connection with the objective. The Court also rejected the argument of incrementalism since the government did not adduce any evidence concerning the increase in costs and, furthermore, the figures seemed to indicate that inclusion would involve an increase in government revenues. The Court ordered that the words "of the same sex" be incorporated in the definition of "spouse" in the *Income Tax Act*.

Note: As in *Haig*, the Ontario Court of Appeal called the federal government to order.

***Canada (Attorney General)* v. *Moore* (1998), 4 F.C. 585 (T.D.)**
Facts: This case began in 1991, before the decision in *Haig.* Employees filed complaints with the Human Rights Commission against the employer and their unions for concluding collective agreements under which the partners of gay and lesbian employees were ineligible for benefits. In its 1996 decision, the Human Rights Tribunal found that there was a basis for the complaints of discrimination and awarded the employees compensation for all the benefits lost and the expenses of the partners from 1991 on. It ordered the parties to interpret any provision of the collective agreement as including same-sex partners in common-law relationships. The Tribunal also ordered the Treasury Board and the unions in question to prepare, in consultation and in co-operation with the Human Rights Commission, a list of all the statutes, regulations and directives, including the *Income Tax Act,* that continued to create discrimination based on sexual orientation in the provision of social benefits. The list and a proposal to eliminate all these discriminatory provisions was to be submitted to the Tribunal within sixty days. The proposal submitted created a separate class of persons known as "same-sex partners" who were entitled to fringe benefits, but the Tribunal found the list to be inadequate and still discriminatory. The federal government applied for judicial review on the ground that the Tribunal had exceeded its jurisdiction, among other things, when it found that the employer's approach to the provision of benefits did not meet the requirements of the *Canadian Human Rights Act.*

Decision: The employer's proposal in this case did not meet the requirements of the *Canadian Human Rights Act* by creating a "separate but equal" plan. The separate definition of same-sex partners can result in strengthening preexisting discriminatory concepts and may be discriminatory even in the absence of material disadvantages. By creating a new class to

include same-sex spouses, the applicant failed to comply with the order that the Tribunal had jurisdiction to make.

***Ontario Public Service Employees Union Pension Plan Trust Fund (Trustees of)* v. *Ontario (Management Board of Cabinet)* (1998), O.J. No. 5075 (Ont. C. Gen. Div.), on line: QL(OJ)**

Facts: In order to comply both with the rules of the Department of Revenue and the prescriptions set out in the decision in *Leshner*, the administrators of the Ontario Public Service Employees Union Pension Plan created a separate plan for same-sex couples. The trustees of the Plan asked the Court for directions since they now wished to merge the plans and the employer refused to co-operate.

Decision: The definition of "spouse" in the original plan and in the Ontario *Pension Benefits Act* was discriminatory. The most appropriate relief to ensure compliance with the *Canadian Charter of Rights and Freedoms* was to eliminate the words "either a man or a woman" from the definition of "spouse" and to replace it with "one individual or another" in the Plan and in the Act. Concerning the request for adjournment made by the Government of Ontario, which argued that it was necessary to await the decision of the Supreme Court of Canada in *M.* v. *H.*, the Court refused, stating, on the one hand, that the issues were different and, on the other, that it was bound by the decision in *Rosenberg.* It added that, where there is discrimination, it must cease as soon as possible. Consequently, the parallel plan was not necessary. The two plans were ordered to be merged.

Note: In January 1999, the Government of Ontario (after the adoption of the *Amendments Because of the Supreme Court of Canada Decision in M.* v. *H. Act*, which did not amend the *Pension Benefits Act*) announced that it would appeal this decision.

***M.* v. *H.* (1999), 2 S.C.R. 3 (S.C.C.)**

Facts: M. and H. were two women who had lived together for almost 10 years. At the time of their separation, they reached agreement on the division of family property. However, M. subsequently changed her application to include a claim for support in accordance with the provisions of the *Family Law Act* of Ontario. She argued that the definition of "spouse" in the Act was invalid because it applied only to opposite-sex spouses and this would deprive her of the right to receive support. M. was successful at trial and on appeal but neither M. nor H. appealed the decision of the Court of Appeal. It was the Government of Ontario that appealed to the Supreme Court of Canada.

Decision: Denial of the possibility of relying on the support obligation that is applied and protected by the courts was likely to impose a financial burden on the vulnerable partner in a same-sex couple. This denial suggested that M., and in general people who establish unions with a person of the same sex, are not capable of forming intimate relationships characterized by economic interdependence compared with same-sex couples, regardless of their actual situation. Such an exclusion perpetuates the disadvantages suffered by persons who form a same-sex couple, contributes to making them invisible and violates section 15 of the *Canadian Charter of Rights and Freedoms.*

With respect to section 1 of the *Canadian Charter*, the Court held that, even if it were accepted that the Act was designed to correct the systemic inequality of the sexes within relationships between persons of the opposite sex, the necessary link between this objective and the measures selected was absent since the regime made no distinction based on sex. In addition, there was nothing to show that the exclusion of same-sex couples might contribute in any way to the attainment of the objective. The fact that the partners in a same-sex couple are not very often placed in a situation similar to that of many heterosexual women does not make them any different from heterosexual men who, even though they generally benefit from a division of labour based on sex and from inequality in earning power, have just as much right to request support as their female partners. Even if it were accepted as being a pressing concern, the protection of children would also not meet the rational connection criterion since opposite-sex spouses are entitled to support even when they do not have any children while a growing percentage of children are conceived and raised by lesbian and gay couples. As far as other forms of relief were concerned, such as the contract or unjust enrichment, they did not constitute a valid alternative for economic, moral and social reasons. Since the right to support was only part of the Act, the mere addition by the Court of same-sex spouses to that part of the Act would create inconsistencies with the other parts. Consequently, it was preferable to give the Ontario government an opportunity and time to amend the Act as a whole and to make all its provisions consistent. To this end, the declaration of unconstitutionality was suspended for a period of six months.

Note: A few days short of the deadline, the Ontario government enacted the *Amendments Because of the Supreme Court of Canada Decision in M. v. H. Act.* It added "same-sex partners" after the definition of "spouse" in some 53 statutes.

***N.P. (Re)* (1999), R.J.Q. 2910 (Que. S. C. Fam. Div.)**
Facts: N.P. and M.G, a lesbian couple, decided to have a child together which was born to M.G. by artificial insemination. N.P. and M.G. asked the Court to recognize N.P. as the child's psychological parent and to recognize that there was a delegation and sharing of parental authority.

Decision: The Court dismissed the request on the ground that there was no basis in law for the concept of psychological parent and that, according to the *Civil Code of Quebec*, the only people who held parental authority were the child's mother and father. A third party could be given parental authority only when the holders had lost such authority. The only other case in which a court could designate a person to exercise parental authority in respect of a child was found in article 562 C.C.Q., that is, when a child was eligible for adoption.

Note: N.P. and M.G. are appealing this decision.

***A (Re)* (1999), A.J. No. 1349 (Q.B., November 26, 1999), on line: QL(AJ)**
Facts: Lesbians wishing to adopt their partner's child challenged the definition of "spouse" in the Alberta adoption legislation. One year after the applications were filed, the Alberta government still maintained that same-sex partners were excluded. Six weeks before the trial, however, it withdrew its opposition and amended the Act to replace "spouse" with "step-

parent". Since the latter term was not defined, the Court had to determine whether the expression included same-sex partners. The applicants also asked the Court to order the government to reimburse the legal costs incurred as a result of its original opposition.

Decision: The evidence clearly showed that the intention of the legislature in replacing "spouse" with "step-parent" was to recognize same-sex spouses as having a right to adopt. Consequently, the expression must be interpreted in a way that respected this legislative intention. However, the fact that a person is a step-parent does not provide an automatic right to adopt, the decisive factor being the relationship established by the parent with the child. Applications to adopt were granted on the basis of evidence showing that the applicants were good parents. Concerning the additional costs caused by the government's opposition, although there was no misconduct on the government's part, justice required that the applicants be reimbursed for these costs.

Note

[1] With a few exceptions (e.g. *Vriend*), this Appendix contains only decisions that deal directly with the conjugality of persons of the same sex. We have excluded those that deal strictly with sexual orientation without any conjugal relationship, those dealing with the criminal law, discrimination in employment, censorship or freedom of expression. However, it is impossible to ignore the indirect impact of these decisions on attitudes because they opened the door to recognition of the conjugality and parental status of lesbians and gays.

APPENDIX 2: INTERVIEW GUIDE, LIST OF ORGANIZATIONS AND RESOURCE PERSONS CONSULTED AND PORTRAIT OF WOMEN WHO PARTICIPATED IN THE CONSULTATIONS

INTERVIEW GUIDE: EXPECTATIONS AND NEEDS OF LESBIAN RIGHTS ADVOCACY GROUPS IN QUEBEC AND FRANCOPHONE ONTARIO

Importance of the legal recognition of same-sex couples

- Does your group consider the idea that the provincial and federal governments should provide legal recognition for same-sex couples important? What are the reasons for your opinion?

- Do you believe that same-sex couples should be eligible for the same forms of conjugal status as opposite-sex couples?

- Do you believe that the positions you have expressed concerning the recognition of same-sex couples generally reflect the views expressed by lesbians in Canada?

Legal definition of the concept of spouse

- There are currently criteria for the definition of the concept of a "*de facto*" or "common-law spouse" in social legislation (assistance plans, social insurance plans, labour law, etc.) and tax legislation. Spousal status is, as a rule, recognized by default on the basis of the following criteria: cohabitation of the partners, economic interdependence, and public acknowledgment of the relationship. How do you react to the idea that these criteria should also provide a basis for the legal recognition of same-sex couples?

- Do you agree or disagree with the application of these criteria to same-sex couples? Why?

- Do you feel that the legal recognition of same-sex couples should be applied to <u>all</u> laws and plans in which the concept of spouse appears in order to eliminate discrimination?

- In your view, what would be the advantages for a lesbian couple with or without children in obtaining the same rights and obligations as a married or common-law heterosexual couple?

- In your view, what would be the disadvantages for a lesbian couple with or without children in obtaining the same rights and obligations as a married or common-law heterosexual couple?

Models for the legal recognition of same-sex couples

- What model for the legal recognition of same-sex couples is advocated by your organization? On what principles was this choice based?

- What do you think of the registered or domestic partnership models? Do you think these models should be adopted in Canada? Why?

- The federal government is preparing an omnibus bill to provide recognition in its social legislation for certain forms of non-conjugal union in which gay and lesbian couples would be included. What do you think of this strategy? What are the advantages and disadvantages?

Declaration of relationship

- Finally, in the event that gay and lesbian couples in Canada obtain legal equality with heterosexual couples, will you declare your relationship?

LIST OF ORGANIZATIONS AND RESOURCE PERSONS CONSULTED

Association des femmes professionnelles et gaies
Founded in 1993, this organization has 150 members. The group's mission is to promote links among gay business and professional women, to encourage economic exchanges among the members and to promote a network of social contacts within the lesbian and gay communities. The interview with this group took place on January 7, 2000.

Association des mères lesbiennes
Founded in 1998, this organization has 140 members. The Association is a support group for lesbian mothers or those wishing to become mothers. The interview with this group took place on January 8, 2000.

Coalition des gais et lesbiennes du Québec (Claudine Ouellet, Executive Director)
Founded in 1992, the Coalition has 200 members. Its mission is to promote, represent and defend the interests of gay and lesbian communities in Quebec. The interview took place on November 25, 1999.

Coalition québécoise pour la reconnaissance des conjoints et conjointes de même sexe
Founded in 1998, the Coalition's goal is to eliminate systemic discrimination against gays and lesbians and their families in social legislation and policies and in the labour force. The following are members of the Coalition:

- L'Alliance des professeures et professeurs de Montréal
- La CEDEC Centre-Sud et Plateau Mont-Royal
- La Centrale de l'enseignement du Québec (CEQ)
- The Confederation of National Trade Unions (CNTU)
- Le Conseil central du Montréal métropolitain (CNTU)
- Le Conseil des travailleurs et travailleuses du Montréal métropolitain (QFL)
- La Fédération des femmes du Québec (FFQ)
- La Fédération du personnel de soutien (CEQ)
- Le Forum des gais et lesbiennes syndiqués du Québec
- La Ligue des droits et libertés
- La Table de concertation des lesbiennes et des gais du Grand Montréal
- Quebec Lesbians Network (RLQ/QLN)
- Canadian Union of Public Employees (Quebec Section)
- Canadian Union of Postal Workers (Quebec Section)

Collective lesbienne de l'Ontario
Founded in 1993, the Collective has 60 members. Its mission is to allow French-speaking lesbians to meet and create networks in which they can consult and take political action. The interview with this group took place on June 12, 1999.

Côté, Andrée (resource person)
Ms. Côté is a lawyer and Director of Legal Affairs for the National Association of Women and the Law. The interview took place on November 30, 1999.

EGALE – Equality for Gays and Lesbians Everywhere - (John Fisher, Director General)
Founded in 1986, this organization has 1,500 members. EGALE's mission is to promote equality for lesbians, gays and bisexuals at the federal level. The interview with Mr. Fisher took place on October 27, 1999.

Groupe de lesbiennes de la région de l'Abitibi-Témiscamingue
A group of 24 lesbians from various municipalities in the area were invited to a meeting by the Rouyn-Noranda women's centre. The interview with this group took place on November 26, 1999.

Réseau des lesbiennes du Québec/Quebec Lesbians Network
Founded in 1996, the Network has 100 members. Its mission is to promote and defend the rights and interests of lesbians in Quebec. The interview with this group took place on June 23, 1999.

Ricard, Nathalie (resource person)
Nathalie Ricard works as a nurse at the Notre-Dame-de-Grâce CLSC (community clinic). She also holds a Master's degree in social work with a specialization in feminist studies from the University of Quebec at Montréal. Her thesis explored lesbian motherhood as a new form of family configuration. The interview took place on January 7, 2000.

PORTRAIT OF WOMEN WHO PARTICIPATED IN THE CONSULTATIONS ON THE LEGAL RECOGNITION OF LESBIAN COUPLES

Compilation

1. To which age group do you belong?

Under 25	5.5% (N: 4)
26 to 34	19% (N: 14)
35 to 44	41% (N: 31)
45 to 54	29% (N: 22)
55 to 64	5.5% (N: 4)
65 and over	0

2. What level of education have you completed?

Fewer than 9 years of school	1% (N: 1)
Secondary school partly completed	3% (N: 2)
Secondary school graduation	11% (N: 8)
Trade school diploma or certificate	1% (N: 1)
Post-secondary studies partly completed	12% (N: 9)
Postsecondary certificate or diploma	17% (N: 13)
University degree	55% (N: 41)

3. What is your current occupation?

Student	5.5% (N: 4)
Homemaker	4% (N: 3)
Full-time worker	65% (N: 49)
Part-time worker	5.5% (N: 4)
Social assistance recipient	1% (N: 1)
Unemployed	4% (N: 3)
Retired	1% (N: 1)
Other(explain): self-employed	11% (N: 8)
doctors	3% (N: 2)

4. What was your <u>personal</u> annual income in 1998?

Under $10,000	8% (N: 6)
$10,000 to $14,999	12% (N: 9)
$15,000 to $19,999	4% (N: 3)
$20,000 to $24,999	6.25% (N: 5)
$25,000 to $34,999	24% (N: 18)
$35,000 to $39,999	16% (N: 12)
$40,000 to $44,999	6.25% (N: 5)
$45,000 to $49,999	11% (N: 8)
$50,000 to $54,999	4% (N: 3)
$55,000 to $59,999	3% (N: 2)
$60,000 and over	5.5% (N: 4)

5. What is your current situation in terms of relationships?

I do not currently have a partner.	25% (N: 19)
I am involved in an intimate relationship with a woman but do not live with her.	25% (N: 19)
I live with my spouse.	50% (N: 37)
Other (explain):	

6. If you live with your partner, for how long have you done so?

Number of years:
- 1 to 4 years = 11 respondents
- 5 to 9 years = 10 respondents
- 10 to 14 years = 5 respondents
- 15 to 19 years = 3 respondents
- 20 to 25 years = 1 respondent

Median: 6 years Average: 7.16 years

7. Are you the mother of one or more children?

Yes	43% (N: 26 + 6 non-biological mothers)
No	57% (N: 43)

8. If so, does this child or do these children live with you?

Yes	59% (N: 17)
No	41% (N: 12)

9. Does your partner have one or more children?

Yes	37% (N: 21)
No	63% (N: 36)

10. If so, does this child or do these children live with you?

Yes	71% (N: 15)
No	29% (N: 6)

BIBLIOGRAPHY

AGENCE FRANCE PRESSE. "Les Pays-Bas autorisent l'adoption", *Le Devoir*, February 7, 1998, p. A4.

———. "Les députés néerlandais disent oui au mariage des homosexuels", *Le Soleil*, April 17, 1996, p. A14.

ANDREWS, K. "We are Family", *Healthsharing*, Vol. 18 (Fall 1989), p. 6-16.

ARNUP, K. "*We Are Family:* Lesbian Mothers in Canada", *Resources for Feminist Research*, Vol. 20, N^{os} 3-4 (1991), p. 101-107.

BAILEY, M. *Marriage and Marriage-like Relationships*, Ottawa, Law Commission of Canada, 1999.

———. "Hawaii's Same-Sex Marriage Initiatives: Implications For Canada", *Canadian Journal of Family Law*, Vol. 15 (1998), p. 153-181.

BALA, N. "Alternatives for Extending Spousal Status: A Commentary", a paper delivered to the Conference on *Domestic Partnerships*, Kingston, Faculty of Law, Queen's University, October 21-23, 1999.

BELL, A. P. and M. S. WEINBERG. *Homosexualités. Un rapport officiel sur les comportements homosexuels par l'Institut de recherche sexologique fondé par Alfred C. Kinsey*, Paris, éditions Albin Michel, 1980.

BERTRAND, L. *Le rapport Bertrand sur le vécu de 1 000 femmes lesbiennes*, Montréal, éditions Primeur, 1984.

BERTRAND, M.-A. "L'analyse du discours juridique" in L. Richard and M.T. Séguin (eds.), *Homosexualités et tolérance sociale*, Moncton, Éditions d'Acadie, 1988, p.143-152.

BOUTIN, C. *Le "mariage" des homosexuels? CUCS, PIC, PACS et autres projets législatifs*, Paris, Criterion, 1998.

BOYD, M. "Changing Canadian Family Forms: Issues for Women" in N. Mandell and A. Duffy (eds.), *Reconstructing the Canadian Family: Feminist Perspectives*, Toronto, Butterworths, 1988, p. 85-109.

BOYD, S. B. "Best Friends or Spouses? Privatization and the Recognition of Lesbians Relationships in *M.* v. *H.*", *Canadian Journal of Family Law*, Vol. 13 (1996), p. 321-341.

BRITISH COLUMBIA LAW INSTITUTE. *Report on Recognition of Spousal and Family Status*, Vancouver, The Institute, 1998.

BRODSKY, G. and S. DAY. *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back*? Ottawa, Canadian Advisory Council on the Status of Women, 1989.

BURNETTE, W. B. "Hawaii's Reciprocal Beneficiaries Act: An Effective Step In Resolving The Controversy Surrounding Same-Sex Marriage", *Brandeis Law Journal*, Vol. 37 (Fall 1998-1999), p. 80-92.

BUSSEMAKER, J. and K. VAN KERSBERGEN. "Gender and Welfare States: Some Theoretical Reflections" in Diane Sainsbury (ed.), *Gendering Welfare States*, London, Sage, 1994, p. 8-25.

CANADA. *The Seniors Benefit: securing the future*, Ottawa, 1996.

CANADA. DEPARTMENT OF FINANCE OF CANADA. *Government of Canada Tax Expenditures 1999*, Ottawa, Department of Finance, 1999.

———. *Budget plan 2000*, tabled in the House of Commons by Minister of Finance Paul Martin, Ottawa, February 28, 2000.

CANADA. HEALTH AND WELFARE CANADA. *Inventory of income security programs in Canada, January 1988*, Ottawa, Health and Welfare Canada, 1989.

CANADA. REVENUE CANADA. *Tax statistics on individuals, 1998 edition.* On line at: <http://www.ccra-adrc.gc.ca/tax/individuals/stats/gb96/sfp96/f4v-ca.htm>, consulted on October 26, 2000.

CANADA. STATISTICS CANADA. *Households' Unpaid Work: Measurement and Valuation*, Ottawa, Department of Industry, No. 13-603E, No. 3, 1995.

CHAMBERLAND, L. "Du fléau social au fait social. L'étude des homosexualités", *Sociologie et sociétés*, Vol. 29, No. 1 (Spring 1997), p. 5-20.

CHEVRETTE, F. and H. MARX. *Droit constitutionnel*, Montréal, Presses de l'Université de Montréal, 1982.

COSSMAN, B. "Family Inside/Out", *University of Toronto Law Journal*, Vol. 44, No. 1 (Winter 1994), p. 1-39.

———. "Dancing in the Dark: A Review of Gwen Brodsky and Shelagh Day, Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?", *Windsor Yearbook of Access to Justice*, Vol. 10 (1990), p. 219-230.

DANDURAND, R. B. *Le mariage en question. Essai sociohistorique,* Quebec, Institut québécois de recherche sur la culture, 1988.

DEMCZUK, I. "Reconnaissance des couples de lesbiennes: un projet de loi est enfin déposé", *Féminisme en bref*, Vol. 10, No. 1 (June 1999), p. 13-14.

——— (ed.). "Introduction", *Des droits à reconnaître: les lesbiennes face à la discrimination,* Montréal, Éditions du remue-ménage, 1998, p. 9-14.

———. "Le traitement des lesbiennes dans la recherche féministe francophone au Québec", A paper delivered to the International Conference on *La recherche féministe dans la francophonie*, Sainte-Foy, Laval University, September 27, 1996.

DEMCZUK, I. and A. GARIÉPY, *La reconnaissance des conjoints et conjointes de même sexe: un droit au coeur de nos vies*, Montréal, Table de concertation des lesbiennes et des gais du Grand Montréal et Coalition québécoise pour la reconnaissance des conjoints et conjointes de même sexe, 1999.

DEMCZUK, I. and F. W. REMIGGI. "Un demi-siècle de changements" in I. Demczuk and F. W. Remiggi (eds.), *Sortir de l'ombre, Histoires des communautés lesbienne et gaie de Montréal*, Montréal, VLB éditeur, 1998, p. 13-23.

DHAVERNAS, O. *Droits des femmes, pouvoir des hommes.* Paris, édition du Seuil, 1978, p. 329.

EATON, M. *Theorizing Sexual Orientation*, Master's thesis for the Degree of LL.M., Kingston, Queen's University, 1991.

ÉGALE. *Policies Around Relationship Recognition*, internal printed document, Ottawa, November 7-9, 1997.

EICHLER, M. *Families in Canada Today*, Toronto, Gage, 1988.

ELLIOTT, K. "Lesbian and Gay Rights Arrive in Nova Scotia", *Gazette,* No. 9 (1990), p. 4.

FINDLAY, B. "All in the Family Values", *Canadian Journal of Family Law,* Vol. 14 (1997), p. 129-196.

FORDER, C. " Models of Domestic Partnership Laws: The Field of Choice", A Paper delivered to the Conference on *Domestic Partnerships,* Kingston, Faculty of Law, Queen's University, October 21-23, 1999a.

FORDER, C. [assisted by S. H. Lombardo]. *Civil Law Aspect of Emerging Forms of Registered Partnerships,* Netherlands: Ministry of Justice, 1999b.

FRANCE. MINISTÈRE DE LA JUSTICE. *Pacte civil de solidarité (PACS), Mode d'emploi*, 1999. On line at: <http://www.justice.gouv.fr./justicef/pacs2.html>, consulted on February 6, 2000.

FREEDMAN, B., P. J. TAYLOR, T. WONNACOTT and K. HILL. "Criteria for Parenting in Canada: A Comparative Survey of Adoption and Artificial Insemination Practices", *Canadian Family Law Quarterly*, Vol. 3, No. 35 (1988), p. 35-54.

FRIEDMAN, A. "The Necessity for State Recognition of Same Sex Marriage: Constitutional Requirements and Evolving Notions of Family", *Berkeley Women's Law Journal*, Vol. 134, No. 3 (1987-1988), p. 134-170.

FUDGE, J. "The Effects of Entrenching a Bill of Rights upon Political Discourse: Feminist Demands and Sexual Violence in Canada", *International Journal of Sociology and the Law*, Vol. 17 (1989), p. 445-463.

GAVIGAN, S. A. M. "Paradise Lost, Paradox Revisited: The Implications of Familial Ideology for Feminist, Lesbian, and Gay Engagement to Law", *Osgoode Hall Law Journal*, Vol. 31, No. 3 (1993), p. 589-624.

GIRARD, M. "Les demi-vérités du gouvernement Bouchard sur les allocations familiales", *La Presse*, May 20, 2000, p. F2.

GIRARD, P. L. "From Subversion to Liberation: Homosexuals and the Immigration Act 1952-1977", *Canadian Journal of Law and Society*, Vol. 2 (1987), p. 1-27.

GROSJEAN, B. "Couples homos: la solution d'Irène Théry", *Libération*, May 27, 1998, p. 3. On line at: <http://liberation.com/pacs/portrait/980527html>, consulted on December 10, 1999.

GROUPE DE REFLEXION : CONSEQUENCES FINANCIERES DE LA SEPARATION DES COUPLES. *Thème: Pacte d'intérêt commun*, Mission de recherche Droit et Justice, Paris, Centre national de recherche scientifique, April 30, 1998.

GUIGOU, É. *Discours à l'Assemblée nationale de France*, November 3, 1998. On line at: <http://www.justice.gouv.fr/justicef/pacs2.html>, consulted on February 6, 2000.

HERMAN, D. *Rights of Passage: Struggles for Lesbian & Gay Legal Equality*, Toronto, University of Toronto Press, 1994.

———. "Are We Family? Lesbian Rights and Women's Liberation", *Osgoode Hall Law Journal*, Vol. 28, No. 4 (1990), p. 789-815.

HOGG, P. *Constitutional Law of Canada*, Toronto, Carswell, 2d edition, 1985.

HOLLAND, W. “Intimate Relationships in the New Millenium: The Assimilation of Marriage and Cohabitation?”, A Paper Delivered to the Conference on *Domestic Partnerships*, Kingston, Faculty of Law, Queen’s University, October 21-23, 1999.

HOLTZ, M. “La spectaculaire multiplication des Pacs: 6 211 pactes ont été signés en un mois et demi”, *Libération*, January 21, 2000. On line at: <http://www.liberation.com/pacs/index.html>, consulted on February 6, 2000.

HUNTER, N. “Marriage, Law and Gender: A Feminist Inquiry”, *Law and Sexuality*, Vol. 9, No. 1 (1991), p. 23-34.

HURLEY, M. C. *Législation d’autres pays concernant les conjoints de même sexe*, Ottawa, Research Branch, Law and Government Division, Government of Canada, 1994.

JENSON, J. and S. THOMPSON. *Comparative Family Policy: Six Provincial Stories*, Canadian Policy Research Networks Study No. F|08|, Ottawa, Renouf Publishing Co. Ltd., 1999.

JULIEN, D., M. DUBÉ and I. GAGNON. “Le développement des enfants de parents homosexuels comparé à celui des enfants de parents hétérosexuels”», *La revue québécoise de psychologie*, vol. 15, n° 3, (1994), p. 135-153.

JULIEN, D. and É. CHARTRAND. “ La psychologie familiale des gais et des lesbiennes : perspective de la tradition scientifique nord-américaine”», *Sociologie et Sociétés*, Vol. 29, No. 1 (Spring 1997), p. 71-81.

KATZ, L. “ The Scope of the Federal Legislative Authority in Relation to Marriage”, *Ottawa Law Review* (1975), p. 384-396.

KINSMAN, G. *The Regulation of Desire*, Montréal, Black Rose Books, 1987.

KINSMAN, G. and P. GENTILE. “*In the Interests of the State: The Anti-gay, Anti-lesbian National Security Campaign in Canada. A Preliminary Research Report*”, printed document, Department of Sociology and Anthropology, Laurentian University, April 1998.

LAHEY, K. A. *Are We Persons Yet? Law and Sexuality in Canada*, Toronto, University of Toronto Press, 1999a.

———. “Of Constitutions, Codes and Queers: ‘Partnership’ Legislation and Discrimination”, A Paper Delivered to the Conference on *Domestic Partnerships*, Kingston, Faculty of Law, Queen’s University, October 21-23, 1999b.

LELEU, Y. H., C. COUQELET and É. VON FRENCKELL. “La cohabitation légale”, *Chronique du droit à l’usage des juges de paix et de la police*, Cahier n° 26, Faculté de droit, Université de Liège, October 16, 1999.

LEONARD, L. M. “A Missing Voice in Feminist Theory: The Heterosexual Presumption”, *Women’s Rights Law Reporter*, Vol. 12, No. 1 (Spring 1990), p. 39-49.

LEPAGE, F., G. BÉRUBÉ and L. DESROCHERS. *Vivre en union de fait au Québec*, Quebec, Conseil du statut de la femme, Les publications du Québec, 2d edition, 1992.

LØDRUP, P. “Registered Partnership in Norway” in A. Bainham (eds.), *The International Survey of Family Law 1994*, The Hague, Martinus Nijhoff, 1996.

MACKINNON, C. “Difference and Dominance: On Sex Discrimination” in C. MacKinnon (ed.), *Feminism Unmodified*, Cambridge, Harvard University Press, 1987, p. 32-45.

MAJURY, D. “Refashioning the Unfashionable: Claiming Lesbian Identities in the Legal Context”, *Revue Femmes et Droit*, Vol. 7 (1994), p. 286-317.

MALAURIE, G. “Vers des concubins de première et seconde classe? un débat entre Jean-Pierre Michel, rapporteur de la proposition de loi, et la sociologue Irène Théry”, *Le Nouvel Observateur*, No. 1767 (September 17, 1998), p. 12-13.

MANDEL, M. *The Charter of Rights and the Legalization of Politics in Canada*, Toronto, Wall and Thompson, 1989.

MARSHALL, K. “Employment After Childbirth”, *Perspectives on Labour and Income*, Ottawa, Statistics Canada, No. 75-001-XPE (Fall 1999), p. 20-28.

McCARTHY, M. “Supporting Same Sex Families”, A Paper Delivered to the Conference on *Domestic Partnerships*, Kingston, Faculty of Law, Queen’s University, October 21-23, 1999.

McCARTHY, M. A. and J. L. RADBORD. “Family Law for Same Sex Couples: Chart(er)ing the Course”, *Canadian Journal of Family Law*, Vol. 15 (1998), p. 101-177.

McILROY, A. “Most in Poll Want Gay Marriages Legalized”, *The Globe and Mail*, June 10, 1999, p. A-1.

NATIONAL COUNCIL OF WELFARE. *A Pension Primer*, Ottawa, Public Works and Government Services, Canada, 1999a.

———. *Poverty Profile 1997*, Ottawa, Public Works and Government Services Canada, 1999b.

———. *Profiles of Welfare, Myths and Realities*, Ottawa, Public Works and Government Services Canada, 1998.

THE NETHERLANDS. MINISTRY OF JUSTICE . *Registered Partnership in the Netherlands: A Quick Scan*, La Haye, WDOC, 1999.

NIELSEN, L. “Family Rights and ‘Registered Partnership’ in Denmark”, *International Journal of Law and the Family*, Vol. 4, No. 297 (1990), p. 278-301.

O’BRIEN, C. A. and L. WEIR. “Lesbians and Gay Men Inside and Outside Families”, in N. Mandell and A. Duffy (eds.), *Canadian Families, Diversity, Conflict and Change*, Toronto, Harcourt Brace Canada, 1995, p. 111-139.

OBSERVATOIRE DU PACS. *Rapport*, 1999. On line at: <http://www.chez.com/obspacs/rapport_observatoire_du_pacs_1999.html>, consulted on December 10, 1999.

ONTARIO. SOCIAL ASSISTANCE REVIEW COMMITTEE. *Transitions*, Report for the Ministry of Social and Community Services, Toronto, Queen’s Printer for Ontario, 1988.

PEPLAU, L. A. “Lesbian and Gay Relationships” in John C. Gonsiorek and James D. Weinrich (ed.), *Homosexuality: Research Implications for Public Policy*, Newbury Park, Sage, 1991, p. 177-196.

POULIQUEN, J.-P. “Le contrat d’union sociale”, *Politique, la revue*, No. 5 (July-August-September 1997), p. 53-56.

QUEBEC. COMMISSION DES DROITS DE LA PERSONNE DU QUÉBEC. *Rapport du comité interne de la Commission sur la violence et la discrimination à l’égard des lesbiennes et des gais*, [written by Daniel Carpentier, Michèle Morin, Ghislaine Patry-Buisson], Montréal, la Commission, 1993.

———. *De l’illégalité à l’égalité. Rapport de la consultation publique sur la violence et la discrimination envers les gais et lesbiennes*, Montréal, la Commission, 1994.

QUEBEC. CONSEIL DU STATUT DE LA FEMME DU QUEBEC. *Commentaires sur le projet de loi concernant les conjoints de fait de même sexe*, [Researched and written by Guylaine Bérubé], Québec, Government of Quebec, July 1999.

———. *One plus one: A study of the legal recognition of lesbian couples*, [Researched and written by Guylaine Bérubé], Québec, le Conseil, August 1998.

QUEBEC. MINISTÈRE DE L’ÉDUCATION. *Student Financial Assistance 1999-2000*, a brochure for students, Québec, Department of Education, 1999.

QUEBEC. MINISTÈRE DE LA SÉCURITÉ DU REVENU. *Échelle d’équivalence*, Québec, Direction générale des politiques et des programmes, 1996.

ROBINSON, A. “Lesbiennes, conjointes et mères: les exclues du droit civil québécois” in I. Demczuk (ed.), *Des droits à reconnaître: les lesbiennes face à la discrimination*, Montréal, Éditions du remue-ménage, 1998, p. 21-68.

ROBSON, R. *Lesbian Out (Law): Survival Under the Rule of Law,* Ithaca, Firebrand Books, 1992.

ROSE, R. “Sous prétexte d’aider les pauvres, on étend l’appauvrissement”, *Possibles,* Vol. 22, Nos. 3- 4 (Summer-Fall 1998a), p. 95-115.

———. “Politiques pour les familles pauvres : suppléments au revenu gagné et revenus minimum garantis” in Renée B. Dandurand, Pierre Lefebvre and Jean-Pierre Lamoureux (eds.), *Quelle politique familiale à l’aube de l’an 2000 ?,* Montréal, l’Harmattan, 1998b, p. 247-288.

RUSSEL, P. *The Gay 100. A Ranking of the Most Influential Gay Men and Lesbians, Past and Present,* New York, Citadel Press Book, 1995.

RYDER, B. “Becoming Spouses: The Rights of Lesbian and Gay Couples”, *Special Lectures of the Law Society of Upper Canada*, 1993, p. 399-450.

———. “Equality Rights and Sexual Orientation: Confronting Heterosexual Family Privilege”, *Canadian Journal of Family Law,* Vol. 9, No. 1 (Fall 1990), p. 39-47.

SCHNEIDER, E. M. “The Dialectic of Rights and Politics: Perspectives from the Women’s Movement”, *New York Law Review,* Vol. 61 (1986), p. 586-652.

SCHULTZ, M. “Lesbiennes: les silences du droit ”, *Les Temps modernes,* No. 598 (March-April 1998), p. 113-155.

SIVRY, J. M. “Traces militantes éphémères: L’ADGQ et *Le Berdache*” in I. Demczuk and F. W. Remiggi (eds.), *Sortir de l’ombre, Histoires des communautés lesbienne et gaie de Montréal*, Montréal, VLB éditeur, 1998, p. 235-263.

SMITH, M. *Lesbian and Gay Rights in Canada: Social Movements and Equality-Seeking, 1971-1995,* Toronto, University of Toronto Press, 1999.

SWEDISH INSTITUTE. “Equality Between Men and Women”, Classification: FD 82 I Ohj, September 1997. On line at: <www.si.se>, consulted on October 24, 2000.

TARNOPOLSKY, S. and W. PENTNEY. *Discrimination and the Law,* Toronto, Carswell, 1994.

THÉRY, I. *Couple, filiation et parenté aujourd’hui: le droit face aux mutations de la famille et de la vie privée,* rapport à la ministre de l’Emploi et de la Solidarité, Garde des Sceaux, Paris, Ministre de la Justice, 1998.

———. “Le contrat d’union sociale en question”, *Esprit,* October 1997, p. 159-211.

TURCOTTE, L. “Itinéraire d’un courant politique : le lesbianisme radical au Québec”, in I. Demczuk and F. W. Remiggi (eds.), *Sortir de l’ombre, Histoires des communautés lesbienne et gaie de Montréal,* Montréal, VLB éditeur, 1998, p. 363-398.

TURCOTTE, P. “Recent Family Trends and the Second Demographic Transition in Canada”, A Paper Delivered to the Conference on *Domestic Partnerships*, Kingston, Faculty of Law, Queen’s University, October 21-23, 1999.

VAILLANCOURT, Y. *L’évolution des politiques sociales au Québec 1940-1960,* Montréal, Presses de l’Université de Montréal, 1988.

WAIGI, C. “Un couple peut en cacher un autre: le PACS et le rapport Théry en perspective”, *3 Keller*, n° 39 (June 1998), p. 12-13.

WAKKARY, A. “Assessing the Impact of Changing Marital Rights and Obligations: Practical Considerations”, A Paper Delivered to the Conference on *Domestic Partnerships*, Kingston, Faculty of Law, Queen’s University, October 21-23, 1999.

WAUGH, T. “Des Adonis en quête d’immortalité: la photographie homoérotique” in I. Demczuk and F. W. Remiggi (eds.), *Sortir de l’ombre, Histoires des communautés lesbienne et gaie de Montréal,* Montréal, VLB éditeur, 1998, p. 53-89.

WEILL, C. “Les casse-tête du vrai-faux mariage”, *Le Nouvel Observateur,* No. 1739 (March 5 to 11, 1998), p. 43-45.

WILLIAMS, P. J. *The Alchemy of Race and Rights*, Cambridge, Harvard University Press, 1991.

WOMEN’S LEGAL ACTION AND EDUCATION FUND (LEAF/FEAJ), *Litigating for Lesbians. LEAF’s Report on Consultations with the Lesbian Community*, Ottawa, the Fund, June 1993.

YOGIS, J. A., R. R. DUPLAK and J. R. TRAINOR. *Sexual Orientation and Canadian Law: An Assessment of the Law Affecting Lesbian and Gay Persons,* Toronto, Emond Montgomery Publications, 1996.

YOUNG, C. “Taxing Times for Lesbians and Gay Men: Equality at What Cost?”, *Dalhousie Law Journal*, Vol. 17, No. 2 (Fall 1994), p. 534-559.