

# CLGRO

COALITION FOR LESBIAN & GAY RIGHTS IN ONTARIO

Coalition pour les droits des personnes gaies en Ontario

## Happy Families

The Recognition of Same-Sex Spousal Relationships

A brief on the recognition of same-sex spousal relationships  
written for the Ontario legislature  
by the Coalition for Lesbian and Gay Rights in Ontario.

April 1992

All people, regardless of sexual orientation, have the right to determine for themselves their primary personal relationships and to have these relationships supported and recognized in law and by social institutions.

CLGRO Statement of Principle, adopted at the  
On Our Own Terms conference in 1989.

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## Coalition for Lesbian and Gay Rights in Ontario

The Coalition for Lesbian and Gay Rights in Ontario (CLGRO) is a provincial coalition with 24 member groups and hundreds of individual members around Ontario.

Founded in January 1975, CLGRO worked steadily in a successful campaign for the inclusion of human rights protection for lesbians and gay men in the *Ontario Human Rights Code*. "Sexual orientation" was finally included in the *Code* in December 1986.

In addition to working for legislative change, CLGRO is committed to grassroots organizing and public education.

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**HAPPY FAMILIES**  
**The Recognition of Same-Sex Spousal Relationships**

**CONTENTS**

PART ONE	page
Summary .....	iii
List of recommendations .....	v
1 Preamble .....	1
2 Introduction: Lesbians and Gay Men in the Family and in the Community.....	3
3 A Historical Overview of Discrimination .....	4
4 Examples of Legislative Alternatives .....	8
5 Conclusion.....	9
PART TWO	
6 Ontario Statutes.....	11
6.1 Personal Relationships .....	11
6.1.1 Recognition of Same-Sex Spousal Relationships.....	11
6.1.2 Child Protection, Custody, and Adoption .....	14
6.1.3 Privacy, Proxies, and Next-of-Kin.....	18
6.1.4 Health, Life, and Death .....	21
6.2 Financial Relationships .....	23
6.2.1 Taxation .....	23
6.2.1a "Family" Transactions .....	23
6.2.1b Taxation of Real Property .....	26
6.2.2 Land Registration .....	31
6.2.3 Housing.....	31
6.2.4 Family Support Obligations .....	32
6.2.5 Division of Property on Separation and Divorce.....	35
6.2.6 Division of Property on Death .....	37
6.2.7 Social Benefits .....	38
6.2.8 Employment Benefits .....	41
6.2.9 Conflict-of-Interest Rules .....	42



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PART ONE

### SUMMARY

Although lesbians and gay men still live in a general climate of oppression, many of us choose to live openly lesbian or gay lives. In 1986, the province of Ontario took an important step towards establishing legal equality for lesbians and gay men by adding "sexual orientation" to the *Human Rights Code* as a prohibited ground of discrimination.

The *Ontario Human Rights Code*, however, continues to discriminate against lesbians and gay men by retaining an exclusively heterosexual definition of "spouse." Many other provincial statutes also deny legal recognition to same-sex familial relationships.

In Ontario, many provincial statutes provide benefits and responsibilities for individuals solely on the basis of their marital status. When lesbians and gay men enter into relationships, significant economic consequences result: incomes are pooled, assets shared, houses purchased, investments acquired. For the many lesbians and gay men who are parents, issues relating to custody, support, and family responsibilities become paramount.

Over time, the structure of "the family" has changed and, in the last few decades, governments have moved away from a narrow view of marriage and recognized in law that many heterosexual couples live in "marriage-like" relationships while not actually married. Heterosexual common-law couples now enjoy some of the benefits provided to married people and bear some of their responsibilities. Lesbian and gay relationships should also be able to share the benefits and burdens provided by state recognition.

In the lesbian and gay communities, there are varying opinions as to the best models for relationships. Some reject the traditional models of relationships and family, or find them discriminatory towards single persons. Some choose alternative lifestyles, while others wish to live in much the same way as their heterosexual friends and relatives. Many others have views and lifestyles that fall somewhere in between these two positions.

CLGRO's position is that basic equality should be provided to lesbians and gay men: same-sex relationships should receive legal recognition on the same basis as those of heterosexuals. Gay and lesbian relationships should receive the same benefits and rights, and be subject to the same obligations, as heterosexual relationships. Some lesbians and gay men may choose not to pursue these options, but simple freedom of choice demands that they be available to those lesbians and gay men who want them.

This brief provides a comprehensive overview of provincial laws which systematically discriminate against lesbian and gay relationships and offers specific proposals for change. CLGRO's proposals are based on the premise that all persons should have the right to determine the nature of their own personal relationships in accordance with their personal values and beliefs.

All people, regardless of sexual orientation, have the right to determine for themselves their primary personal relationships and to have these relationships supported and recognized in law and by social institutions.

CLGRO Statement of Principle, adopted at the  
On Our Own Terms conference in 1989.

CLGRO believes that, while our preference would be that benefits be made available on an individual basis (with allowances for the dependence of children, the aged, and the disabled), whenever benefits are made available to heterosexuals living in couples, these same benefits must also be made available to same-sex couples on the same footing.

CLGRO Statement of Principle, 1990.

## LIST OF RECOMMENDATIONS

CLGRO recommends:

- 1 That the definition of "spouse" and "marital status" in the *Ontario Human Rights Code* be amended to include same-sex partners and the status of being in an intimate relationship with a person of the same sex.
- 2 That the provincial government establish an optional system of status designation to permit couples, whether heterosexual or same-sex, to identify themselves as being in a relationship. This designation would provide to unmarried couples as many of the benefits and obligations of marriage as are within the legislative competence of the province to confer.
- 3 That the *Child and Family Services Act* be amended to permit same-sex couples to adopt children.
- 4 That the *Children's Law Reform Act* be amended so that "family" and "family unit" are not interpreted solely in heterosexual terms; lesbian and gay parents must have the right to legal custody of, and access to, their natural or adoptive children.
- 5 That discrimination against lesbians and gay men under the *Child and Family Services Act* be remedied by:
  - (a) amending the definition of "spouse" in the *Act* to include persons in same-sex relationships; and
  - (b) including a declaration in the *Act* recognizing the suitability of non-traditional forms of family, including same-sex relationships, as adopting parents.
- 6 That the *Change of Name Act* be amended to permit a person in a same-sex relationship, if s/he chooses, to make a joint declaration in the same manner as common-law heterosexuals and to elect to change his/her surname to that of his/her same-sex spouse.
- 7 That the *Vital Statistics Act* be amended to ensure that the same-sex partner of a deceased person is competent to provide a statement of personal particulars to a funeral director.
- 8 That "sexual orientation" be added to the list of prohibited grounds of discrimination in the anti-harassment sections of the *Ontario Human Rights Code*.

- 9 That the *Evidence Act* be amended to include same-sex couples as well as heterosexual common-law couples.
- 10 That the *Juries Act* be amended to extend to same-sex spouses the considerations which apply to heterosexual married spouses in exempting them from jury duty.
- 11 That the term "spouse" in the *Election Act* be amended to include same-sex and heterosexual common-law spouses.
- 12 That the definition of "spouse" in the *Child and Family Services Act* be amended to include same-sex spouses.
- 13 That the *Freedom of Information and Protection of Privacy Act* be amended to ensure that a same-sex spouse is considered an appropriate person under the *Act* to whom to disclose personal information, and that the terms "marital status," "family status," "next of kin," and "legal representative" should be redefined to include lesbian and gay families and relationships.
- 14 That the interpretation of the terms "bona fide friend" and "relative" in the *Anatomy Act* and the *Cemeteries Act* include a same-sex partner; that the *Acts* be amended so that the term "relative" include a same-sex spouse.
- 15 That the definition of spouse in the *Coroner's Act* and the *Human Tissue Gift Act* be amended to include a same-sex spouse; that the definition of persons who may apply for a declaration of mental incompetency under the *Mental Incompetency Act* be expanded to include a same-sex spouse.
- 16 That the *Land Transfer Tax Act* and the *Retail Sales Tax Act* be amended to recognize same-sex spouses as a family unit.
- 17 That the definition of "spouse" in the *Land Transfer Tax Act* and the *Non-Resident Agricultural Land Interests Registration Act* be amended to include same-sex spouses.
- 18 That the *Ontario Home Ownership Savings Plan Act* be amended so that common-law and same-sex spouses are not eligible for greater benefits than married persons.
- 19 That same-sex spouses and heterosexual spouses be subject to the same restrictions on entering into certain types of transactions found in the *Securities Act*.
- 20 That the definitions of "spouse" and "family" should encompass same-sex couples and should be standardized in all Ontario statutes, unless there are identified public-policy reasons for a variation.

- 21 That the definition of "spouse" in the *Municipal Elderly Residents' Assistance Act* be amended to include same-sex spouses.
- 22 That the *Income Tax Act* (Ontario) be amended to make same-sex spouses eligible for a property-tax credit; that definitions of "spouse" and "supporting person" which do not discriminate against those in same -sex relationships be added to the *Act*.
- 23 That the *Income Tax Act* be amended so that common-law and same-sex spouses are not eligible for greater benefits than married persons; that the *Income Tax Act* be amended to permit heterosexual common-law spouses and same-sex spouses sharing a principal residence to elect which spouse will claim the property-tax credit for both spouses.
- 24 That, on the breakdown of their relationships, property rights in their principal residence be protected for same-sex and common-law spouses in the same manner as the property rights of married spouses' to the matrimonial home; that section 47 of the *Land Titles Act* apply to same-sex and common-law spouses equally with married spouses; that the *Land Registration Reform Act's* requirement for statements of spousal status should apply equally to common-law and same-sex spouses.
- 25 That the definition of "spouse" in the *Landlord and Tenant Act* be amended to include same-sex spouses.
- 26 That the *Ontario Human Rights Code* be amended to include a definition of "family status" which includes same-sex spouses.
- 27 That the term "family" in the *Housing Development Act* be defined to include same-sex spouses.
- 28 That the *Family Law Act* be amended to extend the application of the *Act's* property-division and spousal-support obligations to same-sex relationships if the persons in that relationship choose to designate themselves as spouses; that spousal-support obligations flow from the recognition of a common-law status for same-sex relationships on the same terms as those for common-law heterosexual relationships; that domestic contracts entered into between same-sex partners be recognized in law.
- 29 That the *Family Law Act* be amended to permit members of a same-sex couple who have made a declaration of their relationship to obtain an equalization and division of net family property on the breakdown of the relationship and to obtain possession of the home they occupied during the

relationship, subject to the terms of a domestic contract made between the couple to the contrary.

- 30 That same-sex spouses who have made a declaration of their relationship be considered to be "spouses" within the meaning of the *Succession Law Reform Act*.
- 31 That a de facto test of dependency be established in order to remove discrimination in the determination of eligibility for social benefits in all provincial statutes granting benefits to individuals based on their relationship to other persons.
- 32 That a definition of beneficiaries which expressly includes same-sex spouses be included in all statutes granting an economic or social benefit.
- 33 That the *Business Corporations Act*, the *Corporations Act*, the *Cooperative Corporations Act*, the *Insurance Act*, the *Credit Unions and Caisses Populaires Act* and the *Loan and Trust Corporations Act* be amended to define "associate" in such a way that it includes a same-sex spouse.
- 34 That the definitions of "spouse" found in political conflict-of-interest legislation be amended to include same-sex relationships.
- 35 That the *Health Disciplines Act*, the *Insurance Act*, and the *Nursing Homes Act* should be amended so that the term "associate" includes a same-sex spouse.

All people, regardless of sexual orientation, have the right to determine for themselves their primary personal relationships and to have these relationships supported and recognized in law and by social institutions.

CLGRO Statement of Principle, passed at the  
On Our Own Terms conference in 1989.

## 1 Preamble

Since its inception in 1975, CLGRO has expended much energy on human rights issues concerning lesbians and gay men, notably the 13-year campaign to have the words "sexual orientation" added to the *Ontario Human Rights Code* as a prohibited grounds of discrimination. When the *Code* was amended, in December 1986, CLGRO spent some time working on the implications of our new status, as people with human-rights protection.

In August 1989, CLGRO held a conference, *On Our Own Terms*, to begin to develop a province-wide, community-based stance on relationships recognition, both social and legal. Following the conference, CLGRO convened a working group to concentrate on issues of relationships recognition. One of the products of this was the book *On Our Own Terms*, written by Laurie Bell and published by CLGRO in 1991. This book, which has been much in demand, outlines the legal provisions affecting the status of lesbian and gay relationships in Ontario.

This brief is the result of a process which parallels the Ontario government's legislative review. CLGRO has sought broad-based input from lesbians and gay men in the province of Ontario. We have conducted an extensive review of provincial statutes that systematically discriminate against same-sex partnerships, and we make specific proposals for change.

All communities contains diverse opinions on many subjects, and this is no less true of Ontario's lesbian and gay communities on the issue of same-sex relationship rights.

Some people in our communities do not seek these rights because they reject the concept of the traditional heterosexual family, which they see as patriarchal and exploitative, part of a social structure that has oppressed lesbians, gay men, women, and other groups for centuries. Some think the rights and benefits governments have given to couples and families have led to a situation of unfair discrimination against single individuals

Other lesbians and gay men, however, wish to live in much the same way as their heterosexual friends and relatives. They want to marry their same-sex partners or to live with them in socially

acknowledged couples, to raise children, and to enjoy traditional family relationships analogous to those of their parents.

Many people in our communities have views which lie somewhere between these two positions. We believe that, even if some would choose not to avail themselves of these rights, most people in our communities want these rights to be available to lesbians and gay men on the same terms as they already are to heterosexuals.

All individuals should have the right to determine the nature of their own personal relationships in accordance with their personal values and beliefs. This is essentially an issue of freedom of choice. And these relationships should receive institutional support from government and the community to support their stability.

CLGRO believes that all members of our communities should have equal relationship rights and the opportunity to exercise these rights fully.

## 2 Introduction: Lesbians and Gay Men in the Family and the Community

Lesbians and gay men live in a climate of oppression, where many have chosen to hide their sexual orientation and personal relationships. Today, however, increasing numbers of lesbians and gay men are choosing to live their lives - individually and in partnerships - both openly and honestly.

As the slogan says, lesbians and gay men are everywhere. Every riding in this province has a population of gay men and lesbians who have the right to expect their elected representatives to recognize them and help them better their positions in society. Gay and lesbian relationships exist wherever there are gay men and lesbians. When lesbians or gay men enter into relationships, significant economic consequences result as incomes are pooled, assets shared, houses purchased, or investments are acquired.

By defining the term "spouse" as a person of the opposite sex, Ontario human rights legislation and other statutes deny lesbian and gay male couples the status, benefits, and obligations granted to heterosexual couples. The *Ontario Human Rights Code*<sup>1</sup> ("the Code") was amended in 1986 to prohibit discrimination on the basis of sexual orientation in employment, housing, and access to services. These provisions, however, apply only to individuals. True equality for lesbians and gay men will not exist until our relationships are recognized and treated in law equally with those of heterosexuals.

Like heterosexuals, lesbians and gay men live in family relationships. Yet Ontario's laws do not reflect the reality of the diverse family relationships which exist in Ontario today. The Ontario government has the power to amend outdated provincial laws and to legitimize same-sex relationships by integrating them socially and economically into the legal structures of family and community in Ontario. The equality-seeking citizens of Ontario look to the government to demonstrate their concern about rights by making the legislative amendments needed to guarantee equality for all.

We congratulate the Ontario government for its December 1990 announcement that employee benefits are being extended to the same-sex partners of provincial public servants. This raises other human rights issues, and we are pleased that the government has initiated a comprehensive review of provincial laws and policies pertaining to spousal benefits.

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<sup>1</sup> *Human Rights Code*, RSO 1990, c. H19.

### 3 A Historical Overview of Discrimination

The family unit has been, and remains, a fluid and changing entity, socially constructed and varying significantly between countries, regions, cultures, and communities according to social, economic and religious differences. Change is also evident from one period to another - the characteristics of family structure are determined by, the members of particular communities at various times.<sup>2</sup>. Some communities tolerate a considerable variety, while others rigidly dictate acceptable forms of association.

In western society, Judaeo-Christian morality and economic function have been the primary influences on the family. The Judaeo-Christian tradition focuses on the morality of sexual conduct, rather than aesthetic or erotic considerations. Sex was to take place only between one man and one woman within marriage, and its purpose, or at least its redeeming feature, was procreation. Economics, too, has helped determine the form and function of family groupings. Until the late nineteenth century generally, and even now in rural areas, subsistence agriculture and fishing required a multi-functional family grouping, often irregular in composition, containing several generations and relations, as well as hired labour.

The industrial revolution transformed the family as an economic unit. Wage labour rather than subsistence farming provided the family's food, clothing, and shelter. The family was both a reproductive unit and the legal instrument for the holding of property. With economic and political power as well as social influence, the rising urban middle class used the nuclear family as its model, and it still serves today as the template for social policy and planning.

Nineteenth-century political upheavals, social migrations, technical innovations, and challenges to religious faith created a sense that social institutions had to be shored up. An attempt was made to identify the essential building blocks of society. Even though this overlooked the complex, existing network of groupings in society, the nuclear family was identified as the elemental societal unit. Concern for "social decay" created a strong interest in classification and definition. The word "homosexual" was coined in 1878 as a medical term to label those with an "abnormal" desire for persons of the same sex. (The word "heterosexual" was coined a few years later.) Homosexuals were seen as threatening because they did not fit the then-dominant family model of the heterosexual reproductive couple.

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<sup>2</sup> Please see list of selected references at the end of this section.

In response, the definition of ideal gender behaviour was narrowed. The terms "masculine" and "feminine" took on increasingly precise and narrow definitions. Women's social roles as mothers and home-makers were more strongly enforced. Marriage laws were tightened, and divorce was strictly limited. Criminal codes were revised and stringently applied, especially those relating to perceived "deviant" behaviour, such as homosexual activity. Lastly, and especially after the first world war, governments sought to stabilize and promote the nuclear family by extending benefits and social services for those who conformed to the norm. Assistance to ease the burdens of parenthood, mothers' allowances, and tax breaks for the nuclear family - all these were intended to shore up the nuclear family, preserving the reproductive pair and their offspring.

Heterosexual, lifelong marriages composed of one man and one woman have not satisfied everyone. Many people have not accepted the constraints of a rigid nuclear family. The pressure for social change has been constant, and governments have recognized demands for greater freedom in personal relations in the last few decades by loosening divorce laws and expanding the availability of benefits to heterosexual common-law relations. Homosexual acts have gradually been decriminalized. Homosexuality is no longer regarded as a disorder or disease by the medical or psychiatric communities, and government agencies now need to come into line.

Lesbians and gay men have no access to formal, institutionally sanctioned marriage and lack institutional support outside the lesbian and gay communities.<sup>3</sup> Lesbians and gay men do not have the legal right of access when their partners are in hospital, do not have automatic inheritance rights on the death of a partner, or rights to a division of property on the breakup of a relationship. Yet they have consistently set up their own spousal relationships: committed, caring, social, and economic partnerships, often supporting the nurturing of children.

Governments have regulated heterosexual partnerships in an attempt to stabilize them, and indeed they have helped secure them. CLGRO believes that the sexual orientation of the people involved in such partnerships should not be an issue.

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<sup>3</sup> The lack of recognition of gay men and lesbians as part of the social fabric of the community is demonstrated by the failure of governments to collect statistical information on self-identified lesbians and gay men. Given that governments are deeply involved in social issues of fundamental concern to gay men and lesbians, such as health care, AIDS, custody issues, and so on, this is surprising, not to say callous.

All people, regardless of sexual orientation, have the right to determine for themselves their primary personal relationships and to have these relationships supported and recognized in law and by social institutions.<sup>4</sup>

Canadian governments have accepted and promoted the diversity of communities in this country; this principle is enshrined in federal and provincial multiculturalism policies.

Diversity in the heterosexual family structure, too, is implicitly recognized in Ontario legislation. For example, the Ontario *Human Rights Code* does not define "family status" in a limited way to mean a married couple, composed of a man and a woman, and their children. This would exclude married heterosexuals who have no children, single parents with children, and common-law spouses with or without children.

Society in fact supports a diversity of relationships and "family status" must now be explicitly defined to include the recognition of same-sex couples. Legislation affecting family and individual status must reflect and support the diversity of individual relationships in society.

We are aware that, in the words of Professor Bruce Ryder of Osgoode Hall, York University, "according the same benefits to same-sex couples as are currently granted to heterosexual couples may entrench the privilege of coupled (nuclear) family units at the expense of other familial arrangements."<sup>5</sup> Nevertheless, the failure to confer on same-sex relationships the material, psychological, and symbolic benefits and legitimacy granted by the law to heterosexual couples is clearly discrimination on the basis of sexual orientation.

CLGRO believes that, while our preference would be that benefits be made available on an individual basis (with allowances for the dependence of children, the aged, and the disabled), whenever benefits are made available to heterosexuals living in couples, these same benefits must also be made available to same-sex couples on the same footing.<sup>6</sup>

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<sup>4</sup> CLGRO statement of principle, proposed by the On Our Own Terms conference and adopted by the coalition in 1989.

<sup>5</sup> Bruce Ryder, "Equality Rights and Sexual Orientation: Confronting Heterosexual Family Privilege" (1990), 9 *Canadian Journal of Family Law* 39.

<sup>6</sup> CLGRO statement of principle, 1990.

We recommend a fundamental restructuring of the provincial system of social benefits, based on a system of individual need and dependency. If, however, the Ontario government is not willing to embark on such a system of restructuring, then at the very least lesbian and gay couples must be treated at law like heterosexual couples.

### **Section 3: Selected Historical References.**

Philippe Ariès & Georges Duby, eds., *A History of Private Life*, 4 vols., Arthur Goldhammer, tr. (Cambridge, MA: Belknap-Harvard, 1987-91).

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Veronica Strong-Boag, *The New Day Recalled: Lives of Girls & Women in English Canada, 1919-1939* (Markham, Ont.: Penguin, 1988).

Jeffrey Weeks, *Sexuality & its Discontents: Meaning, Myths & Modern Sexualities*, (London: Routledge & Kegan Paul, 1985).

Jeffrey Weeks, *Sex, Politics & Society: The Regulation of Sexuality Since 1800*, 2 ed. (London: Longman, 1988).

#### 4 Legislative Alternatives: Examples and a Proposal

In this brief, we describe provincial statutes relating to lesbian and gay relationships and indicate places where systemic discrimination is to be found. We then propose a new model for partnership options in Ontario which we believe to be more fair and equitable than the current system, both for same-sex and for heterosexual partnerships.

Several foreign jurisdictions have already enacted legislation recognizing same-sex spousal relationships. In 1989, Denmark became the first country to recognize same-sex marriages.<sup>7</sup> Several American municipalities (including: New York City, New York; Seattle, Washington; and East Lansing, Michigan) have recognized domestic partnership as a basis for entitlement to the rights and benefits normally provided employees within their municipal jurisdiction. New York City defines "domestic partner" as "two people, both of whom are 18 years of age or older and neither of whom are married, who have a close and committed personal relationship involving shared responsibilities." Seattle defines "domestic partners" as unmarried persons over 18 years of age who are "each other's sole domestic partner and are responsible for each other's common welfare."

The government of Ontario has stated its goal of ensuring equality for lesbian and gay relationships and now faces the considerable legislative challenge involved in making the necessary amendments. As the government begins to address this challenge, it is vitally important that lesbians and gay men have a voice in the process of change, and we greatly appreciate the fact that this government has shown itself willing to seek community input. CLGRO hopes that lesbians and gay men will continue to speak out on these matters which so seriously affect the way we live and that this brief will help give our community a voice in the process of legislative change.

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<sup>7</sup> *The Danish Act on Registered Partnerships*, enacted May 26, 1989, came into force October 1, 1989.

## 5 Conclusion

At present, Ontario statutes do not define the term "spouse" with any consistency. In some statutes, only marriage creates spousal status. Some statutes, such as the *Evidence Act*, are anachronistic, in that they provide special privilege to the married state. Some statutes provide only a limited definition of spouse, such as that in the property-division sections of the *Family Law Act* or the intestate-succession section of the *Succession Law Reform Act*. These definitions are based on a policy decision which is increasingly difficult to defend.

Most statutes which define spousal relationships, however, recognize a "common-law" partner as a spouse, as long as the two people are of the opposite sex. Statutes which recognize common-law relationships, however, are not consistent in establishing the minimum period of time required to identify the relationship as permanent; heterosexuals may have to live together for one year, three years, or, more vaguely, be in "a relationship of some permanence, with a child" before being recognized as a spouse. There is no rational policy reason for this inconsistency.

Many statutes simply use the broad term "spouse" or "family" without further clarification or distinction. It is unclear how a court or an administrative body would apply such terms to persons in a same-sex relationship. Courts have wide discretion to interpret these terms either restrictively, to mean a married spouse and the nuclear family, or more broadly, to mean the relationships that merit recognition as family.

This brief describes the irrationality of the current definitions of spouse in the statutes of Ontario, but its purpose is much broader than that. There is a significant group of Ontarians whose relationships have not been recognized in law: lesbians and gay men who have intimate and supportive relationships, form households, raise children, and contribute to the life and economy of this province.

In fact, the legislative confusion we have described accurately reflects the mixed attitudes of the lawmakers towards lesbians and gay men. The *Ontario Human Rights Code* was amended in December 1986 with the clear intention of protecting lesbians and gay men from discrimination. Yet the bill which inserted the phrase "sexual orientation" into the *Code* failed to remove the discriminatory definition of spouse as a person of the opposite sex.

Implicit in a recognition that laws should not discriminate against lesbians and gay men is the realization that the defining characteristic of gay men and lesbians is an emotional and physical attraction to members of their own sex. The logical

corollary of this is that the law must recognize that gay and lesbian relationships and households are an integral, fundamental part of being gay or lesbian. Individual protection only begins to integrate gay men and lesbians into the legal structure of Ontario society. A recognition of lesbian and gay relationships must follow. Specific legislation must now be enacted to provide full equality to lesbians and gay men and their relationships.

Lesbians and gay men must be allowed to register their relationships with the government and to receive all the benefits and obligations which the Ontario government grants to those in heterosexual relationships. For example, lesbian/gay surviving spouses must be recognized as beneficiaries under pension legislation and intestacy rules. An equitable system of support and property division must be recognized to ease the ending of relationships. Cohabitation contracts between same-sex spouses must be recognized. To prevent injustice on relationship breakup, a default system similar to that created for married spouses under the *Family Law Act* must be set up with respect to lesbian/gay spouses who do not choose to register their relationships.

The first step to the full equality of lesbians and gay men was taken when the *Human Rights Code* was amended to include "sexual orientation" as a prohibited ground of discrimination. The recognition of lesbian and gay relationships must now follow.

## **HAPPY FAMILIES**

### **The Recognition of Same-Sex Spousal Relationships**

A brief on the recognition of same-sex spousal relationships  
written for the Ontario legislature  
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#### PART TWO

### **6 Ontario Statutes and Proposed Amendments**

#### **6.1 Personal Relationships**

##### **6.1.1 Recognition of Same-Sex Spousal Relationships**

In Canada, governments use legislated standards to recognize (or refuse to recognize) the individual relationships people choose. Various provincial statutes determine how individuals identify themselves and define the terms used by government for this process of recognition.

While the provincial governments have the power to make laws affecting the conducting of the marriage ceremony, the federal government has the exclusive power to determine the capacity of people to marry. Since the federal government has set few definitions of the capacity to marry, this issue is determined by common law. The classic nineteenth-century legal exposition of the nature of marriage is:

Marriage as understood in Christendom may ... be defined as the voluntary union for life of one man and one woman to the exclusion of all others.<sup>8</sup>

Marriage is viewed as a consensual agreement between parties, but it is also a contract which confers special status in law. Married status is public in nature, since the state has invested a particular interest in it. An assortment of public benefits and burdens flow from married status; it is, therefore, institutional as well as consensual in nature.

Although Ontario does not have the constitutional power to determine capacity to marry, provincial statutes do grant many benefits and impose responsibilities on individuals solely on the basis of their married status. In the last few decades, Canada and Ontario have moved away from the narrow view of marriage as the lifelong commitment of one man and one woman to the exclusion

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<sup>8</sup> *Hyde v. Hyde & Woodmansee* (1866), LR 1 P&D, 130, at 133.

of all others: the government has broadened the grounds for divorce and recognized that many heterosexual couples live in a "marriage-like" state while not actually married. Heterosexual common-law couples now enjoy some of the benefits provided to married people and bear some of their responsibilities. Lesbian and gay couples too should be able to share the benefits and burdens provided by state recognition of their relationships.

In Canada, only marriages between people of the opposite sex are recognized by the state. A number of churches in Canada will perform marriage ceremonies for same-sex couples, but a ceremony of marriage between persons of the same sex, even where all legally prescribed formalities have been met, does not create a marriage in law.<sup>9</sup> However, nothing in the *Marriage Act*<sup>10</sup> prohibits the solemnization of marriage between same-sex couples. The *Act* does refer to capacity to marry, setting out the prohibited degrees of affinity and consanguinity,<sup>11</sup> but these degrees, based in the Judaeo-Christian tradition, do not contain a specific prohibition of same-sex marriages, which were either unknown or unacknowledged.

In Ontario, the *Human Rights Code* is paramount in relation to all other provincial legislation.<sup>12</sup> Yet section 10 of the *Code* contains definitions inconsistent with its own stated aims with respect to gay men and lesbians. Although the *Code* prohibits discrimination against lesbians and gay men, the defined terms "marital status" and "spouse" specifically exclude lesbian and gay relationships. The definition of "spouse" in the *Human Rights Code* is used by reference in many other provincial statutes.

While the *Constitution Act, 1867*,<sup>13</sup> places "marriage" in the sphere of federal jurisdiction, provincial legislatures have recognized what are known as "common-law" relationships, by which heterosexual unmarried couples are provided with certain benefits and obligations. Amendment of the *Human Rights Code* to bring same-sex couples within the definitions of "spouse" and "marital status" would give lesbian and gay relationships equality with heterosexual common-law relationships. Such an amendment would also change the definition of spouse in many provincial statutes without the necessity of further amendments.

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<sup>9</sup> *Worth et al. v. Matheson* (1976), 20 RFL 112 (Man. Co. Ct.).

<sup>10</sup> *Marriage Act, RSO 1990, c. M3.*

<sup>11</sup> Form 1 to the act

<sup>12</sup> *Human Rights Code, s. 47(2).*

<sup>13</sup> *Constitution Act, 1867, s. 91(26).*

## Recommendation 1

That the definitions of "spouse" and "marital status" in the Ontario *Human Rights Code* be amended to include same-sex partners and the status of being in an intimate relationship with a person of the same sex.

In addition, a system of status designations could permit a couple, whether heterosexual or same-sex, to identify themselves as being in a relationship, instead of relying on the default régime provided at present by the *Code* and the *Family Law Act*.<sup>14</sup> It would also provide to unmarried couples those benefits and obligations of marriage which are within the legislative competence of the province to confer.

We propose the following definitions of "marital status" and "spouse":

"marital status" means the status of being married, single, widowed, divorced, separated, designated or revoked, and includes the status of living with a person of either sex in a conjugal relationship outside marriage."

"spouse" means a person,

- (a) to whom a person is married;
- (b) with whom a person of either sex is living in a conjugal relationship outside of marriage,
  - (i) continuously for a period of not less than one year,
  - (ii) in a relationship of some permanence, if they are the natural or adoptive parents of a child, or
  - (iii) if the two persons have together entered into a cohabitation agreement under section 53 of the *Family Law Act*; or
- (c) whom a person of either sex has designated as a spouse with the person's consent.

"designated" means designated in accordance with the regulations.

"revoked" means revoked in accordance with the regulations.

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<sup>14</sup> *Family Law Act*, RSO 1990, c. F3.

The government will have to determine the appropriate manner in which a same-sex partnership is to be designated and, once designated, revoked. We should be able to address our concerns once the government agrees that there should be a formal means by which the state can address our relationships. Thus "designated" and "revoked" would be defined by regulations in the appropriate legislation.

## **Recommendation 2**

That the provincial government establish an optional system of status designation to permit couples, whether heterosexual or same-sex, to identify themselves as being in a relationship. This designation would provide to unmarried couples as many of the benefits and obligations of marriage as are within the legislative competence of the province to confer.

### **6.1.2 Child Protection, Custody, and Adoption**

The *Child and Family Services Act*<sup>15</sup> provides that a crown court order or children's aid society wardship expires when the child who is the subject of the order marries or attains the age of 18 years, whichever comes first. Marriage, but not heterosexual or homosexual cohabitation, terminates the control of wardship.

Part VII of the *Child and Family Services Act* discriminates against lesbian and gay couples because, since it applies only to married couples, it provides no rights of adoption to lesbians and gay men. Further, it employs the phrase "the best interests of the child," which has been interpreted to exclude lesbians and gay men. When determining the best interests of the child, one of the criteria for adoption is "the importance for the child's development of a positive relationship with a parent and a secure place as a member of a family." "Family" is not defined. An order for adoption is not permitted without the consent of the child's parents and cannot be made without the written consent of the spouse of the applicant. No licence to adopt is required to place a child with a relative of the child, but "relative" is defined as a child's grandparent, great-uncle or -aunt, uncle or aunt, or the parent's spouse. "Spouse" is defined as a person the opposite sex to whom a person is married or with whom the person is living in a conjugal relationship outside marriage.

The *Act* permits a court to make an adoption order in the child's best interests on the application of the child's relative or parent or the spouse of the child's parent. But courts have

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<sup>15</sup> *Child and Family Services Act*, RSO 1990, c. C11.

exhibited considerable hostility to granting custody rights to a lesbian or gay parent on the breakdown of a marriage, and this indicates that courts will likely be unsympathetic to attempts by lesbians and gay men to adopt a child, even if the child is the biological child of their partner.<sup>16</sup> The *Act* states that an application for adoption may be made either by an individual or jointly by two persons who are spouses of one another.

### **Recommendation 3**

That the *Child and Family Services Act* be amended to permit same-sex couples to adopt children.

The *Children's Law Reform Act*<sup>17</sup> also provides that a person is a child of his or her natural parents regardless of the parents' marital status. Biology, not marital status defines the child's relationship to his/her parents. An adopted child has the same legal status as a biological child. Part III of the *Act*, which sets out rights of custody, access, and guardianship, states that the father and mother of a child have equal rights to custody, which entails certain parental rights and responsibilities.

However, the child's best interests have priority over parental rights; a parent of a child or any other person may apply for, and obtain, custody of that child. The determination of the best interest of the child requires consideration of the love, affection, and emotional ties between the child and the person(s) seeking custody or access, other members of the child's family residing with him or her, and the persons involved with the child's care and upbringing. "Family" is not defined.

Other considerations include:

- (i) the ability of a person seeking custody or access to act as a parent;
- (ii) the ability and willingness of the person seeking custody to provide the child with guidance, education, and the necessities of life, and to meet the child's special needs; and
- (iii) the permanence and stability of the family unit in which it is proposed that the child will live.

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<sup>16</sup> See J. Arnup, "Mothers Just Like Others: Lesbians, Divorce, and Child Custody in Canada" (1989), in 3 *Canadian Journal of Women and the Law* 18, as well as *Saunders v. Saunders* (1989), 20 RFL (3d) 368 (BC Co. Ct.).

<sup>17</sup> *Children's Law Reform Act*, RSO 1990, c. C12.

In the determination of the child's best interests, courts have not been favourably disposed towards granting access or custody rights to a lesbian or gay parent, particularly not while that parent is in a relationship with a person of the same sex.<sup>18</sup>

#### **Recommendation 4**

That the *Children's Law Reform Act* be amended so that "family" and "family unit" are not interpreted solely in heterosexual terms; lesbian and gay parents must have the right to legal custody of, and access to, their natural or adoptive children.

The *Child and Family Services Act* deals with the adoption of children and with the protection of children by the state.<sup>19</sup> This *Act* does not recognize the existence of same-sex partners with children or the worthiness of same-sex couples as caring parents. The *Act* uses the definition of "spouse" in parts I and II of the *Human Rights Code*, which is that of the traditional nuclear family: heterosexuals married to each other or who have cohabited together for a period greater than a year. Although the term "family" is not defined in the *Child and Family Services Act*, the *Act* addresses only this traditional family form. For example, the *Act* provides that marriage terminates a crown wardship,<sup>20</sup> less cumbersome "family" adoptions are permitted between "spouses" of the child's parents,<sup>21</sup> and joint applications for adoptions are available only to "spouses."<sup>22</sup>

The "best interests of the child" require consideration of "the importance for the child's development of a positive relationship with a parent and a secure place as a member of a family."<sup>23</sup> Without a declaration of the worthiness of same-sex couples as

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<sup>18</sup> For the interpretation of British Columbia legislation in relation to lesbian and gay parents' rights to access or custody, see: *Anderson v. Luoma* (1986), 50 RFL (2d) 127 (BC SC); *Saunders v. Saunders* (1989), 20 RFL (3d) 368 (BC Co. Ct.). See also Brownstone, "The Homosexual Parent in Custody Disputes" (1980), 5 *Queen's Law Journal* 199; Gross, "Judging the Best Interests of the Child: Child Custody and the Homosexual Parent" (1986), 1 *Canadian Journal of Women & the Law* 585.

<sup>19</sup> *Child and Family Services Act*, part VII.

<sup>20</sup> *Child and Family Services Act*, s. 71(1).

<sup>21</sup> *Child and Family Services Act*, ss. 141(8), 146(2).

<sup>22</sup> *Child and Family Services Act*, s. 146 (4).

<sup>23</sup> *Child and Family Services Act*, s. 136(2).

parents and family members, lesbians and gay men will continue to face discrimination in obtaining the adoption and/or custody of children.

Without the recognition of same-sex families under the *Act*, the determination of "family" and the "best interests of the child" is left to judges and officials of children's aid societies. Thus, lesbians and gay men are entirely dependent on the discretion and attitudes of decision-makers regarding the suitability of same-sex couples as parents.

### **Recommendation 5**

That discrimination against lesbians and gay men under the *Child and Family Services Act* be remedied by:

- (a) amending the definition of "spouse" in the *Act* to include persons in same-sex relationships; and
- (b) including a declaration in the *Act* recognizing the suitability of non-traditional forms of family, including same-sex relationships, as adopting parents.

The *Change of Name Act*<sup>24</sup> permits a married man or woman to elect to change his/her surname to that of his/her spouse immediately before marriage. Men and women living in a conjugal relationship, who make a joint declaration, then have the same right as married persons. Yet people who wish to change their surname to that of their same-sex partner must follow a more formal, time-consuming, and expensive procedure set out in the *Act*.<sup>25</sup>

### **Recommendation 6**

That the *Change of Name Act* be amended to permit a person in a same-sex relationship, if s/he chooses, to make a joint declaration in the same manner as common-law heterosexuals and to elect to change his/her surname to that of his/her same-sex spouse.

The *Vital Statistics Act*<sup>26</sup> requires the recording of biological information by a relative on the birth or death of an individual. The *Act* requires a child's mother, if not incapable, and father,

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<sup>24</sup> *Change of Name Act*, RSO 1990, c. C7.

<sup>25</sup> *Change of Name Act*, ss. 3, 4.

<sup>26</sup> *Vital Statistics Act*, RSO 1990, c. V4.

if not incapable or unacknowledged, to certify a child's birth by recording the biological relationships.<sup>27</sup> On death, a statement of personal particulars of a deceased person must be delivered to the funeral director by the nearest relative present at the death or last illness of the deceased.<sup>28</sup> The term "nearest relative" is not defined.

### **Recommendation 7**

That the *Vital Statistics Act* be amended to ensure that the same-sex partner of a deceased person is competent to provide a statement of personal particulars to a funeral director.

### **6.1.3 Privacy, Proxies, and Next-of Kin**

The Ontario *Human Rights Code* is perhaps the most important piece of legislation directly affecting the rights of lesbians and gay men in Ontario. Its preamble recognizes "the inherent dignity and the equal and inalienable rights of all members of the human family" and provides for "equal rights and opportunities without discrimination that is contrary to law" to individuals so that "each person feels a part of the community and able to contribute fully" to it. If gay men and lesbians are to become full participants in the human family and community, certain amendments must be made to the Code.

At present, discrimination on the basis of sexual orientation is forbidden in employment, accommodation, and access to services.<sup>29</sup> In the areas of harassment in accommodation and employment,<sup>30</sup> however, harassment on the basis of sexual orientation is not prohibited.

### **Recommendation 8**

That "sexual orientation" be added to the list of prohibited grounds of discrimination in the anti-harassment sections of the Ontario *Human Rights Code*.

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<sup>27</sup> *Vital Statistics Act*, s. 9.

<sup>28</sup> *Vital Statistics Act*, s. 21(2).

<sup>29</sup> *Human Rights Code*, ss. 1, 2, 5, respectively.

<sup>30</sup> *Human Rights Code*, s. 2(2) with respect to accommodation and s. 4(2) with respect to employment.

In addition to the Code, several other statutes deal with rights-related issues and privacy. The *Evidence Act*,<sup>31</sup> defines "husbands and wives" as "competent and compellable" witnesses to give evidence in legal proceedings involving the other spouse,<sup>32</sup> but protects them, in certain circumstances, from giving incriminating testimony.<sup>33</sup> In addition, married people cannot be compelled to divulge communications made among themselves during the marriage.<sup>34</sup>

The *Evidence Act* creates a special sanctuary for the privacy of marital relationships by preventing the intrusion of the legal system into the area of communications between husband and wife. The language of this statute fails to recognize either lesbian/gay relationships or common-law heterosexual relationships.

### **Recommendation 9**

That the *Evidence Act* be amended to include same-sex couples as well as heterosexual common-law couples.

Subsection 3(7) of the *Juries Act*<sup>35</sup> recognizes that spouses<sup>36</sup> are bound to have an influence on one another and that it is therefore undesirable to include on a jury the spouse of a lawyer, judge, justice of the peace, or law enforcement officer. Spouses of such persons are exempted from jury duty by the *Act*.

### **Recommendation 10**

That the *Juries Act* be amended to extend to same-sex spouses the considerations which apply to heterosexual married spouses in exempting them from jury duty.

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<sup>31</sup> *Evidence Act*, RSO 1990, c. E23.

<sup>32</sup> *Evidence Act*, s. 8(1).

<sup>33</sup> *Evidence Act*, s. 10.

<sup>34</sup> *Evidence Act*, s. 11.

<sup>35</sup> *Juries Act*, RSO 1990, c. J3.

<sup>36</sup> "Spouse" is defined as one of two persons of the opposite sex who are either married to each other or who are "living in a conjugal relationship outside of marriage."

The *Election Act*<sup>37</sup> permits one spouse to apply on behalf of the other for a certificate to vote. A returning officer may not appoint a spouse as an election clerk.<sup>38</sup> 18 The term "spouse" in the *Election Act* includes only heterosexually married couples and couples of the opposite sex who have cohabited for at least one year, or who are together the parents of a child, or who have entered into a cohabitation agreement under section 53 of the *Family Law Act*.<sup>39</sup>

### **Recommendation**

That the term "spouse" in the *Election Act* be amended to include same-sex and heterosexual common-law spouses.

Part VIII of the *Child and Family Services Act* recognizes the privacy interests of family members by controlling rights of access to personal information; it restricts the disclosure of records of those who provide services to children and their families. "Family" is defined as a person's spouse, parents, and children. The word "spouse" is defined by cross-reference to the *Family Law Act* and is limited to a married or common-law partner of the opposite sex; gay and lesbian partners are excluded.<sup>40</sup>

### **Recommendation 12**

That the definition of "spouse" in the *Child and Family Services Act* be amended to include-same-sex spouses.

The *Freedom of Information and Protection of Privacy Act*<sup>41</sup> protects personal information relating to an individual's sexual orientation and marital or family status. Since no definition of these terms is given in the *Act*, they would likely be interpreted according to the *Ontario Human Rights Code*. As stated above, the definitions of "marital status" and "family status" in the *Human Rights Code* are framed only in heterosexual terms.

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<sup>37</sup> *Election Act*, RSO 1990, c. E6.

<sup>38</sup> *Election Act*, s. 8.

<sup>39</sup> *Election Act*, s. 22.

<sup>40</sup> *Child and Family Services Act*, s. 178(1).

<sup>41</sup> *Freedom of Information and Protection of Privacy Act*, RSO 1990, s. 2 (definition of "personal information"), s. 41.

Section 42 of the *Freedom of Information and Protection of Privacy Act* states that personal information held by a government institution must not be disclosed except under specified circumstances. In particular, three clauses of this section are of concern.

Subsection (a), clause (i), reflects the interest that people have in the welfare of members of their family or close friends. Information may be disclosed "in compassionate circumstances to facilitate contact with the next of kin or a friend of an individual who is injured, ill or deceased." The terms "next of kin" or "friend" are not defined in the *Act*. The *Act* must be amended to ensure that a same-sex spouse is considered an appropriate person to whom to disclose personal information.

Subsection (b), clauses (j) and (k), recognize that it is sometimes appropriate for family members to act as proxies and make decisions on a person's behalf. Information may be disclosed to a "member of the Legislative Assembly" or to a "bargaining agent" who has been authorized by a "constituent" or "employee" to whom the information relates. If the constituent or employee is incapacitated, a next of kin or legal representative can authorize the disclosure. At present, the terms "next of kin" and "legal representative" would likely be interpreted as not including same-sex partners.

### **Recommendation 13**

That the *Freedom of Information and Protection of Privacy Act* be amended to ensure that a same-sex spouse is considered an appropriate person under the *Act* to whom to disclose personal information, and that the terms "marital status," "family status," "next of kin" and "legal representative" should be redefined to include lesbian and gay families and relationships.

#### **6.1.4 Health, Life, and Death**

The *Anatomy Act*<sup>42</sup> permits a bona fide friend or relative of a deceased person to claim a body under the control of a local inspector. The meaning of the terms "bona fide friend" and "relative" are not defined in the *Act*. Similarly, a provision in the *Cemeteries Act*<sup>43</sup> permits a bona fide friend to retrieve the body of an individual from a cemetery that is being closed.

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<sup>42</sup> *Anatomy Act*, RSO 1990, c. A21.

<sup>43</sup> *Cemeteries Act*, RSO 1990, c. C3.

#### **Recommendation 14**

That the interpretation of the terms "bona fide friend" and "relative" in the *Anatomy Act* and the *Cemeteries Act* include a same-sex partner; that these *Acts* be amended so that the term "relative" include a same-sex spouse.

Several statutes dealing with the bodies of deceased persons specifically prevent a same-sex partner from making decisions concerning it. For example, the *Coroner's Act* permits a spouse, parent, brother, and sister to examine the coroner's findings, request an inquest, and object to the removal of the deceased's pituitary gland.<sup>44</sup> Similarly, the *Human Tissue Gift Act*<sup>45</sup> permits the spouse, child, parent, sibling, or next of kin of a person whose death is imminent, and who is unable to consent personally, to allow the medical use of that person's body.

Finally, the list of persons who may request a declaration of incompetency under the *Mental Incompetency Act*<sup>46</sup> includes a person to whom the allegedly incompetent person is married, or a person of the opposite sex with whom the allegedly incompetent person was living in a conjugal relationship outside of marriage, a creditor, the attorney general, or any other person.

In these statutes, same-sex spouses are denied rights concerning health, disability, death, means of death, disposition of the body, and other areas. The biological family of a lesbian or gay person may, at a critical moment in that person's life or on that person's death, have statutory rights which take precedence over those of a same-sex spouse, even in matters of vital importance and direct opposition to that person's wishes.

#### **Recommendation 15**

That the definition of spouse in the *Coroner's Act* and the *Human Tissue Gift Act* be amended to include a same-sex spouse; that the definition of

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<sup>44</sup> *Coroner's Act*, RSO 1990, c. C37, ss. 26(1) and 29(2). In s. 18(2) "spouse" is defined as the person to whom the deceased was married at the time of his or her death, or a person with whom the deceased had co-habited for a period of at least a year, who together with the deceased was a parent of a child, or with whom the deceased had entered into a cohabitation agreement under the *Family Law Act*, s. 53.

<sup>45</sup> *Human Tissue Gift Act*, RSO 1990, c. H20. In s. 5(1) "spouse" is defined as in the *Coroner's Act*.

<sup>46</sup> *Mental Incompetency Act*, RSO 1990, c. M9.

persons who may apply for a declaration of mental incompetency under the *Mental Incompetency Act* be expanded to include a same-sex spouse.

## 6.2 Financial Relationship

### 6.2.1. Taxation

#### 6.2.1a "Family" Transactions

Taxation statutes treat "family" transactions favourably and frequently draw on definitions in the *Income Tax Act* (Canada).<sup>47</sup> An example of this is the tax treatment of a family farm or family fishing corporation.. "Family" includes "spouse" (not defined), but draws from the definition of family in the *Income Tax Act* (Canada), which includes only married spouses.

The *Land Transfer Tax Act*<sup>48</sup> which uses the *Family Law Act* definition of "spouse," permits the tax-exempt transfer of land to family members. The *Retail Tax Act*<sup>49</sup> permits a tax-free transfer of property between family members and a tax-free acquisition of property by a "spouse" (as defined by the *Family Law Act*) by a transfer of property under the *Family Law Act*. At present, none of these benefits is available to gay and lesbian partners, even though the purpose of the legislation is to protect the financial integrity of the family as an economic unit.

#### Recommendation 16

That the *Land Transfer Tax Act* and the *Retail Sales Tax Act* be amended to recognize same-sex spouses as a family unit.

The *Land Transfer Tax Act* imposes a tax on those who tender for registration any instrument that transfers land. Tax is levied on the amount of the consideration for the transfer and also imposed on certain dispositions of beneficial interests in land. Section 1 of the *Act* defines "spouse" as in s. 29 of the *Family Law Act*<sup>50</sup> and defines

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<sup>47</sup> *Income Tax Act* (Canada), RSO 1952, c. 148, as amended by SC: 1970-71-72, c. 63, and as subsequently amended.

<sup>48</sup> *Land Transfer Tax Act*, RSO 1990, c. L6.

<sup>49</sup> *Retail Sales Tax Act*, RSO 1990, c. R31.

<sup>50</sup> The *Family Law Act*, s. 29, defines "spouse" as either one of a couple composed of a man or women who

(a) are married to each other, or

(b) have lived together and entered into a marriage that is voidable or void, in good faith on the part of the person asserting a right under the *Act*,

and includes either of a man or woman who are not married to each other and have cohabited

(c) continuously for a period of not less than three years, or

"associate" to include spouses.

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(d) in a relationship of some permanence, if they are the natural or adoptive parents of a child.

Subsection 2(3) of the *Act* imposes a larger tax if the land is conveyed to a transferee who is a non-resident of Canada. Subsection 18(8), however, allows the minister of revenue to cancel the extra tax if the non-resident person is the spouse of a Canadian citizen and the land is being acquired for use as a principal residence.

The *Non-Resident Agricultural Land Interests Registration Act*<sup>51</sup> requires the disclosure of non-residents' interest in agricultural land in Ontario. The reporting requirement is waived where the person residing outside Canada is a spouse of and living with a member of the Canadian Armed Forces, an ambassadorial agent of Canada, or a person who performs services for a federal international development programme. "Spouse" is defined as in the *Municipal Act*.<sup>52</sup>

### **Recommendation 17**

That the definition of "spouse" in the *Land Transfer Tax Act* and the *Non-Resident Agricultural Land Interests Registration Act* be amended to include same-sex spouses.

The *Ontario Home Ownership Savings Plan Act*<sup>53</sup> assists Ontario residents to save for a first home. Individuals with incomes of less than \$40,000 and married couples with combined incomes of less than \$80,000 can benefit from interest earned on OHOSP

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<sup>51</sup> *Non-Resident Agricultural Land Interests Registration Act*, RSO 1990, c. N4.

<sup>52</sup> *Municipal Act*, RSO 1990, c. M45; section 1 defines "spouse" as a person of the opposite sex,  
(a) to whom the person is married; or  
(b) with whom the person is living outside marriage in a conjugal relationship, if the two persons,  
(i) have cohabited for at least one year,  
(ii) are together the parents of a child, or  
(iii) have entered into cohabitation agreement under section 53 of the *Family Law Act*.

<sup>53</sup> *Ontario Home Ownership Savings Plan Act*, RSO 1990, c. 020.

funds, the OHOSP tax credit under the *Income Tax Act* (Ontario),<sup>54</sup> and a land transfer tax refund under the *Land Transfer Tax Act*.

Section 1 of this *Act* defines "spouse" to include heterosexually married spouses only. The provisions are as follows: a person can open an OHOSP if s/he never owned an eligible home and if his/her spouse has not owned a home since the marriage. Joint OHOSPs are not available. Each spouse may open a plan by completing a separate OHOSP application.

An OHOSP plan-holder may be entitled to a land transfer tax refund if s/he or his/her spouse received an OHOSP tax credit in one of the previous two years. If two or more plan-holders (other than a married couple) purchase a home together, each would be eligible for a land transfer tax refund in proportion to their ownership in the house. If an OHOSP plan-holder purchases a home with an individual (other than a spouse) who does not have an OHOSP, the land transfer tax refund would be based only on that portion of the property owned by the OHOSP plan-holder. In contrast to this, if only one married spouse is a plan-holder, s/he would be entitled to a full land transfer tax refund if s/he appears on the title to the eligible home.

### **Recommendation 18**

That the *Ontario Home Ownership Savings Plan Act* be amended so that common-law and same-sex spouses are not eligible for greater benefits than married persons.

Each of these taxation statutes recognizes and facilitates the functioning of the family as an economic unit. In some circumstances, transactions within the family are treated benignly or are encouraged by law; for example, taxation statutes and the *Securities Act*<sup>55</sup> provide favourable treatment for, or waive obligations that might otherwise be imposed on, non-family members. In the majority of cases, however, circumstances have been identified where individuals, because of their positions within corporations or because of their occupations, might attempt to gain an advantage which would be contrary to the interest of the corporation or of society at large, as in the case of political conflict-of-interest guidelines. In most of the cases cited above, a gay or lesbian spouse would not be barred from benefiting from transactions which would be prohibited to heterosexual couples. While this may represent a benefit to certain individual gay or lesbian couples, the public-policy reason for prohibiting such transactions is as applicable

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<sup>54</sup> *Income Tax Act* (Ontario), RSO 1990, c. 12.

<sup>55</sup> *Securities Act*, RSO 1990, c. S5.

to relations between persons of the same sex as to heterosexual couples .

**Recommendation 19**

That same-sex spouses and heterosexual spouses be subject to the same restrictions on entering into certain types of transactions found in the *Securities Act*.

Diverse definitions of "spouse" and "family" are to be found in these statutes, from no definition at all to those found in the *Human Rights Code*, the *Family Law Act*, and the *Income Tax Act* (Canada), as well as definitions peculiar to the particular *Act*.

**Recommendation 20**

That the definitions of "spouse" and "family" should encompass same-sex couples and should be standardized in all Ontario statutes, unless there are identified public-policy reasons for a variation.

**6.2.1b Taxation of Real Property**

Lesbian and gay residents of Ontario pay the same property taxes as all other residents. Yet, in the area of taxation of real property, same-sex couples are not treated equally with heterosexual common-law couples and married couples.

In Canada, the unit of taxation is the individual. In a family group, the person who owns property or has a legal interest in its income is the person taxed on it. In a pure system of individual taxation, a taxpayer's marital status would not affect his or her tax status. Nevertheless, the taxation regime increasingly recognizes the family as a taxation unit. The rationale for this is the economic interdependence of the members of a family unit.

A recent tax study has concluded that, under both federal and provincial income tax systems, common-law couples fare better than married couples.<sup>56</sup> In particular, the provisions of various tax and transfer programmes can result in differences in disposable income for married couples and common-law couples. Some benefits not available to married couples are nonetheless available to single persons and common-law couples. Some programmes are based on the combined incomes of adult family

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<sup>56</sup> Statistics Canada, *Canadian Social Trends*, summer 1991.

members, and benefits are reduced for married couples based on the sum of the two spouse's incomes. The tax system also stipulates which spouse must claim certain tax credits, and this may increase the amount of tax payable. Certain programmes benefit only married spouses, yet other programmes do not depend on marital status at all.

The *Assessment Act*<sup>57</sup> gives municipalities the authority to impose property taxes, but these are actually levied under the *Municipal Act*.<sup>58</sup> In unorganized municipalities, property taxes are imposed by the *Provincial Land Tax Act*.<sup>59</sup> Only the *Municipal Act*, however, defines the term "spouse."<sup>60</sup>

The *Ontario Pensioners Property Tax Assistance Act*<sup>61</sup> provides for an annual grant of up to \$600 per eligible household, regardless of income, to offset the municipal taxes paid by persons 65 years of age and over who own or rent their homes. The property tax or rent may be paid by the applicant, his/her spouse, or a third party, such as a trustee. The *Ontario Pensioners Property Tax Assistance Act* defines "family unit" as:

- (i) an individual and his spouse; or
- (ii) any individuals occupying the same principal residence, whether or not they are related to each other.<sup>62</sup>

Although the *Act* does not define the term "spouse," subsection 3(4) provides for grants to a "husband and wife" in the year of marriage. If a married couple, both 65 years of age or older, separates, lives apart, and maintains separate principal residences at the time of the application, each spouse may apply for a property-tax grant. Unmarried persons 65 years of age or older who live together are required to complete separate applications and submit them in one envelope. Because this *Act* provides a property-tax grant to all persons occupying a principal residence as a unit, regardless of their relationship to each other, it is neutral in its application to same-sex and heterosexual spouses.

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<sup>57</sup> *Assessment Act*, RSO 1990, c. A31.

<sup>58</sup> *Municipal Act*, RSO 1990, c. M45.

<sup>59</sup> *Provincial Land Tax Act*, RSO 1990, c. P32.

<sup>60</sup> See footnote 49 above.

<sup>61</sup> *Ontario Pensioners Property Tax Assistance Act*, RSO 1990, c. 033, ss. 2 and 7.

<sup>62</sup> *Ontario Pensioners Property Tax Assistance Act*, s. 1.

The *Municipal Elderly Residents' Assistance Act*<sup>63</sup> authorizes a municipality to pass a bylaw providing for a uniform credit against property taxes on the principal residence of taxpayers over 64 years of age and their spouses. Using the same definition of "spouse" as that in the *Municipal Act*, the *Municipal Elderly Residents' Assistance Act* discriminates against same-sex spouses by defining "spouse" in heterosexual terms, thereby preventing a same-sex spouse from claiming a municipal property-tax credit.

### **Recommendation 21**

That the definition of "spouse" in the *Municipal Elderly Residents' Assistance Act* be amended to include same-sex spouses.

Section 8 of the Ontario *Income Tax Act* provides for a property-tax credit. To determine benefit eligibility and calculate the Ontario property-tax credit, it is necessary to determine the combined family income of the taxpayer. Family income is the combined total of the net income of the taxpayer's net income, that of the taxpayer's spouse, and that of any supporting person.

The *Income Tax Act* (Ontario) does not define the term "spouse." The Ontario Act adopts the definitions contained in the *Income Tax Act* (Canada).<sup>64</sup> Currently, the only definition of the term "spouse" in the federal Act is in section 146(1.1) and comprises only heterosexual married and common-law couples.<sup>65</sup> This definition only applies for registered retirement savings plans such as RRSPs, RRIFs, and registered pension funds. As a result, the meaning of the word "spouse" in other parts of the federal Act is governed by judicial interpretation.<sup>66</sup>

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<sup>63</sup> *Municipal Elderly Residents' Assistance Act*, RSO 1990, c. M52, s. 2.

<sup>64</sup> *Income Tax Act*, RSO 1990, c. 12, s. 1(4).

<sup>65</sup> In the *Income Tax Act* (Canada), s. 146(1.1) defines "spouse" as "a person of the opposite sex

- (a) who is married to an individual, or
- (b) who is cohabiting with the individual in a conjugal relationship and
  - (i) has so cohabited for a period of at least one year, or
  - (ii) is a parent of a child of whom the individual is a parent.

<sup>66</sup> In *The Queen v. Taylor*, (1984) CTC 244, at 250, the Federal Court (Trial Division) held that the meaning of the term "spouse" is to be taken as that attributed to it in common parlance and that is to be taken as a party to matrimonial union in the legal sense.

Subsection 8(l) of the *Income Tax Act* (Ontario) defines "supporting person" by reference to a repealed section of the *Income Tax Act* (Canada). A "supporting person" means an individual, including a married spouse or a heterosexual common-law partner with whom the individual resides and there is a child of either or both parents. For example, when a taxpayer claims the property-tax credit, her or his partner is considered a supporting person if:

- (a) the taxpayer and his/her partner have a child, or
- (b) the taxpayer has claimed a dependent credit for his or her partner's child, or
- (c) the partner claimed the dependent credit for the taxpayer's child.

A person other than a heterosexually married spouse or common-law partner who claims a dependent credit for the taxpayer's child is a supporting person even if that person is not living with the taxpayer. The property-tax credit for a taxpayer, the taxpayer's spouse, and/or a supporting person must be jointly claimed by one of them. If one spouse is 65 years or older, that spouse must claim a property-tax grant, regardless of who pays the property tax or rent or owns the residence. The younger spouse is not eligible for a property-tax credit.

#### **Recommendation 22**

That the *Income Tax Act* (Ontario) be amended to make same-sex spouses eligible for a property-tax credit; that definitions of "spouse" and "supporting person" which do not discriminate against those in same-sex relationships be added to the *Act*.

In addition to combined family income, the calculation of the property-tax credit is based on "occupancy cost." For home-owners, "occupancy cost" is the amount of property tax paid in the tax year. For tenants, "occupancy costs" is 20% of rent paid. When two individuals marry, entitlement to the property-tax credit during that tax year depends on the applicant's age. If both spouses are under 65 years of age, the occupancy cost for each individual before marriage is combined with the occupancy cost after marriage, and one spouse must claim for both. If one spouse is over 65 years of age, that person may claim a property-tax credit for the part of the year prior to marriage. If a married couple 65 years of age or under separate, live apart or maintain separate principal residences, each spouse may apply for a property-tax credit. Each claim is based on a share of the property tax or rent for the part of the year when they lived together, and the spouse's own property tax or rent paid following the separation.

In general, each principal residence will have only one claimant and one tax credit claim. Nevertheless, there are two notable exceptions. First, if two or more individuals who are not married to each other share a principal residence, occupancy cost may be allocated either according to each individual's share of ownership in the housing unit or according to the rent paid by each tenant. Second, where a senior citizen shares a residence with someone under 65 years of age to whom he or she is not married, both a property-tax grant and a property-tax credit may be claimed. A senior citizen applies for a property-tax grant based on his or her share of the property tax or rent, and the person under 65 years of age who shares the residence applies for a property-tax credit based on his or her share of the property tax or rent. In any event, if one or more of the individuals who is sharing the housing unit is a supporting person, his or her net income must be included in the calculation of income for Ontario tax credits.

The calculation of occupancy cost and the property-tax credit for married persons, therefore, is different from that for unmarried persons sharing a principal residence. For married persons maintaining a single principal residence, the spouse with the lower income may elect to claim the property-tax credit. For heterosexual common-law spouses or same-sex spouses sharing a single principal residence, each spouse must calculate his or her occupancy cost according to his or her ownership share in the residence or in accordance with the rent paid; their eligibility for a property-tax credit is determined accordingly.

For married spouses or common-law couples with children, the property-tax credit is based on their combined incomes, and these spouses may make only one claim for the property-tax credit. Two single persons living together, including same-sex couples and common-law couples without children, may each make a claim for the property-tax credit. Double-income married couples are treated less favourably than double-income common-law couples, same-sex couples, or two single persons living together.

### **Recommendation 23**

That the *Income Tax Act* be amended so that common-law and same-sex spouses are not eligible for greater benefits than married persons; that the *Income Tax Act* be amended to permit heterosexual common-law spouses and same-sex spouses sharing a principal residence to elect which spouse will claim the property-tax credit for both spouses.

## 6.2.2 Land Registration

Two acts govern the registration of land in Ontario: the *Land Titles Act*<sup>67</sup> and the *Registry Act*.<sup>68</sup> Both have been amended by the *Land Registration Reform Act*.<sup>69</sup> Section 47 of the *Land Title Act* states that land registered in the land-titles system remains subject to the rights of a spouse under part III of the *Family Law Act* (the matrimonial home provision).

The *Land Registration Reform Act* requires a statement of spousal status and the consent of a non-owning spouse on all types of documents disposing of property to protect the non-owning spouse's interests. These provisions affect only married spouses where the property involved is the matrimonial home.

### Recommendation 24

That, on the breakdown of their relationships, property rights in their principal residence be protected for same-sex and common-law spouses in the same manner as the property rights of married spouses' to the matrimonial home; that section 47 of the *Land Titles Act* apply to same-sex and common-law spouses equally with married spouses; that the *Land Registration Reform Act's* requirement for statements of spousal status should apply equally to common-law and same-sex spouses.

## 6.2.3 Housing

Several housing statutes discriminate against lesbians and gay men. The *Landlord and Tenant Act*<sup>70</sup> defines "spouse" as a person of the opposite sex to whom the person is married or with whom the person is living in a conjugal relationship outside of marriage where the two have cohabited for at least one year, or are both parents of a child, or have entered into a cohabitation agreement under the *Family Law Act*. The *Act* provides the right for an owner to terminate a tenancy if s/he requires the rental premises for use of a close relative, including his/her spouse.

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<sup>67</sup> *Land Titles Act*, RSO 1990, c. L5.

<sup>68</sup> *Registry Act*, RSO 1990, c. R20.

<sup>69</sup> *Land Registration Reform Act*, RSO 1990, c. L4.

<sup>70</sup> *Landlord and Tenant Act*, RSO 1990, c. L7.

**Recommendation 25**

That the definition of "spouse" in the *Landlord and Tenant Act* be amended to include same-sex spouses.

The Ontario *Human Rights Code*, which now prohibits discrimination in the area of housing on the basis of sexual orientation, provides protection only on an individual basis. The Code does not prohibit a landlord from discriminating against a lesbian or gay couple because of their spousal status. Nor is there any protection against this type of discrimination under the *Landlord and Tenant Act*.

**Recommendation 26**

That the *Human Rights Code* be amended to include a definition of "family status" which includes same-sex spouses.

The *Housing Development Act*<sup>71</sup> provides for leasing to families with low incomes. "Family" is not defined in the *Act* and, based on traditional jurisprudence, would not include same-sex couples.

**Recommendation 27**

That the term "family" in the *Housing Development Act* be defined to include same-sex spouses.

**6.2.4 Family Support Obligations**

The preamble to the *Family Law Act* states:

Whereas it is desirable to encourage and strengthen the role of the family; and whereas for that purpose it is necessary to recognize the equal position of the spouses as individuals within marriage and to recognize marriage as a form of partnership; and whereas in support of such recognition it is necessary to provide in law for the orderly and equitable settlement of the affairs of the spouses upon the breakdown of the partnership, and to provide for other mutual obligations in family relationships, including the equitable sharing by parents of responsibility for their children.<sup>72</sup>

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<sup>71</sup> *Housing Development Act*, RSO 1990, c. H18, s. 10.

<sup>72</sup> *Family Law Act*, RSO 1990, c. F3.

The preamble of the *Family Law Act* recognizes marriage as a partnership and identifies the *Act's* purpose as providing for the orderly and equitable settlement of affairs on the breakdown of a marriage. Thus, the *Act* permits a heterosexual spouse to apply to a court for, among other things, an equalization of net family property, spousal support, and exclusive possession of the matrimonial home.

Same-sex couples are excluded from the financial support regime made available to heterosexual couples. Excluded by the legislation, same-sex families are neither encouraged nor strengthened by the *Act*.

Gay men and lesbians pay tax dollars to support legislative and judicial systems which regulate the relationships of heterosexuals only. This system imposes financial support obligations on heterosexual couples and adjudicate the financial support obligations arising from intimate relationships.

The relationships of lesbians and gay men, like those of heterosexuals, are economically interdependent, yet the preamble to the *Family Law Act* reflects a traditional conception of the nuclear family. It addresses the encouragement and strengthening of the family, but that family is obviously heterosexual.

Discrimination against gay men and lesbians in the area of family law takes the form of the exclusion of same-sex relationships from the statutory definitions of "spouse". For example, section 1 of the *Family Law Act* states that "spouse"

means either of a man or a woman

(a) who are married to each other, or

(b) have together entered into a marriage that is voidable or void, in good faith on the part of the person asserting a right under the *Act*.

The status of "spouse" in family law confers benefits and imposes responsibilities relating to the division of property and possession of the matrimonial home.

The *Family Law Act* establishes the form of the family support regime.<sup>73</sup> Although the *Act* distinguishes, for the purpose of property division, between married and common-law heterosexual couples, it permits members of both to claim financial support

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<sup>73</sup> The *Succession Law Reform Act*, RSO 1990, c. S26, also imposes some support obligations on the estate of a deceased person by permitting a "dependent" to claim support in certain circumstances.

from a "spouse."<sup>74</sup> The *Act* provides that a man and a woman who are not married to each other, but who have cohabited continuously for a period of not less than three years, or who are in a relationship of some permanence, and who have child of whom they are the natural or adoptive parents, will be considered spouses for the purposes of qualifying for spousal support.<sup>75</sup>

The *Act* creates an obligation between spouses to support each other:

Every spouse has an obligation to provide support for himself or herself and for the other spouse, in accordance with need, to the extent that he or she is capable of doing so.<sup>76</sup>

The purposes of spousal support include:

- the recognition of the spouse's contribution to the relationship;
- the economic consequences of the relationship for the spouse;
- equitable sharing of the economic burden of child support;
- the assistance of the spouse to contribute to his or her own support and to the relief of financial hardship if this has not been achieved by court order pursuant to the division of property sections of the *Family Law Act*.<sup>77</sup>

Heterosexual spouses are covered by the *Act*, and they may elect to accept the spousal-support obligations imposed by the *Act* or to contract out of the support provisions by means of domestic contracts.<sup>78</sup> The needs of lesbian and gay relationships are not addressed by the *Family Law Act*, even though same-sex couples, like heterosexual couples, are economically interdependent and should enjoy the same benefits and shoulder the same burdens as heterosexual couples.

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<sup>74</sup> *Family Law Act*, s. 30.

<sup>75</sup> *Family Law Act*, s. 29.

<sup>76</sup> *Family Law Act*, s. 30.

<sup>77</sup> *Family Law Act*, s. 33(8)

<sup>78</sup> *Family Law Act*, s. 52(1)(b) with respect to married couples and s. 53(1)(b) with respect to cohabitation agreements.

Only a failure to understand the nature of same-sex relationships can account for this continuing discrimination. Like heterosexuals ending long-term relationships, gay men and lesbians must be able to divide the property and share the financial security gained during the course of that relationship. Access to support would assist in reestablishing individual self-sufficiency and self-esteem, and it would also lessen dependence on government social security programmes.

This discrimination should be ended by:

- (a) permitting gay men and lesbians to designate a spouse who will share the benefits and obligations of marriage as conferred by the province;
- (b) recognizing a common-law status for lesbian and gay relationships on the same basis as that for heterosexual "common-law" relationships; and
- (c) providing clear statutory recognition under the *Family Law Act* of domestic contracts entered into by lesbians and gay men.

At a minimum, lesbian and gay couples must be granted the same common-law spousal status enjoyed by their heterosexual counterparts, with the option of contracting into the *Act's* property-division provisions. Like heterosexual couples, gay and lesbian couples also must be permitted the choice of limiting their support obligations to their partners by domestic contract, subject to the power of the courts to set aside such contracts on the grounds of unconscionability.

### **Recommendation 28**

That the *Family Law Act* be amended to extend the application of the *Act's* property-division and spousal-support obligations to same-sex relationships if the persons in that relationship choose to designate themselves as spouses; that spousal-support obligations flow from the recognition of a common-law status for same-sex relationships on the same terms as those for common-law heterosexual relationships; that domestic contracts entered into between same-sex partners be recognized in law.

## 6.2.5 Division of Property on Separation and Divorce

Section 5(7) of the *Family Law Act* provides as follows:

The purpose of this section is to recognize that child care, household management, and financial provision are the joint responsibilities of the spouses and that inherent in the marital relationship there is equal contribution, whether financial or otherwise, by the spouses to the assumption of these responsibilities, entitling each spouse to the equalization of the net family properties, subject to the equitable considerations set out in subsection (6).

This is the stated purpose of the *Family Law Act's* property regime: to recognize the equal contributions of spouses in a marital relationship. This property regime recognizes the contributions to their relationships of married persons only. Further, married spouses can contract out of the *Act's* property provisions, if they choose to do so, with the exception of the provisions relating to the matrimonial home.

Same-sex couples are not afforded the orderly and equitable property settlements envisioned by the *Act*. In the protection of property rights arising from their relationships, gay men and lesbians are limited to common-law and other statutory remedies.<sup>79</sup> These remedies are expensive to obtain, because they rely on the litigation process, and the result of litigation is uncertain, particularly in the absence of statutory guidance.

The following examples compare the relative treatment of married and same-sex couples.

On the breakdown of a traditional marriage, in the absence of a domestic contract, a married spouse would be entitled to the following property rights:

(a) equalization and division of net family property, as well as the right to apply for interim relief to secure the preservation of the property;<sup>80</sup>

(b) possession of the matrimonial home, as well as the right to apply for interim and permanent exclusive possession of that home;<sup>81</sup> and

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<sup>79</sup> For example, the right of a joint tenant to apply for a partition and sale under the *Partition Act*, RSO 1990, c. P4.

<sup>80</sup> *Family Law Act*, ss. 5(1) and (2).

<sup>81</sup> *Family Law Act*, s. 19.

(c) a declaration of trust in any property where the spouse can prove s/he has made contributions towards its acquisition and maintenance.

On the breakdown of a same-sex relationship, however, a person who had stayed at home to provide home-maker duties and to care for the children being raised by the couple has no entitlement to an orderly and equitable settlement under provincial law. Nor is that person entitled to a share in the accumulated property during the relationship, despite her or his partnership role within the relationship. Unless he or she has title to the home shared by the couple, s/he has no right to continue to occupy it. S/he would be entitled only to apply for a declaration of trust in common law in any property in which s/he could prove a contribution towards its acquisition or maintenance.

### **Recommendation 29**

That the *Family Law Act* be amended to permit members of a same-sex couple who have made a declaration of their relationship to obtain an equalization and division of net family property on the breakdown of the relationship and to obtain possession of the home they occupied during the relationship, subject to the terms of a domestic contract made between the couple to the contrary.

### **6.2.6 Division of Property on Death**

When a married heterosexual person neglects to make provision for his/her spouse on death, Ontario's laws create a safety net, permitting the surviving spouse certain statutory property rights. But because same-sex spouses and heterosexual common-law spouses have no right pursuant to the provincial succession laws governing intestate succession, lesbians and gay men must provide in their wills for any bequest of property intended for their same-sex partners.

The *Succession Law Reform Act*<sup>82</sup> provides that the spouse and children of an intestate person are entitled to the deceased person's entire estate. "Spouse" is defined in section 1 of the *Act* to mean a man and a woman who are married to each other or who have entered into a marriage that is voidable or void in good faith on the part of the person asserting a right under the *Act*. Provided that the estate is sufficiently large, the spouse receives a "preferential share" of \$75,000 and then half or one third of the remainder of the estate, depending on the number of surviving children. The balance of the estate is divided equally

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<sup>82</sup> *Succession Law Reform Act*, RSO 1990, c. S26.

among the children of the deceased. Where no spouse or children exist, the estate is distributed to parents, siblings, and others related by degrees of consanguinity.<sup>83</sup>

Unlike their

heterosexual counterparts, gay men and lesbians do not have any rights under the *Act* when their same-sex partner dies intestate.

If a heterosexually married person dies, either with or without a valid will, his or her spouse is entitled to renounce any bequest from the deceased's will or under the law of intestate succession and apply for an equalization of net family property under the provisions of the *Family Law Act*.<sup>84</sup> This section was added to the *Family Law Act* to protect a surviving spouse from having to accept a smaller settlement of the assets of the deceased spouse than s/he might have received if the relationship had ended and the property been divided prior to death. These provisions, however, do not apply to heterosexual common-law or same-sex spouses.

### **Recommendation 30**

That same-sex spouses who have made a declaration of their relationship be considered to be "spouses" within the meaning of the *Succession Law Reform Act*.

### **6.2.7 Social Benefits**

The statutes which provide social benefits do not use a consistent definition of "spouse." Indeed, some statutes do not define relationships at all. The common-law definition of spouse must be used to interpret these statutes. Some statutes fail to recognize social changes in the definition of heterosexual relationships, much less in relationships between same-sex couples.

Many social-benefit statutes focus on the provision of services to individuals rather than the regulation of relationships, and so they affect same-sex relations only tangentially. Other statutes consider relationships of dependency, rather than relationships of status. In those statutes, the nature of discrimination against same-sex couples is quite different.

Some social-benefit statutes determine the provision of benefits to individuals in relationships of status. Generally, this regulation ensures that people in relationships do not receive

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<sup>83</sup> *Succession Law Reform Act*, s. 47

<sup>84</sup> *Family Law Act*, s. 6.

extra benefits because of their relationship status: benefits given to an individual are determined by consideration of the partner's economic resources. For example, the Ontario Guaranteed Annual Income Act,<sup>85</sup> section 1, provides that benefits to a married person are adjusted to take spousal income into account. Under the present definition of spouse, those in same-sex relationships will not be considered "spouses." Their entitlement to benefits may, in fact, be higher than the entitlement of heterosexual spouses whose resources are considered together. On the other hand, a same-sex partner does not enjoy the right to benefits of a surviving spouse.

Section I of the Ontario Pensioners Property Tax Assistance Act,<sup>86</sup> which provides direct tax credits to seniors, provides the following definition.

"Family unit" means,

- (i) an individual and his or her spouse, or
- (ii) any individuals occupying the same principal residence, whether or not they are related to each other.

This is the only place in the social-benefit statutes where the consideration of a relationship extends beyond traditional definitions. The amount of the grant available to family units is capped; it must be apportioned among the eligible members of the family unit.

Social-benefit statutes are concerned with the provision of services to indigent persons and their dependents. For example, section 21 of the *Ambulance Act*<sup>87</sup> states that, where ambulance service is provided to a person who is receiving public assistance or to a dependent of that person, the municipality is responsible for the payment of the service. Generally, the term "dependents" is not defined but, if statute or case law is followed, the term probably comprises only certain relationships, notably parent/child and husband/wife.

If a de facto test of dependency is used, a dependent is entitled to receive municipal support if his or her partner is receiving public assistance. If a de jure test of dependency is used, benefits may be denied if the relationship does not fall within an enumerated list of dependent relationships. The statute may

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<sup>85</sup> *Ontario Guaranteed Annual Income Act*, RSO 1990, c. 017.

<sup>86</sup> *Ontario Pensioners Property Tax Assistance Act*, RSO 1990, c. 033.

<sup>87</sup> *Ambulance Act*, RSO 1990, c. A19.

be interpreted in a discriminatory manner, for instance, if a person, who does not qualify for public assistance on his or her own and is dependent on another person receiving public assistance, is denied a benefit because a de jure test of dependency is applied. Discrimination can be avoided by the application of a de facto test of dependency. For consistency, this test should be applied to all relationships of dependency.

The definition of the term "dependent" is also important in considering the application of the *Compensation for Victims of Crime Act*.<sup>88</sup> The board administering the *Act* has considerable discretion in determining the amount of compensation to be paid to the victim, a person who is responsible for the support of the victim, or, in cases of the death of the victim, his or her dependents.

The *Family Benefits Act*<sup>89</sup> does not treat men and women equally, nor does it treat heterosexual and same-sex relationships equally. Consider the following definitions in section 1 of the *Act*:

"dependent child" means a person residing in Ontario who is supported by his or her mother, dependent father or the person who stands in the role of a parent to him or her and,

- (a) who is under twenty-one years of age and attends an educational institution of a class defined by the regulations and, if sixteen years of age or over, is making satisfactory progress with his studies, or
- (b) who is under eighteen years of age and is not attending school

because,

- (i) he or she is of pre-school age, or
- (ii) he or she is unable to attend school by reason of mental or physical disability;

"dependent father" means a father who is permanently unemployable by reason of physical or mental disability, and includes a father who is blind or otherwise disabled as defined by the regulations;

"mother" means the mother of a dependent child.

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<sup>88</sup> *Compensation for the Victims of Crime Act*, RSO 1990, c. C24.

<sup>89</sup> *Family Benefits Act*, RSO 1990, c. F2.

All forms of discrimination could be removed by the establishment of a de facto test of dependency. The *Family Benefits Act* fails to consider a mother's resources but instead deems all children "dependent" if they are supported by their mother, while children supported by their fathers are only deemed "dependent" if the father is deemed "dependent" as well.

This *Act* provides certain benefits to women between the ages of 60 and 65 if they are unmarried, divorced, or separated, or if their husbands meet specific conditions. The *Act* does not provide for benefits to men who meet equivalent conditions. Benefits are only available to married women or widows, not to persons living in common-law or same-sex relationships. Women in same-sex relationships may benefit, however, since both women in a relationship would be considered to be single. If both qualified for benefits, each would obtain greater benefit than if their relationship was recognized to constitute an economic unit.

### **Recommendation 31**

That a de facto test of dependency be established in order to remove discrimination in the determination of eligibility for social benefits in all provincial statutes granting benefits to individuals based on their relationship to other persons.

### **6.2.8 Employment Benefits**

Many provincial statutes recognize the right of dependent family members and spouses to receive benefits during the lifetime, and after the death, of an employed family member.

Entitlement to benefits varies. The *Law Society Act*<sup>90</sup> creates a fund for the "dependents of deceased members." "Dependents" is not defined in the *Act*. The *Legislative Assembly Retirement Allowances Act*<sup>91</sup> authorizes the payment of benefits to a "spouse" as defined in the *Family Law Act*. Clearly, these benefits are not available to same-sex couples. The *Ontario Municipal Employee's Retirement System Act*<sup>92</sup> authorizes the payment of benefits to widows and widowers, including persons not married but who have cohabited for seven years and who have publicly represented themselves to be husband and wife. Again, benefits are denied to same-sex couples.

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<sup>90</sup> *Law Society Act*, RSO 1990, c. L8.

<sup>91</sup> *Legislative Assembly Retirement Allowances Act*, RSO 1990, c. L11.

<sup>92</sup> *Ontario Municipal Employee's Retirement System Act*, RSO 1990, c. 029.

These examples are representative of the availability of statutory benefits to family relations under Ontario laws. The availability of benefits to individuals is usually determined by a "family-like" relationship and often by dependency. Although many statutes lack clarity, it is doubtful that same-sex spouses would be entitled to receive benefits, simply because their relationships lack recognition in law.

These statutes discriminate against same-sex couples by failing to treat them as equivalent to heterosexual spouses.

### **Recommendation 32**

That a definition of beneficiaries which expressly includes same-sex spouses be included in all statutes granting an economic or social benefit.

### **6.2.9 Conflict of Interest Rules**

Spouses are one of the group of "associates" or "related persons against whom certain restrictions are established under several business regulation statutes, particularly in the granting of loans or other monetary advantages. For example, the *Business Corporations Act*<sup>93</sup> defines "associate" as including a spouse or a relative of a spouse having the same home as the person. "Spouse" is here defined as in the *Human Rights Code*, as a person of the opposite sex to whom the person is married or with whom the person is living in a conjugal relationship outside marriage

The *Business Corporations Act*, the *Corporations Act*,<sup>94</sup> the *Cooperative Corporations Act*,<sup>95</sup> the *Insurance Act*,<sup>96</sup> the *Credit Unions and Caisses Populaires Act*<sup>97</sup> and the *Loan and Trust Corporations Act*<sup>98</sup> all contain provisions prohibiting a corporation from giving financial assistance to an associate of a director, officer, shareholder, or employee. Moreover, an associate of an insider is accountable to the corporation for benefits derived from the use of confidential information.

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<sup>93</sup> *Business Corporations Act*, RSO 1990, c. B16, s. 1(1).

<sup>94</sup> *Corporations Act*, RSO 1990, c. C38.

<sup>95</sup> *Cooperative Corporations Act*, RSO 1990, c. C35.

<sup>96</sup> *Insurance Act*, RSO 1990, c. 18.

<sup>97</sup> *Credit Unions and Caisses Populaires Act*, RSO 1990, c. C44.

<sup>98</sup> *Loan and Trust Corporations Act*, RSO 1990, c. L25.

### **Recommendation 33**

That the *Business Corporations Act*, the *Corporations Act*, the *Cooperative Corporations Act*, the *Insurance Act*, the *Credit Unions and Caisses Populaires Act* and the *Loan and Trust Corporations Act* be amended to define "associate" in such a way that it includes a same-sex spouse.

Political conflict-of-interest legislation has a similar purpose, but the definition of "spouse" used in these statutes varies. The *Members' Conflict of Interest Act*<sup>99</sup> uses the term "spouse" as it is defined in the *Family Law Act*. The spouse and minor children of provincial members of parliament must disclose their financial assets. The financial interests of the "spouse" of a municipal politician are deemed to be those of the politician, but the *Municipal Conflict of Interest Act*<sup>100</sup> uses the less restrictive definition of "spouse" found in the *Human Rights Code*. The use of a municipal candidate's spouse's funds in an election campaign is deemed a contribution which need not be reported.

### **Recommendation 34**

That the definitions of "spouse" found in political conflict-of-interest legislation be amended to include same-sex relationships.

Similar considerations arise in the regulation of the professions. The *Health Disciplines Act*<sup>101</sup> prevents members of a health professional's family from receiving benefits from suppliers, ordering diagnostic sets, or selling drugs and medical products. The definition of "member of the family" is limited; "spouse" only includes married relations. The *Insurance Act* forbids the granting of an insurance licence to a person (including lawyers, mortgage brokers, bank officers, and government employees) who is in a position to use undue influence to secure business or to the spouse (not defined) of that person. The *Nursing Homes Act*<sup>102</sup> requires that licence holders provide financial statements which include any payments or benefits made to an associate of a licensee, which includes his or her spouse (not defined). Finally, the spouse of an officer or director cannot act as an auditor of a credit union, or loan or trust

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<sup>99</sup> *Members' Conflict of Interest Act*, RSO 1990, c. M6.

<sup>100</sup> *Municipal Conflict of Interest Act*, RSO 1990, c. M50.

<sup>101</sup> *Health Disciplines Act*, RSO 1990, c. H4.

<sup>102</sup> *Nursing Homes Act*, RSO 1990, c. N7.

company, or as a receiver if that person is the spouse of a "trustee" under the *Business Corporations Act*.

**Recommendation 35**

That the *Health Disciplines Act*, the *Insurance Act*, and the *Nursing Homes Act* should be amended so that the term "associate" includes a same-sex spouse.