Review Panel on Common Law Relationships

Opinion of

Hon. A.C. Hamilton Q.C., LL.D.

December 20, 2001

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Executive Summary

Part I of my report advises the Minister there are a number of discriminatory provisions in the Adoption Act which would not withstand a *Charter* challenge and will have to be amended. I review Supreme Court decisions dealing with the point, and the methods used by other provinces to correct their legislation. I recommend against following their approaches and prefer the method, if not the wording, used in Bill 41.

The Manitoba Act should be amended to enable any adult to at least apply, alone or jointly with another to adopt a child, and if found suitable by a court, to be granted an order of adoption. I describe the care that is now taken before anyone is allowed to adopt a child and set out some of the expert testimony on the suitability of same sex couples to adopt that appears in reported cases from other provinces.

Part II discusses the purpose of conflict of interest rules and how they protect the public interest. It reviews the Acts that deal with the responsibilities of elected members of the legislature, city and municipal councillors and school trustees. As I do with respect to each topic, I refer to the attitudes of those we consulted. During the discussion of this topic, gays, lesbians, those supporting the traditional family, school trustees and a member of the legislature, were unanimous in their belief that the rules requiring the filing of a statement of assets and declaring a conflict of interest when it arises, should be the same for everyone. I agree.

Part III contains a lengthy review of Supreme Court of Canada decisions dealing with the stereotyping of, and discrimination against, gays, lesbians and others who have been marginalized in the past. The cases, particularly the most recent unanimous decision in *Law v. Canada,* indicate why legislative discrimination is unacceptable. That case establishes guidelines and a process for the courts and others to follow when an allegedly discriminatory legislative provision is questioned.

There are a number of provisions in Manitoba statutes that discriminate against common-law relationships and would not withstand a *Charter* challenge. I propose a two-stage approach to correct the problem. The first is to make some immediate amendments to correct the most obvious problems. The second is to do a careful review of all statutes to remove any distinctions that exist between the rights of married and common-law couples, as well as all distinctions between the rights of children born to, or raised by, common-law and married couples.

During a discussion of the equal rights of all children, and because of the Supreme Court decision in *Chartier*, I recommend the term *in loco parentis* be removed from Manitoba statutes and be replaced with "an adult who has acted as a parent toward a child." That would, I hope, confirm that any person or couple that is raising a child is responsible for its continuing support, even after a partnership dissolves, and to inheritance benefits as well. It is important to put an end to the ability of a common-law partner to abandon and disavow support for a child he or she has helped to raise. The provision "who has acted as a parent toward a child" should also indicate the point at which those living in a common-law relationship assume parental responsibilities.

Although I do not deal with every statute requiring attention, I provide examples of the sort of amendments that are needed. I analyze the wordings used in the Bill 41 amendments and suggest they remain discriminatory and in need of amendment again. I recommend that all statutes, where the terms are used, contain identical definitions of "spouse" "common-law partner" "conjugal relationship" and "family."

Part IV discusses the benefits of a system that will permit all common-law couples, including those where one of the parties is still married to another, to register their common-law partnerships. The Nova Scotia amendments to its Vital Statistics Act, the Civil Union statute that exists in Vermont and the "avant projet" that would establish a Civil Union in Quebec, are all discussed. I suggest Manitoba not adopt any of those systems at the present time, but I do recommend Manitoba establish its own form of Common-Law Registry.

In my opinion, those who choose to register their relationship would be declaring its permanence and stability, and the registration in itself should rebut the assumption of many people that those characteristics do not apply to a common-law relationship. A certificate of registration, issued by Vital Statistics, would provide *prima facie* proof of the relationship and allow schools, hospitals and others to accept a consent to a procedure or direction from a legally recognized representative.

The availability of proof would certainly be of advantage when dealing with employee benefits and interests in real property in a Land Titles Office. I assume employers would welcome the availability of proof of the existence of a common-law partnership as well. The use of a common-law registry would not interfere with marriage in any way, or the rights and responsibilities that flow from that institution.

Introduction

When the Review Panel on Common-law Relationships was established on June 21, 2001 by the Honourable Gord Mackintosh, the Minister of Justice and Attorney General of the Province of Manitoba, he sought the advice of Jennifer A. Cooper Q.C. and myself on several issues.

As we began to write our report on the various topics, we found that, although we agreed on many matters, we disagreed on others. We had difficulty trying to reflect our differing positions in one report and finally concluded that we could more clearly express our opinions and recommendations if we submitted separate reports.

That possibility was discussed with the Deputy Minister and he suggested two interpretations of the issues, and separate opinions, might be even more beneficial to government than one. We are therefore submitting separate reports.

The Minister initially asked us to report to him by the 31st of December, 2001, but subsequently asked us to expedite our report on Adoption and submit an Interim Report on that topic. My interim report was submitted on October 29, 2001. The following is my final opinion and report. It alters my interim report by inserting some initial comments in this document and by eliminating others that are no longer necessary. The substance of my comments on adoption remains unchanged.

The terms of reference we received from the Minister indicate the issues we were to examine, what we were to report on, and to some extent, how we were to proceed. They stated:

> *Government seeks your advice on a series of issues respecting persons in common-law relationships. The Province of Manitoba maintains a policy of non-discrimination in the application of provincial statutes. Concerns recently have been raised that a number of statutes may need to be addressed in terms of their fairness to and potentially discriminatory effect against members of the gay and lesbian community in Manitoba.*
>
> *In the development of your advice, you have full access to all relevant employees within the Department of Justice (Manitoba), should you find that such access may be helpful to you in providing advice to government. You may also consult with experts in relevant areas of the law. Any legislation resulting from your advice will result in full public hearings which will permit any member of the public to address the issues under consideration by the legislature. For that reason, public hearings are unnecessary at this stage, and are not contemplated under these terms of reference. However, you may consult with interested individuals or groups, if you feel it would be helpful to do so. It is important to emphasize that proceeding with despatch and in a focused way is a critical element of these terms of reference.*
>
> *Your advice should be provided to me by or before the 31st of December, 2001. To ensure a transparent process, and public accountability, these terms of reference and any*

subsequent amendments that may be requested by you are, and will continue to be, publicly available. Your advice will be made public as well.

The issues for which government seeks your advice are as follows:

Adoption

1. *As they apply to adoption applications by same sex common-law couples, are the provisions in Manitoba's Adoption Act likely to survive a Charter challenge?*

2. *The best interests of the child is the paramount consideration in any adoption proceeding. If Manitoba's Adoption Act is not likely to survive a Charter challenge, review legislative approaches in other Canadian jurisdictions, identify models (legislative approaches) which would comply with the Charter and recommend a preferred approach.*

Conflicts of Interest and Protection of the Public Interest

3. *A number of Manitoba statutes contain conflict of interest provisions, including those affecting public officials. Are amendments recommended to these conflict of interest provisions and other provisions to protect the public interest to include persons in common-law relationships, where those persons are currently excluded? If so, what approach is recommended?*

4. *One or both persons in a same sex common-law relationship may not be open with family, friends, co-workers and others about their sexual orientation. Some persons in opposite sex common-law relationships may also have concerns about open disclosure. If amendments to conflict of interest provisions are recommended, then how should these changes be reconciled with the privacy rights/interests of both persons in a common-law relationship?*

Legislation dealing with Property Interests

5. *Taking into account legislative developments across Canada, particularly in Saskatchewan and Nova Scotia, recommend an approach to addressing rights and duties of common-law partners in legislation that gives married spouses an interest in and right to inherit/share their spouse's property.*

The first thing we did as we entered upon our responsibilities was to invite people to send us their comments and suggestions on the various issues. We published a notice and request for comments (in urban and rural newspapers throughout the province) and received a number of replies. They served two purposes. They provided us with a cross-section of opinion and enabled us to identify those with whom we would like to meet.

Our second step was to arrange a number of private meetings and to invite a representative number of individuals and organizations to discuss their thoughts and recommendations with us. We invited those we believed had a similar point of view to the same meeting so we could discuss their perspectives free from any or argument from those who might disagree with them.

We were anxious to avoid confrontations and bitterness displayed during the committee hearings on Bill 41.

We also invited some we thought would have first-hand knowledge of how the adoption system operates. We developed a number of questions and tentative concerns and wanted the opportunity to explore them with people who are actively involved in administering the Act. We wanted to learn of their concerns, if they were prepared to share them with us. Everyone we invited, who was available, came to a meeting and graciously discussed the issues with us. After the in-person consultations were completed we made a number of long distance conference calls to discuss our terms of reference with national organizations that have staff studying the issues and intervening in Supreme Court of Canada and other cases.

While the plans for meetings were being put in place, we considered the state of the existing law and read the transcripts of the oral presentations that were made to the Standing Committee on Law Amendments on June 18th and 21st, 2001 and the written submissions that had been filed with it.

The consultations we held and the submissions we received were of value as they provided a considerable amount of information we would not otherwise have had and provided us with a wide variety of strongly held opinions. As will be seen, they played an important role in the formulation of my own opinions and recommendations.

We received eleven written submissions from representatives of national and provincial organizations as well as 25 written submissions from individuals throughout the province. We met with 26 people, 18 of whom represented an organization. Telephone conference calls were held with three national organizations.

I have amended my interim report on Adoption by extracting some opening comments to adapt them to this document. My final report is divided into four parts. Part I contains my analysis of the Supreme Court of Canada case of *M. v. H.* and other cases dealing with adoption. Part II deals with Conflict and the Public Interest and the applicability of the legislative requirements to common-law couples.

Part III deals with property legislation, contains a lengthy review of a another line of Supreme Court and other cases and it deals at length with the effect of stereotyping and the need to avoid legislative discrimination. It suggests changes to many statutes, including some amendments to those changed pursuant to Bill 41. It deals primarily with the reasons changes are necessary, but gives examples of the most serious *Charter* problems that remain.

Part IV reviews systems that record common-law systems in other jurisdictions and discusses their suitability in Manitoba. It spends some time discussing the possibility of establishing a Partnership Registry in Manitoba.

Part I

ADOPTION

Introduction

Like the Terms of Reference, the *Adoption Act of Manitoba* emphasizes the needs of children.

Section 2 of the Act states:

> The purpose of this Act is to provide for new and permanent family ties through adoption, giving paramount consideration in every respect to the child's best interest.

Section 3 expands upon that principle:

> All relevant factors shall be considered in determining the child's best interests, including
>
> (b) the child's opportunity to have a parent-child relationship as a wanted and needed member of a family;
>
> (e) the child's sense of continuity and need for permanency with the least possible disruption;

The *Adoption Act* deals with a number of different kinds of adoptions under numbered Divisions. Division 1 deals with permanent-ward adoptions, where a Child and Family Services Agency (CFS) has already placed a child with foster parents pursuant to its authority under an Order of Guardianship. This is often referred to as a "closed adoption" or the "traditional" method where CFS selects and recommends an individual or couple to adopt a specific child. The birth parents are not told who the adopting individual or couple is.

Division 2 applies to private adoptions and Division 3 applies to the adoption of children in a foreign jurisdiction where they are brought to Canada through an immigration process. Division 4 relates to *de facto* adoptions. It permits the adoption by guardians of a child who has lived with them for at least two years. Extended family adoptions are dealt with in Division 5 and apply to the adoption of a child who is related to the applicant. Parents own Adoptions in Division 6 applies to someone who has married or has entered into a committed relationship with the parent of a child and Division 7 applies to the adoption of one adult by another.

It is difficult to follow the provisions of the Act as it is first necessary to properly identify the category that applies to a particular case and then to see what requirements and limitations apply.

Consultations

All the initial consultations and inquiries were conducted jointly with Ms. Cooper. Following is a summary of the comments and opinions I found to be of particular significance. They include a number of divergent opinions and views, but some similarity as well, particularly on what is best for children.

The method of consultation we followed allowed us to explore each issue and to discuss the opinions that were expressed, in some detail. There was no rancour during any of our meetings and everyone we spoke with was anxious to see government proceed in a fair and appropriate manner. I was pleased to see that each consultant expressed a concern for what is best for children. Most discussed all the topics that were referred to us but, in this interim report, I will only comment on what they said about adoption.

One woman who wrote to us had worked with children, fostered many, and has four of her own. She felt quite strongly that no changes should be made to Manitoba's *Adoption Act*. In addition to her moral considerations, her experience was that children hate to be different from other children. She said that an adopted child often feels different enough without adding further pressures. She believes that same-sex relationships are not normal and feels very disturbed to think of being adopted with no say in the matter, by a same-sex couple, so she would not submit anyone else to such a situation. I took her comments as a plea for and on behalf of children.

The main concern of two women who are in positions of public responsibility with whom we discussed the disclosure and conflict of interest questions, was that joint adoptions by same-sex partners are important as they can provide children with the same rights of support and succession enjoyed by the children of married couples.

We spoke with those who have strong traditional lifestyles and believe in the sanctity of marriage. They believe that all children need a father and a mother and that they are the ones who should be adopting children. They recognize that marriages are breaking down and that alternate lifestyles are becoming more common, but do not want government to do anything that would encourage the breakdown of traditional marriages or that would encourage another lifestyle.

It was necessary on occasion to advise some with whom we spoke that any single adult may now apply to adopt a child, no matter what their sexual orientation may be and that it is only same-sex couples that may not. We had to do that as some felt that no gay or lesbian person should be entitled to adopt at all. Two women to whom we spoke did soften their opposition a bit by agreeing that two sisters of a deceased relative should be able to provide a home for a child and be able to jointly apply to adopt, but they maintained their opposition to gay or lesbian adoptions.

The opposition to gays and lesbians that I perceived was really to the life style they believed gay and lesbian people have, without any particular understanding of what that may include. They of course did not hear gay and lesbian people speak, as we did, of their long-term stable relationships. Nor did they hear of their sensitivity to the needs of children and the large numbers of children now being raised in their homes.

A Manitoba lawyer who is a Board member of Adoption Options, spoke to us. That organization assists young mothers or pregnant women who are thinking of putting their child up for adoption. The mothers are given information about possible adoptive parents and have an opportunity to meet with them and to assess their ability to provide a good home. In effect, they select the adoptive parents. They may also enter into an 'openness agreement' that will give them the right to receive photographs and reports on how the child is doing. Some even include opportunities to visit with the child from time to time.

His focus was on the welfare of children who are adopted by only one member of a same-sex partnership. He was concerned about what would happen if the partners separated. He said:

> “The "non-legal parent" would be at a huge disadvantage in seeking custody or access as against the "legal parent". The presumption that a child is to benefit equally from both "parents" after separation would become a farce and again expose the child to the potential of a protracted court battle.”

He asked how this could possibly be in the best interests of the child. Children's rights, he said, should be the same for all whose "parents" are married or are same- or opposite-sex partners.”

He also said that if the government is of the view that the placement of children in the homes of gay or lesbian couples is bad for children, then the government should explicitly say so and make the practice illegal. He said that by permitting the placement of children in gay or lesbian households, and then declining both partners the right to call themselves parents, the law is engaging in a practice that is intellectually dishonest.

We spoke to two representatives of labour who had obviously looked at the issues on behalf of their members, had discussed them in considerable detail, and had received direction from their members as to the position the unions should take. They said they would like to see changes to the law that would permit common-law partners, whatever their sexual orientation, to adopt children. They suggested that the sole criteria when selecting adoptive parents, should be what is best for the child.

In an earlier written submission, the Canadian Labour Congress had taken the position that "gay and lesbian people are every bit as capable of being loving caring parents." The Manitoba Federation of Labour recognized the diversity of its members and also urged that all be treated with fairness and equity.

The Children’s Advocate advised us that gay and lesbian people are more likely to adopt children with special needs. The chairperson said that the adoptive parents should understand that, when they are given the responsibilities of adoption, the law is saying: "these are your children now" and there should be government financial support and other support services in place to assist them with their difficult responsibility.

We spoke to a woman who was raising her three teen-age children with her same-sex partner. She said the children were well adjusted and she and her partner make certain they have a male

influence in their lives. She said the children have adjusted to the fact that they have two mothers who love and care for them. The couple helps the children understand their particular relationship and has been able to make them comfortable with it. When the children were younger they were encouraged to say whatever they wanted about their "parents" or not to discuss it with their friends until they were older. The couple adapted their approach to the sensitivities of each child.

Others told us of some of the difficulties resulting from the fact that only one partner is officially recognized by the school and medical authorities and to problems that could arise when a consent is needed in a hurry. We did not hear of any actual problems but same-sex partners are concerned that they could arise. Same-sex couples wish to be recognized as equal partners and have equal responsibilities. Although they cannot marry, these women would like to regularize their relationship as much as possible, and in particular, would have liked to have been able to adopt their children as a couple.

We heard a great deal about the impact of the Supreme Court decision in *M. v. H.* on the law. We were told that the Manitoba Bar Association has passed a resolution asking the Government of Manitoba to eliminate all distinctions between same-sex and opposite-sex common-law partners. The members of the Bar we met said they would prefer to see government make the necessary changes, rather than seeing their members and their clients having to challenge the existing law in court.

The majority of those with whom we spoke suggested the decision as to whether a certain person or persons should be able to adopt a child, should be made by a child welfare agency or by a judge, on the basis of what is in the best interests of the particular child.

Many we consulted were anxious to see all children have all the benefits that can flow from an adoption. People on both sides of the question said that children who are adopted should receive the same rights and benefits from those raising them that they would have from natural parents. That should be the case, they said, whether those raising them are single, married, or are same- or opposite-sex partners.

Two openly gay presenters spoke of the caring personality of many gay men who are now involved in parenting children, in one way or another. They suggested that 1 in 10 gay men and every 3 or 4 lesbian women are now raising children. Many have children of their own that are now being raised by a same-sex couple. The only change that is desirable from the standpoint of a couple, and from the position of the children, they said, is to permit both partners to join in adoption applications and to become the official parents of the children they raise.

The Manitoba Human Rights Commission, after a very informative meeting, forwarded a summary of its recommendations. On the topic of adoption it said:

> "We recommend that *The Adoption Act* be amended so that gay or lesbian couples can apply together to adopt or foster a child, and so that the non-biological parent in a same-sex couple can adopt his or her spouse's child."

The Commission also made several other recommendations:

> "Amendments should be drafted in a manner that is respectful of the dignity of gay and lesbian persons in relationships, and their families, and recognizes these relationships as equal with opposite-sex relationships.
>
> Irrespective of the approach favoured by the Panel with respect to any future amendments to *The Adoption Act*, any reference to common-law partners within the adoption process should include both same- and opposite-sex partners.
>
> We recommend that *The Vital Statistics Act* be amended to allow for both the biological parent and the co-parent in a same-sex common-law relationship to register as parents.
>
> We also recommend that *the Vital Statistics Act* be amended so as to extend to same-sex common-law partners the same rights currently enjoyed by opposite-sex common-law partners to register their child with the last name of either partner, or a hyphenated combination of both parents' last names."

We reviewed the carefully researched report of the Manitoba Association of Women and the Law that had been presented to the government. Its contents were discussed by us with its representatives at our first meeting. They raised many issues that we subsequently explored with other presenters. We also heard from the Rainbow Coalition and their suggestions are included in those I attribute to individuals.

The Executive Director of EGALE (Equality for Gays and Lesbians Everywhere) made some interesting comments in the written material we received after we spoke to him by telephone. It said in part:

> "The terms of reference for the Panel on Common Law Relationships make clear that "the Province of Manitoba maintains a policy of non-discrimination in the application of provincial statutes. This commitment is consistent with Manitoba's inclusion since 1987 of "sexual orientation" in its human rights legislation as a prohibited ground of discrimination. It is also consistent with the constitutional obligation shared by all governments in Canada to ensure that the laws of each jurisdiction correspond with the equality guarantees of the *Charter of Rights.*"

An officer of Focus on the Family in British Columbia advised that their concern is the family. Their approach is based on Christian principles and they believe in monogamous heterosexual relationships. He said that they have two positions on same-sex adoptions:

> "Position 1 Non-legally married people should have no right to adopt. They should apply for guardianship.
>
> Position 2 Adoption should be based solely on the best interests of the child."

His personal feeling was that he would have to agree to giving the same rights to same-sex and common-law couples. He makes no distinction between opposite and same-sex arrangements. He subsequently advised that he had contacted the Vital Statistics office in British Columbia and was informed that while most birth certificates refer to a "father" and "mother", in the case of same-sex adoptions, the names are changed to "parent" and "parent".

REAL Women of Canada in their written submission to us said:

> "The social movement by same sex couples to adopt children, as couples, is the seeking *inter alia* of the court's approval of same-sex sexual practices. Such a movement is about same-sex couples' interests, not the interests of children.
>
> It is our view that the Manitoba *Adoption Act* cannot be amended to apply to same-sex couples because it is not legally possible within the legal and constitutional framework of adoption law. This framework is the Prerogative law of the *parens patriae*, the sovereign's guardianship, maintenance and protection of children…."

The person we spoke to on the phone also said:

> "Yes, there are long waiting lists of children waiting for adoption. Children should not have succession rights. They can get welfare."

While I disagree strongly with these sentiments I feel obliged to pass them along to government. I will refrain from identifying the person to whom we spoke in the hope that her comments do not reflect a corporate policy.

We met with three senior Child and Family Service administrators who have had extensive experience in child welfare work and in finding suitable people to adopt the many children who have had to be removed from their birth parents. They spoke of their inability to find enough adoptive parents, particularly for older children and those with special needs.

When people apply to adopt a child, a CFS agency undertakes a detailed examination of their background and arrives at an opinion as to whether they are able to properly care for and raise a child. If a same-sex couple applies to adopt they are advised that only one of them can be the official applicant but that the suitability of both partners will be examined. If an agency approves a single applicant and supports their application to adopt a particular child, an application is made to Court and again only one applicant is shown as applying to adopt the child.

If an Order of Adoption is made by a judge, only the one same-sex applicant is named as the adoptive parent. From that day on that person is the official parent of the child and has the rights and obligations of a natural parent.

They emphasized that every adoption applicant is judged on his or her ability to care for a child and they do not approve a gay or lesbian person any more quickly than any other applicant. They make the same inquiries and apply the same criteria when assessing their suitability. On the other

hand, they do not reject a gay or lesbian person or couple solely on the basis of their sexual preference.

The administrators were familiar with adoptions that have been processed under the direction of their agency. Follow-ups have shown some excellent same-sex situations in which the adopted child is doing well and is benefiting from the love and attention of two people of the same sex. Even more significant is the fact that they have found "some beautiful gay and lesbian families."

They volunteered that, in their experience, people in same-sex relationships are no more promiscuous than partners in other arrangements. They pointed out that there is a need, throughout the province, for adoption applicants and they look beyond the stereotypes and look at their applicants as individuals.

In passing, they mentioned that there are a number of matters every adoptive parent has to deal with. They have to be sensitive to the needs of their children and tell them that they are adopted, and the nature of their own relationship. That should be done, they said, before a child is 12 and the door to a discussion should even be opened after age 6 to let the children ask questions if they want to. They urge same-sex couples to do the same.

They stated that they come as close to approving same-sex couples as adoptive parents as the law permits and that they plan to continue that practice. Whether the existing law is changed or not, it would make no difference to their present practice.

Following our meeting, one of the CFS representatives sent us a copy of some of the rules that were published in the Manitoba Gazette that apply when the suitability of an applicant is being examined. A social worker, when doing a home study report on adoption applicants must cover the following matters, which I list in summary form:

Biographical data on the applicant, their family and those living with the applicant.

Present relationships with them and any children of a previous relationship.

Past marriages or relationships.

Ability to parent a child with special needs or from another culture.

The stability of the person and the effect of adding a child to the family.

Lifestyle, including involvement in neighbourhood, leisure and social activities.

Description of the home and community.

Description of the child who may be placed with them.

Wishes with respect to an openness agreement, a contract veto and a disclosure veto.

An evaluation of the suitability of the person to assume the responsibilities of a parent.

A recommendation as to whether the person should be approved for the placement of a child.

Any other relevant factors.

As I did not fully understand the significance of the openness agreements referred to in the directive, I phoned and asked the person who had forwarded the material to give me some further information. Apparently openness agreements are quite varied. Some applicants are not comfortable with them at all while others agree to send some information to the birth mother or grandparents. This may take the form of an occasional letter or photograph. Some adoptive parents stop sending photographs as the child grows up for fear that he or she might be identified and demands to see the child in person might commence or escalate.

The *Adoption Act* says that these agreements may be in writing, and may contain a method of resolving any dispute that may arise, but that is apparently not done in practice. The existence of an openness agreement is merely noted in the CFS file.

It seems that openness agreements are more often used in the adoption of Aboriginal children. The adoptive parents are more likely to appreciate the importance of having the child maintain a connection with his or her extended family and with Aboriginal culture and traditions. Aboriginal social workers and Aboriginal communities are comfortable with that arrangement.

I explored the comment made during our in-person meeting that it did not matter to Child and Family Services whether the law is changed or not. The person I spoke to said that the intent of that remark was only to indicate that CFS now examines the capacity of both same-sex applicants to parent a child, even though only one can legally adopt. Child and Family Services nevertheless believes that the system would be improved, and that it would be better for children, if same-sex couples could jointly adopt a child.

I have recently been in touch with a recognized expert in California who has done a number of longitudinal studies that followed children of divorced parents for years to assess the impact of their parents' separation on them as they grow up. She advised me that, while there is a considerable amount of writing on the subject, no similar studies have yet been done to track children raised by same-sex couples.

She did say that the research to date shows that children raised by a gay parent do not become gay themselves and that children raised in gay households, by and large, are doing well. She said that some children do experience discrimination as they get older, depending on the degree of tolerance for same-sex relationships in the community where they live. She said that is not a problem in California.

As I conclude my recital on the various comments and suggestions we heard, I must say that I was concerned about the attitude of some that denigrated those who hold a different opinion. Some seem to feel that those on the other side of the debate are strange and unacceptable

members of society while some others feel that those who oppose their request for equality are bigots without any understanding of or compassion for others. These comments were not expressed openly to us but there was certainly strong disagreement on what should or should not be done by government. It may be that my conclusion on the extent of the disagreement was occasioned more by the animosity displayed during the committee hearings.

I believe that the people we are talking about in this study are those who would be found to be suitable adoptive parents by an agency and by a judge. The gay and lesbian people we spoke to impressed me as concerned and responsible citizens who want to do their part in improving society and in helping children are in need of a good home. They wanted no special privileges, only the same opportunities as other citizens.

Society is obviously divided on the rights same-sex couples now have, or that should be accorded to them, and I regret that others were unable to hear the manner in which opinions were expressed to us. Unfortunately, there is a wide gulf of misunderstanding between those on the extremes of the debate. I was bothered by the gulf and by the dichotomy but I found some comfort in one of the cases that was referred to us.

In **Mossop v. Canada [1993] 1 S.C.R. 554**, at page 634, Madam Justice L'Heureux-Dubé of the Supreme Court of Canada said:

> "It is possible to be pro-family without rejecting less traditional family forms. It is not anti-family to support protection for non-traditional families. The traditional family is not the only family form, and non-traditional family forms may equally advance true family values. … {I}t is in society's interest to improve conditions to enable families to function as best they can, free from discrimination."

Case Law

M. v. H. [1999] 2 S.C.R. 3, is a decision of the Supreme Court of Canada. The case was heard by a full court of nine judges. The written decision of the majority was delivered by Cory and Iacobucci JJ. with Major and Bastarache JJ. writing concurring opinions, Gonthier J. dissenting. The Attorney General of Ontario had been given leave to appeal although the motions judge and the Ontario Court of Appeal had ruled in favour of the individual parties. Eight national organizations were granted status as interveners.

The case considered the wording of Section 29 of the *Ontario Family Law Act* and whether it was in conflict with the *Canadian Charter of Rights and Freedoms*.

At the time the case went to court, Section 29 provided:

> 29. "In this Part,
>
> "spouse" means a spouse as defined in subsection 1 (1), and in addition includes either of a man and woman who are not married to each other and have cohabited,
>
> (a) continuously for a period of not less than three years, or
>
> (b) in a relationship of some permanence, if they are the natural or adoptive parents of a child."

Section 1(1) said in part:

> "spouse" means either of a man and woman who
>
> (a) 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 this Act.
>
> "cohabit" means to live together in a conjugal relationship, whether within or outside marriage;

M and H were women who had lived together in a same-sex relationship for ten years and had their own business. After their separation, one commenced a court action seeking the partition or sale of their home and an order of support under the *Family Law Act*. The portion of the definition of "spouse" that I have underlined, seemed to bar the application.

The Supreme Court found that Section 29 of the *Family Law Act of Ontario* was unconstitutional as it infringed Section 15(1) of Schedule B, Part I of the *Constitution Act, 1982*, entitled "*Canadian Charter of Rights and Freedoms*" which provides:

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

The Court held that the definition of "spouse" in Section 29 of the Ontario *Family Law Act* violated the provisions of Section 15(1) and was discriminatory. It discriminated against same-sex partners by conferring certain rights, similar to those of married couples, upon unmarried opposite-sex couples, while denying the same rights to unmarried same-sex couples. Section 29 was declared to be of no force and effect.

Some of the Court's findings were:

> "The proper approach to analyzing a claim of discrimination under s. 15(1) of the *Charter*, as set out in *Law*, requires the court to make the following broad inquiries. First, does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristic? If so, there is differential treatment for the purpose of s. 15(1). Second, was the claimant subject to differential treatment on the basis of one or more of the enumerated and analogous grounds? And third, does the differential treatment discriminate in a substantive sense, bringing into play the purpose of s. 15(1) of the *Charter* in remedying such ills as prejudice, stereotyping, and historical disadvantage.
>
> The central question of this appeal is whether the differential treatment imposed by the impugned legislation on an enumerated or analogous ground is discriminatory within the meaning of s. 15(1). This inquiry is to be undertaken in a purposive and contextual manner, focussing on whether the differential treatment imposes a burden upon or withholds a benefit from the claimant in a manner that reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect to perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration.
>
> …The exclusion of same-sex partners from the benefits of s. 29 promotes the view that M and H and individuals in same-sex relationships generally, are less worthy of recognition and protection. It implies that they are judged to be incapable of forming intimate relationships of economic interdependence as compared to opposite-sex couples, without regard to their actual circumstances. Such exclusion perpetuates the disadvantages suffered by individuals in same-sex relationships and contributes to the erasure of their existence.

> …It is thus apparent that the legislation has drawn a formal distinction between the claimant and others, on the basis of a personal characteristic, namely sexual orientation. Sexual orientation has already been determined to be an analogous ground to those enumerated in s. 15(1) of the *Charter.* "

The Supreme Court also found that the discrimination in Section 29 was not saved by Section 1 of the *Charter,* which provides:

> "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

Some of the comments of the court on that Section were:

> "The first stage of the justification test under s. 1 of the *Charter*, as outlined in *Oakes*, asks whether the legislation limiting a *Charter* right furthers a pressing and substantial objective. Where a law violates the *Charter* owing to under inclusion, this stage is properly concerned with the object of the legislation as a whole, the impugned provisions of the Act, and the omission itself. The purpose of the *FLA* (Parts I to IV) is to provide for the equitable resolution of economic disputes that arise when intimate relationships between individuals who have been financially interdependent break down.
>
> … Providing for the equitable resolution of economic disputes when intimate relationships between financially interdependent individuals break down, and alleviating the burden on the public purse to provide for dependent spouses, are pressing and substantial objectives. These objectives promote both social justice and the dignity of individuals, which are values that underlie a free and democratic society."

On the point of sexual orientation being an analogous ground to those listed in Section 15, the Supreme Court, in **Egan v. Canada [1995] 2 S.C.R. 513**, confirmed that sexual orientation falls within the ambit of Section 15 protection as being analogous to the enumerated grounds.

La Forest J. said at page 528:

> "I have no difficulty accepting the appellants' contention that whether or not sexual orientation is based on biological or physiological factors, which may be a matter of some controversy, it is a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs, and so falls within the ambit of s. 15 protection as being analogous to the enumerated grounds. "

At page 530 he quoted from comments made by McIntyre J. in **Andrews v. Law Society of British Columbia [1989] 1 S.C.R. 143**, at p. 165:

> "In other words, the admittedly unattainable ideal [of equality] should be that a law expressed to bind all should not because of irrelevant personal differences have a more burdensome or less burdensome impact on one than another. "

He also referred to what McIntyre J. said at p. 174:

> "I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society. "

M. v. H. is also of interest in Manitoba as it adopts the description of a "conjugal relationship" that appeared in an earlier case. That term is used in Manitoba's Bill 41 and should be taken as having the following meaning. At page 59 of his reasons, Cory J. comments:

> ***"Molodowich v. Penttinen* (1980) 17 R.F.L. (2d) 376** (Ont. Dist.Ct.), sets out the generally accepted characteristics of a conjugal relationship. They include shared shelter, sexual and personal behaviour, services, social activities, economic support and children, as well as the societal perception of the couple. However, it was recognized that these elements may be present in varying degrees and not all are necessary for the relationship to be found to be conjugal. While it is true that there may not be any consensus as to the societal perception of same-sex couples, there is agreement that same-sex couples share many other "conjugal" characteristics. In order to come within the definition, neither opposite-sex couples nor same-sex couples are required to fit precisely the traditional marital model to demonstrate that the relationship is "conjugal".
>
> Certainly an opposite-sex couple may, after many years together, be considered to be in a conjugal relationship although they have neither children nor sexual relations. Obviously the weight to be accorded the various elements or factors to be considered in determining whether an opposite-sex couple is in a conjugal relationship will vary widely and almost infinitely. The same must hold true for same-sex couples. Courts have wisely determined that the approach to determining whether a relationship is conjugal must be flexible. This must be so, for the relationships of all couples will vary widely. In these circumstances, the Court of Appeal correctly concluded that there is nothing to suggest that same-sex couples do not meet the legal definition of "conjugal"."

It is also important, when considering Manitoba legislative changes, to recognize how limited the Supreme Court decision in *M. v. H.* actually was. Cory J., at paragraph 52 of his reasons said:

> "These observations on the structure of the FLA serve to emphasize that this appeal has nothing to do with marriage *per se.* Much of the FLA is devoted solely to regulating the relationship that exists between married persons, or persons who intend to be married. They alone are guaranteed certain property rights that are not extended to any unmarried

> persons. In some specific instances - such as Part III dealing with support obligations – the legislature has seen fit to extend the rights and obligations that arise under the FLA beyond married persons to include certain unmarried persons as well."

At paragraph 55 he said:

> "It is thus apparent that in this appeal there is no need to consider whether same-sex couples can marry, or whether same-sex couples must, for all purposes, be treated in the same manner as unmarried opposite-sex couples. The only determination that must be made is whether, in extending the spousal support obligations set out in Part III of the FLA to include unmarried men or women in certain opposite-sex relationships, the legislature infringed the equality rights of men or women in similar same-sex relationships, and if so, whether that infringement may be saved by sec 1 of the *Charter."*

Although *M. v. H.* deals with support obligations, and not adoption, and is carefully limited in its scope, it is safe to conclude that the principles that it articulates would be applied in a similar manner to any and all statutory provisions, no matter what the subject matter of the statute might be. Similar distinctions would, I do not hesitate to say, be found to be contrary to the *Canadian Charter of Rights and Freedoms* if they discriminate on the basis of sex or sexual orientation.

A recent case has gone farther than *M. v. H.* and has considered the validity of legislation that differentiates between the rights of married and same-sex couples to adopt a child.

S.C.M. and N.J.C., 2001 NSSF 24, is an oral decision of Madam Justice Gass of the Supreme Court of Nova Scotia, Family Division. She found that the adoption provisions of Nova Scotia's *The Children and Family Services Act*, which prohibit the adoption of children by same-sex couples, was discriminatory and contrary to the *Charter*. The Act contained a number of limitations. The judge severed the offending portions and read-in additional wordings to enable same-sex partners to adopt. She read-in the words 'common-law partners' and other wordings to make the statute apply and awarded the applicants an order of adoption. In effect, she concluded that same-sex couples have the same right to adopt children as do married couples.

Two women had lived in a conjugal relationship since 1987 and went through a ceremony of commitment in 1991. One of them had two children with an anonymous sperm donor and in October 2000 the partners jointly applied to adopt them. The Minister of Community Services and the Attorney General of Nova Scotia initially contested the application but within a month of when the trial was due to commence, they advised the applicants and the court that they were no longer opposing the application, although they were not consenting to an Order of Adoption. In other words, they were leaving the decision up to the court.

That turn of events was significant as the judge, although she found that the failure to include same-sex partners in the Statute was discriminatory under Section 15 of *The Charter*, did not deal with the Section 1 issue, holding that:

> "Once it has been established that the impugned legislation infringes the *Charter*, the onus then shifts to the party seeking to uphold the legislation, to prove that such infringement is demonstrably justified in a free and democratic society.
>
> Because the government is not opposing the application, it has not justified the discrimination."

Most of the evidence dealt with the needs of children and the ability of the applicants to parent. The judge decided that "there is no justification for depriving these children of the right to be part of a legally recognized family relationship because of their parents' sexual orientation."

The learned judge found that the legislation offended Section 15(1) and made the following comments:

> "Only married couples can jointly apply to adopt. Thus persons such as the Applicants are unable to adopt children conceived by their partners and born into the relationship. While the law applies to all non-married couples, whether heterosexual or of the same sex, there is a clear distinction in that gay and lesbian couples are not legally permitted to marry. Thus the legislative requirement that only married person may jointly adopt, results in discrimination, not just on the basis of marital status but also of sexual orientation (p. 7).
>
> It is clear that while one parent is the biological parent, the other is, in all respects, the spouse of that parent and the psychological parent to these two children. Thus I conclude that the law prohibiting them from jointly adopting their children violates their rights and freedoms under s. 15(1) of the Charter (p. 8.)
>
> There is no prohibition against a single gay or lesbian person adopting a child. There can be no justification under the Act for prohibiting a same-sex couple who meet all the criteria (except for their marital status) from doing so as well (p.10).

In view of the implied consent of the government, and the onus the judge applied, it appears to me that the judge gave insufficient attention to the fact that the case went farther than *M. v. H.* and dealt with a comparison between the rights of married people and same-sex couples, while the Supreme Court of Canada only compared same-sex and opposite-sex couples.

If there had been argument supporting the validity of the legislation on both the Section 15 issue and on the implications of Section 1 of the *Charter*, the result might have been different. If the Ministers of the Crown had participated and raised these issues, the court might have concluded that the legislature was entitled to make the distinction it did.

I do not raise this decision for the purpose of criticizing it, but to advise the Government of Manitoba that is not binding on it, and that I advise against accepting it as established authority. If the Supreme Court of Canada eventually considers a similar issue, its decision would be binding on the courts in Manitoba and should be followed by the legislature.

While the case may be an indication of judicial interpretation yet to come, it is impossible to conclude at this time that common-law couples, whether opposite-sex or same-sex, have to be afforded the same rights as married people.

We were told that there are broader challenges starting to work their way through the courts, but as there have been no fully argued and binding decisions on point, I am unable to comment on what the judges hearing those cases might decide. All I can say at the moment is that same-sex and opposite-sex couples must be treated alike.

Quite apart from *Charter* cases dealing with legislation, there is a considerable amount of judicial writing on the appropriateness of gay and lesbian people caring for, raising and adopting children. The following cases indicate the manner in which some judges are receiving and adopting expert evidence that indicates that same-sex partners can provide and have been providing good homes for children.

These cases are not binding in Manitoba either but they do indicate a trend that is developing in reported cases and should be kept in mind by the Government of Manitoba when considering extending adoption and other rights to same-sex partners and to all children. It can reasonably be anticipated that similar cases and similar evidence will be presented to the courts in Manitoba.

A(Re) (1999) 2 R.F.L. (5th) 358, is a decision of November 26, 1999 in which Martin J. of the Alberta Court of Queen's Bench, while granting an order of adoption of two natural children to the applicant's same-sex partner, commented on the importance of adoption to children. The judge said, at page 8 of the decision:

> "It is also important to remember that adoption provides significant benefits to a child as adoptive children have legal rights which are not available to children who are not formally adopted. Examples of rights which arise by virtue of a legally recognized parent/child relationship may be found in the Intestate Succession and the Fatal Accidents Act (both cited). It is reasonable and just that children of same-sex couples have the same legal rights associated with private adoptions as have children of heterosexual couples. There is also a significant emotional benefit to both the child and the adoptive parent in having legal recognition of their relationship, and that too should be available to a child of a same sex couple."

The judge also relied on "the results of extensive scientific research relating to same-sex couples and the experience of children raised by them" given in evidence by a Dr. Froberg:

> "Children raised in lesbian-headed families do not suffer systematically on factors such as gender identity, gender role behaviour, sexual orientation, intellectual ability, psychological or social functioning from those raised in two-parent or single-parent heterosexual families and typically do not experience high levels of stigmatism due to having two mothers.
>
> The child development literature has concluded that, rather than any one particular family structure, what children require to develop in a healthy fashion is a stable, empathic,

> consistent, nurturing relationship with at least one care-giving adult in which the child and adult(s) become attached to one another.
>
> Lesbian women are no less committed to the role of mother nor any less able to function effectively in this role than are heterosexual women and often strive to create strong families which do not differ systematically from heterosexual families on any of the factors noted above.
>
> Lesbian families tend to score highly on the factors which lead to high relationship satisfaction, e.g., egalitarian values, equal sharing of household duties, and often find that their stress is buffered by social support networks which they make a conscious effort to cultivate.
>
> The literature pertaining to the best interests of the child has noted how comforting and security-enhancing it is for children to feel a part of a "forever family" and that their belonging to a particular nuclear and extended family unit is legally recognized, supported and will be protected under conditions of adversity such as death, disability or dissolution of the relationship."

The court also relied on a report from Dr. Jon Amundson, a clinical psychologist and a recognized expert in child and family psychology, which said:

> "The psychological research generally does not support any scientific basis for discrimination against homosexuals with regard to fitness to parent. The fitness and suitability of gay and lesbian parents or foster parents needs to be considered on a case by case basis, as it is for heterosexual parents."

The Supreme Court of Canada case of **Chartier v. Chartier [1999] 1 S.C.R. 242**, when dealing with the concept of *in loco parentis*, makes some interesting comments on adoption and the needs of children. Bastarache J., speaking for the Court, shared the view of Bealieu J. in **Siddall v. Siddall (1994) 11 R.F.L. (4th) 325** at page 23, part of which states:

> "In too many of these situations the ultimate result is that the child is a mere object used to accommodate a person's selfish and personal interests as long as the relationship is satisfying and gratifying. As soon as things sour and become less comfortable, the person can leave, abandoning both the parent and the child, without any legal repercussions…. It is important to encourage the type of relationship that includes commitment, not superficial generosity. If relationships are more difficult for a person to extricate him or herself from then, perhaps, more children will be spared the trauma of rejection, bruised self image and loss of financial support to which they have become accustomed."

Bastarache J. states later:

> "Some concerns may also be raised with regard to the relevance of adoption proceedings where obligations regarding all "children of the marriage" are identical under the *Divorce Act* and *The Family Maintenance Act.* I recall that Mr. Chartier did not finalize his plans

> to adopt Jessica. The simple answer to that is that legal adoption will nevertheless have a significant impact in other areas of the law, most notably trusts and wills; it retains its importance…
>
> Once it is determined that a child is "a child of the marriage" within the meaning of the *Divorce Act*, he or she must be treated as if born to the marriage. As the Quebec Court of Appeal held in ***Droit de la famille* – 1369, [1991] R.J.Q. 2822 (Que. C.A. at p. 2827)**
>
> [Translation] "Once the status of a child of the marriage is recognized, the Act does not allow the distinction to be made between a biological father and someone who stands in the place of one."

The law is now quite clear. Opposite-sex common-law couples and same-sex common-law couples must be treated the same way. Neither can legislatively receive a benefit the other does not receive.

Advice and Recommendations

Issue No. 1.

The first question in the terms of reference was whether the provisions of the Adoption Act of Manitoba would withstand a challenge advanced under the Canadian Charter of Rights and Freedoms.

To comply with the Supreme Court of Canada decision in *M. v. H.*, the *Adoption Act* will have to be amended to remove the rights and benefits now given to opposite-sex common-law partners or to provide the same rights to same-sex partners.

I describe the options in that way because the Supreme Court has not said that it is impossible to legislatively distinguish between the rights of married people and the rights of those who are not married.

The Supreme Court's practice is to not go beyond the facts of the case that is before it and the legal issues those facts raise. It may therefore be years, if ever, before the Supreme Court deals with the question of whether common-law partners are entitled to the same rights as married people. Legislation may intervene, as the provinces can make that sort of change if they wish. The question of whether gay or lesbian people may marry has also yet to be litigated and, as marriage is a federal matter, the federal government can legislate on that topic if it decides to do so.

Because the question was not before it, the Supreme Court, in *M. v. H.* carefully refrained from commenting on whether common-law couples have the same rights as married people. It also clearly declined to discuss the question of whether same-sex people are entitled to marry one another.

As it would be turning the clock back to remove the rights of opposite-sex common-law couples to adopt, when there is such a need for adoptive parents, I assume that it would be preferable to institute the second option and provide the rights now available to opposite-sex partners to same-sex partners as well. In the belief that the Manitoba government will prefer that approach, my subsequent comments will be based on that premise.

I might add that none of those we consulted suggested taking the existing right of opposite-sex common-law couples to adopt away from them. Nor did many suggest that only married couples should be entitled to adopt. While the question of a single person adopting was not addressed in detail, some said that it is preferable for a child to have a mother and a father.

I mention these matters at this point, as I did when discussing the case law, to indicate why I am reluctant to speculate on what the courts or legislatures will do in the future. The Supreme Court has nevertheless, in quite a number of cases, indicated its opinion on the importance of the family and the individual rights of all Canadians to the protections and benefits spelled out in the

Charter. It is reasonable to suggest that the Court will likely continue in that vein and their pronouncements on ancillary matters should be considered in Manitoba.

Recommendation No. 1.

My opinion and advice is that a number of the sections of the *Adoption Act of Manitoba* would not withstand a *Charter* challenge and will have to be amended.

Issue No. 2.

As I discuss possible amendments, I will put forward wordings to make my intent as clear as possible, but I recognize that the government's legislative counsel may prefer different phraseology and may wish to make additional changes to clarify or simplify some of the sections.

I begin my recommendations on amendments to the Act with the one I consider to be of greatest significance. If a statement is made near the beginning of the Act that any two people or adults are entitled to have a child placed with them for the purposes of adoption and are entitled to receive an Order of Adoption, and if that statement is not contradicted by subsequent provisions in the Act, that could have a considerable affect on the manner in which the Act is written.

A number of the troublesome sections I will later refer to will have to be deleted, but others could also be amended in a more substantial manner than I will suggest. The Act could even be entirely re-written and simplified if the basic requirements were the same for all divisions or categories. The need for divisions might not even be necessary. I will not press the point further but do suggest that some of the detailed changes I propose may not be necessary.

Section 10 of the *Adoption Act* now provides:

> "An adult who resides in Manitoba may apply to adopt a person in accordance with this Act."

That provision, as it stands, should be a sufficient indication of who may apply to have a child placed with them for purposes of adoption, and who may become an adoptive parent. The words "an adult" included "adults" as Section 19 of the *Interpretation Act* provides:

> (i) words in the singular include plural, and words in the plural include singular.

That definition unfortunately does not apply throughout the *Adoption Act* at the present time as any two adults may <u>not</u> apply to adopt. Later sections of the Act contradict Section 10 and establish other criteria. The reason why all adults may not adopt is because a number of sections

state that the applicant(s) must be of the opposite sex to the parent, must be related by blood or marriage, or be a man and woman who are not married.

Even if the subsequent sections are amended, I suggest that Section 10 be amended in any event to make it absolutely clear that any two common-law partners may jointly apply to adopt.

When drafting how this contradiction might be corrected, I have considered the terminology used by other provinces when indicating who may apply to adopt. Some are quite precise while others remain vague.

I recommend against following the manner in which Saskatchewan has made its amendments. It has amended its Adoption Act to provide:

> "Clause 2(1)(p) of the Adoption Act is repealed and the following substituted:
>
> > 'spouse' means the legally married spouse of a person or a person with whom that person is cohabiting as spouses."

The same wording is applied to other domestic relations and property-related statutes in Saskatchewan. In my opinion that clause is not clear and may still require judicial interpretation or clarification.

Nova Scotia has not amended its Adoption Act since *M. V. H.*, as have other provinces. While its Act contains some interesting provisions that I will deal with in another part of my final report, there is nothing that I can recommend in its Act that deals with who may apply to or adopt a child.

The best examples of an acceptable statement that I have seen are found in the British Columbia and Newfoundland legislation.

The British Columbia Adoption Act has allowed same-sex couples to adopt jointly for a number of years. Section 5(1) of its Adoption Act, R.S.B.C., 1996, c.5, provides:

> "Who may receive a child for adoption
>
> 5(1) A child may be placed for adoption with one adult or two adults jointly."

Newfoundland has amended its Adoption Act to permit both stranger and step-parent adoptions. Section 20 of the Adoption Act, SN 1999 c. A-2.1 provides:

> "Who may apply to adopt
>
> 20(1) One adult alone or 2 adults jointly may apply to a court to adopt a child under this Act."

Several, including some law professors, urged us to recommend that the Ontario three-tier adoption scheme not be adopted in Manitoba. Ontario has also chosen to re-define "spouse". Along with an analogous definition of "same-sex partner", a number of statutes state:

> "spouse" means a person of the opposite sex,
>
> (a) to whom the person is married, or
>
> (b) with whom the person is living in a conjugal relationship outside marriage, if the two persons,
>
> (i) have cohabited for a least one year,
>
> (ii) are together the parents of a child, or
>
> (iii) have together entered into a cohabitation agreement under section 53 of the Family Law Act;

The majority of those who discussed wordings with us preferred the British Columbia and Newfoundland approach. I also recommend that those wordings, or something similar to them, be used in Manitoba as they are clear and concise and leave no doubt about the ability of opposite and same-sex couples to adopt. The clearer and more precise legislative provisions can be, the greater their certainty and the freer they will be from the need for judicial interpretation.

I believe that Section 10 of the Manitoba Act, as it is now worded, should be sufficient to indicate who is entitled to apply to have a child placed with them for the purpose of adoption, as well as to adopt a child. Out of an abundance of caution however, I suggest a more precise wording. In this wording I do not refer to the right "to have a child placed with them for the purpose of adoption" as I believe that right will be inferred if an applicant has the right to adopt. Legislative counsel will of course select a wording they think is appropriate.

Recommendation No. 2.

Delete Section 10 of the Adoption Act and substitute therefor:

Any adult who resides in Manitoba, alone or jointly with another, may adopt a person in accordance with this Act.

Issue No. 3.

Section 1 of the Act contains definitions that are supposed to apply throughout the Act:

> "extended family" includes, in addition to the persons in the definition of "family", aunts, uncles and cousins of a birth parent, a spouse of any of those persons, and any unmarried adult who is cohabiting in a relationship of some

permanence with any of those persons of the opposite sex who is an unmarried adult;

"family" means a child's parents, step-parents, siblings, grandparents, aunts, uncles, cousins, any person *in loco parentis* to the child and the spouse of any of those persons;

There is no definition of the terms "common-law partner" or "common-law relationship" but if those terms are to appear in an amended statute they should be defined and the same definitions should be used in other statutes as well. The term "family" also appears in property-related statutes and the definition should either be included in all statutes or the term should be defined in the *Interpretation Act* so that it would apply to every statute in the province. The problem with having too much covered by the *Interpretation Act* is that it is not usually consulted by those wanting to find out what a specific Act contains.

The definition of "extended family" as it is now defined would not survive a *Charter* challenge as it limits those covered by it to "persons of the opposite sex---" It is a discriminatory provision akin to that dealt with by the Supreme Court in *M. v. H.*

The problem becomes evident in the reference to "extended family" in Section 76 which says that a person who is entitled to surrender guardianship of a child "may place a child with a member of the child's extended family for the purposes of adoption". The definition of "extended family" limits the section to opposite-sex common-law couples.

Although it is not a matter directly referred to us, I question the accuracy of the definition of "extended family" as it applies to Aboriginal people. It would be well to examine it in consultation with an Aboriginal historian if the intent is to widen the scope of "family". My understanding of the Aboriginal use of the term is that it includes people who are not related by blood, or where that lineage may be difficult to prove. I understand that it may include a member of an Aboriginal community who is called or looked upon as a grandparent, parent, cousin, brother or sister, even though they may not technically fall into any of those categories. Adding the clause "or a spouse of" any of the enumerated relatives adds little to the definition and does not include the other "non-relatives" I have mentioned.

The term "*in loco parentis*" in the definition of "family" does not broaden the scope of "extended family" although it may refer to some common-law spouses of natural parents. A person *in loco parentis* is a person who is not related to the child, directly or by marriage, but stands in the place of a parent and has been acting as a parent toward the child. In my opinion more specific language is required if the definitions are to apply to common-law partners.

I suggest that these issues be examined to make sure they reflect the government's intent to include people who do not fall within the normal definition of family, although I do not include these suggestions as a formal recommendation.

I do however recommend that the *Adoption Act* make it absolutely clear that those entitled to have a child placed with them for purposes of adoption, and the right to become adoptive

parents, applies to everyone whether they are married, are common-law couples of the same or opposite sex, or whether they are a single applicant.

In my opinion the initial definition of "common-law partner" that I recommend is sufficient, but if some should think it is not sufficiently precise, or if the government wishes to make its intent absolutely certain, my alternate definition of "common-law partner" could be used.

Recommendation No. 3.

Amend Section 1 of the Adoption Act in the following ways:

(1) By adding the following definitions:

(a)"common-law partner" means a person who is living with another in a conjugal relationship.

OR

"common-law partner" means a person of the same or opposite sex who is living with another in a conjugal relationship.

(b) "common-law partnership" means two persons who are living together in a conjugal relationship."

(2) By amending the definition of "extended family"

by adding after "spouse" the words "or common-law partner" and by deleting all the words after "persons" in the second last line.

(3) By amending the definition of "family"

by adding, after the word "spouse", the words "or common law partner".

Issue No. 4.

When discussing how statutes might be amended to comply with *M. v. H.*, all the lawyers urged us to recommend against redefining the word "spouse" to have it include a common-law partner. We did not discuss that sort of detail with those who were opposed to same-sex adoptions, but I feel secure in saying they too would be opposed to seeing that term being given any other than its present meaning, namely - the other married partner.

I also recommend against expanding the definition of "spouse". It is not necessary to do that in order to grant adoption and other rights to common-law partners. Such a move would also raise the ire of those who support the sanctity of a traditional marriage to which the term "spouse" relates.

It is preferable, where it is necessary to extend a right now given to a spouse to those in a common-law relationship to add, after the word “spouse” the words “or common-law partner”. That would result in the right in question being accorded to all common-law partners.

Recommendation No. 4.

I recommend that the term “spouse” not be changed or re-defined, but that, where appropriate, “or common law partner” be added after “spouse” in each case where the government wishes to extend the rights of a spouse to a common-law partner.

Issue No. 5.

Section 36 of the Adoption Act now provides that only the following may apply to have a child placed with them for the purposes of adoption.

> Where
>
> (a) a husband and wife
> (b) a man and a woman who are not married but are cohabiting as spouses; or
> (c) a single adult;
>
> desire to have a child who is a permanent ward placed in their home with a view to adopting that child, they may make an application to the child and family services agency having jurisdiction in the area where they reside for the purpose.

Subsection (b) implies that an unmarried couple, comprising a man and a woman, are to be treated as if they were married, so they may apply to have a child placed with them, but the wording limits the provision to "a man and a woman" so two people of the same sex are excluded. Subsection (c) makes it clear that a single person, without regard to their sex or sexual orientation, may also apply to have a child placed in their home.

This subsection would not withstand a *Charter* challenge because subsection (b) provides the opportunity for common-law couples made up of a man and a woman to commence adoption proceedings. The result is that it prohibits a same-sex common-law couple from adopting.

In the language of *M. v. H.*, it is discriminatory and contrary to the equality guaranteed by Section 15 of the *Charter*. It discriminates on the basis of sex and sexual orientation.

If my Recommendation No. 1 is followed, none of subsections (a), (b) or (c) need be included in the statute. If it is not deleted, the following would cure the problem.

Recommendation No. 5.

Amend the Act by deleting section 36(b) and substituting "common-law partners".

Issue No. 6.

Section 73(1) of the Act provides:

> An application for an order of adoption may be made in the prescribed form:
>
> (a) jointly by a husband and wife or by a man and woman who are not married but are cohabiting as spouses, where at the time of the application is made
>
> (i) they are jointly caring for an maintaining the child, and
> (ii) either applicant has had care and control of the child and has maintained the child for at least two consecutive years; or
>
> (b) by a person who at the time of the application is made
>
> (i) is caring for and maintaining the child, and
> (ii) has had care and control of the child and has maintained the child for at least two consecutive years.

This section is in the same category as Section 36 as it limits the right to opposite-sex couples. It would not withstand a *Charter* challenge as it excludes same-sex couples.

Recommendation No. 6.

Amend Section 73(1) of the Act by deleting paragraph (a) and substituting therefor:

(a) jointly by a husband and wife or common-law partners, where at the time the application is made

Issue No. 7.

The present heading to Division 6 refers to the adoption by a person who has married a child's parent. To have it apply to all common-law couples it should be amended.

Recommendation No. 7.

(1) Amend the heading of Division 6 that precedes Section 88 to say:

ADOPTION BY PERSON WHO HAS MARRIED OR IS THE COMMON-LAW PARTNER OF A CHILD'S PARENT

Issue No. 8.

Section 88 (b) now provides:

> A person who
>
> (a) is married to the parent of a child; or
>
> (b) is cohabiting with the parent of a child and is of the opposite sex to the parent;
>
> may, together with that parent or alone but with the consent of that parent, apply to the court in the prescribed form to adopt the child if the child is living with the applicants and is being cared for by them.

This is another section that would not withstand a *Charter* challenge.

Recommendation No. 8.

Delete Section 88(b) and replace it with:

(b) "is a common-law partner of the parent"

Issue No. 9.

Section 94(1)(a) now provides:

> A judge may make an order of adoption of an adult without the consent of anyone, except the person to be adopted as long as
>
> (a) the person adopting is older by a reasonable number of years than the person to be adopted; and
>
> (b) the reason for the adoption is acceptable to the judge hearing the application.

This section provides that a judge may make an order of adoption as long as "the person adopting is older by a reasonable number of years than the person to be adopted". In my opinion that provision could be challenged under the *Charter* as it discriminates on the basis of age. I see no rationale for the provision. There may be circumstances where a younger person might wish to adopt an older person to provide needed protection and support. If the offending words are removed, or if the section did not exist at all, the judge would still be able to consider whether the particular application should be accepted.

Recommendation No. 9.

Delete Section 94(1)(a).

Issue No. 10.

The declaration of commitment that adoption applicants have to sign appears as form AA-14 in Regulation 19/99 made pursuant to the *Adoption Act*. It contains the following clause:

> "2. We have been living together as though husband and wife continuously since the _____ day of _____, _____, and we are currently living together and intend to live together as though husband and wife on a permanent basis."

This implies an opposite-sex relationship and, if amendments are made to the Act itself, it would be contrary to its intent and its provisions.

Recommendation No. 10.

Amend paragraph 2 of the form by deleting the words "as though husband and wife" where they appear in the first and last lines.

Issue No. 11.

I was intrigued to hear of the "openness agreements" that are explored by certain organizations and agencies. Although the Act provides for such agreements to be in writing, it appears that most agreements are oral in nature and are not always honoured. Some agreements, I was told, have to remain flexible in the future to suit the wishes of the parties and their comfort level in communicating with one another.

The agreements usually call for the provision of information on how the child is doing by way of letters and photographs and some include visits with the child. Some permit continuing contact by grandparents. The Act provides that ways of settling disputes can be contained in a written agreement.

Continuing contact between a parent and a child can sometimes be beneficial for the child. This is particularly true where an Aboriginal child is being adopted by people from another culture. Opikihiwawin is an organization in Winnipeg that offers advice and support to non-Aboriginal parents who have adopted Aboriginal children. It places significant emphasis on keeping the children connected with their culture and with their extended families.

If more formal openness agreements are deemed to be appropriate, consideration might be given to permitting a judge to put conditions on an Adoption Order by setting out the terms of future contact that are to apply. If a judge makes some continuing contact a condition of an Order of Adoption, or makes another Order at the same time, it would likely be taken seriously by the adoptive parents, would not be as easily ignored, and could be enforced by the court.

When on the bench I often heard from psychiatrists that as children of separated parents grow older they are anxious to know something of the missing parent. In some cases the child may have a pressing psychological need to know that parent and has a feeling of loss or emptiness if there is no contact. If information on a missing parent is not forthcoming, I was told that a child often places the missing parent on an undeserved pedestal. Expert witnesses suggested that it is often best to encourage some contact between the child and the missing parent so the child can make his or her own realistic assessment of the person.

I am not pressing this recommendation as a number of issues and people would have to be considered before a final decision is made. I do make it however as the government has expressed its concern for the best interests of children.

Recommendation No 11.

I recommend that consideration be given to permitting a judge, when making an Order of Adoption, to include reasonable conditions to ensure some continuing contact between a birth parents and the child.

Issue No. 12.

When a judge makes an Order of Adoption where the applicants are of the same sex, we presume the judge will merely name them as the adoptive parents. There is however a potential problem when the Order reaches the Vital Statistics office. Section 10(9)(b) of the *Vital Statistics Ac*t provides that the names of the adoptive "parents" shall be shown as being the parents of the child, but at the moment the practice is to name them as "mother" and "father".

The Vital Statistics office has not yet had to deal with how it would name same-sex adoptive parents as that is not now permitted, but neither has it been asked to register an adoption from another province, like British Columbia, that does permit same-sex adoptions. I suggest that if the Manitoba law is amended to permit them, a policy be established as to how same-sex adoptive parents are to be designated at Vital Statistics. It may be that an additional form will have to be added in the Regulations to accommodate same-sex parents.

Apparently the Director of Vital Statistics has to record the sex of the new parents for statistical purposes, but I suggest that the new certificate of birth show each same-sex adopting person as "parent" as in British Columbia. It would, in my opinion, be easier for a child to say that he or she has two "parents", rather then two mothers or two fathers. Those terms might be embarrassing to a child in later years when a certificate of birth has to be produced.

Recommendation No. 12.

I recommend that the birth certificate issued under the Vital Statistics Act following an adoption show same-sex parents by adoption as "parent" and "parent".

Part II

CONFLICT AND PROTECTION OF THE PUBLIC INTEREST

Introduction

The Manitoba Statutes that deal with this topic do not indicate their purpose or the concerns they are intended to address. Even though the intent of the legislation can be inferred from its provisions, I wanted to find some written rationale for this sort of legislation so I could consider the details of the Acts with an overall objective in mind. That objective might have a bearing on how to respond to the questions in the terms of reference.

The best explanation of the need for this sort of legislation that I have found is contained in the Federal Government's *Conflict of Interest and Post-Employment Code for Public Office Holders.* It describes the object of the Code as follows:

Object

The object of this code is to enhance public confidence in the integrity of public office holders and the decision-making process in government.

(a) while encouraging experienced and competent persons to seek and accept public office;

(b) while facilitating interchange between the private and the public sector;

(c) by establishing clear rules of conduct respecting conflict of interest for, and post-employment practices applicable to, all public office holders; and

(d) by minimizing the possibility of conflicts arising between the private interests and public duties of public office holders and providing for the resolution of such conflicts in the public interest should they arise.

Principles

Public Scrutiny

Every public office holder shall conform to the following principles.

Public office holders have an obligation to perform their official duties and arrange their private affairs in a manner that will bear the closest public scrutiny, an obligation that is not fully discharged by simply acting within the law.

Public Interest

> On appointment to office, and thereafter, public office holders shall arrange their private affairs in a manner that will prevent real, potential or apparent conflicts of interest from arising but if such a conflict does arise between the private interests of a public office holder and the official duties and responsibilities of that public office holder, the conflict shall be resolved in favour of the public interest.

Preferential Treatment

> Public office holders shall not step out of their official roles to assist private entities or persons in their dealings with the government where this would result in preferential treatment to any person.

Insider Information

> Public office holders shall not knowingly take advantage of, or benefit from, information that is obtained in the course of their official duties and responsibilities and that is not generally available to the public.

The Code is administered by the office of the Ethics Counsellor who takes general direction from the Clerk of the Privy Council. Before or on assuming their official duties and responsibilities, public office holders have to sign a document certifying that, as a condition of their holding office, they will observe the Code. Other conflict of interest provisions appear in the Criminal Code, the Parliament of Canada Act and in the Standing Orders of the House of Commons and the Senate.

Before turning to an examination of the Manitoba Statutes that deal with the issue, I repeat the portion of our Terms of Reference that apply to this issue:

> *A number of Manitoba statutes contain conflict of interest provisions, including those affecting public officials. Are amendments recommended to these conflict of interest provisions and other provisions to protect the public interest to include persons in common-law relationships, where those persons are currently excluded? If so, what approach is recommended?*
>
> *One or both persons in a same sex common-law relationship may not be open with family, friends, co-workers and others about their sexual orientation. Some persons in opposite sex common-law relationships may also have concerns about open disclosure. If amendments to conflict of interest provisions are recommended, then how should these changes be reconciled with the privacy rights/interests of both persons in a common-law relationship?*

There are two Manitoba Statutes that deal exclusively with this topic. One is *The Legislative Assembly and Executive Council Conflict of Interest Act*, which applies to all elected members, Ministers of the Crown and senior public servants. The other is *The Municipal Council Conflict of Interest Act*, which applies to all Mayors, Reeves and elected Councillors, including those of the City of Winnipeg. There is no separate Act dealing with conflict of interest for School Trustees, but *The Public Schools Act* contains a number of sections that deal with the issue.

The *City of Winnipeg Act* refers to the overriding authority of the *Municipal Council Conflict of Interest Act*. Section 18(1) provides that every member of council shall vote on a question unless excused by council or prohibited under the *Municipal Council Conflict of Interest Act*. Section 92.1(1), when speaking of the forfeiture of a seat on council, also refers to that Act.

Manitoba statutes seek to ensure the same high level of performance by their public officials as those in the federal Code. Each of the statutes I mentioned requires elected persons to file a statement of their assets with the Clerk of the House or the Secretary-Treasurer of the School Board or Municipality shortly after their election. They also require members to declare a possible conflict of interest and refrain from voting on issues that might benefit them or those close to them.

When *The Modernization of Benefits and Obligations Act*, was being introduced in the House of Commons, the federal releases made it clear that the amendments were "not a one-way street," as the bill would result in new benefits being extended to same-sex couples, but would impose new obligations on them as well. As will be seen, that corresponds with the wishes of the gays and lesbians we consulted.

Consultations

As I discuss what our consultants said on this topic, it is important to note that the question of conflict of interest and the protection of the public interest is more than a comparison of the rights of same-sex and opposite-sex partners. The government has asked whether the responsibilities that now apply to elected or appointed officials should be extended to include persons in common-law relationships. I take the government's use of 'common-law relationship' to include any two people who are living together in a conjugal relationship.

During our consultations, it was our practice to discuss the conflict and disclosure subject with everyone, even if their primary interest was another topic. Even those who were not familiar with the conflict provisions acknowledged the value of having them.

Our first meeting was with several representatives of the Manitoba Association of Women and the Law and others who supported gays and lesbians in their quest as couples to be able to adopt children. Their brief had been presented to the Law Amendments Committee of the Legislature that was considering Bill 41 and a copy was provided to us in advance of our meeting.

As our discussions began, one or two of those who were present took the position that the conflict of interest laws should make an exception so gay and lesbian people would not have to disclose the fact they are living with someone of the same sex. They, as did the brief, suggested privacy laws be invoked to make any disclosure of their personal living arrangements unnecessary.

I had assumed that was the position of all gays and lesbians but that turned out not to be the case. Others who were present at the same meeting said they disagreed with the association's position and thought gay and lesbian elected officials should be subject to the same requirements as others. It appeared to me that position took the *Women and the Law* representatives by surprise. It turned out they had taken their position in the belief they were doing gays and lesbians a favour.

The representatives agreed they had not canvassed the matter with gays and lesbians, nor had they done any study or conducted any survey to see if their position had general support in the gay community. Others at the meeting made it clear they did not support their approach and believed it was at odds with the approach gays and lesbians wanted. As I will indicate, they were correct.

By the end of the meeting the representatives of Women and the Law had withdrawn their position and request that we urge government to provide an exception for common-law partners. They quite reasonably took the position they did not want to press their earlier suggestion if it was not supported by those they were trying to assist.

Gays and lesbians we spoke with in subsequent meetings confirmed the general opposition to the Women and the Law suggestion. Even though it is somewhat repetitive, I will indicate what others had to say on the topic of disclosure. We continued to explore the specific issue raised in

the terms of reference, namely the effect on those "in a same-sex or opposite-sex relationship (who) may not be open with family, friends, co-workers and others about their sexual orientation."

Those we met with, whether they were aware of the Women and the Law presentation or not, said there should be no exceptions or special provisions for gays or lesbians who are reluctant to make their relationship known. The response was very clear - people, whoever they are and whatever their sexual preference may be, who are concerned about disclosing their assets or personal living relationship, should either not enter public life or should be prepared to accept and abide by the law like everyone else.

The Manitoba Bar Association Gay and Lesbian Issues Subsection forwarded a written submission prior to our in-person meeting with them. It stated that conflict-of-interest laws are necessary to protect the public interest in good government. It took the position that if elected officials are allowed to make decisions while in a position of conflict, democracy is undermined. It disagreed with the position taken by Women and the Law. It argued that, if their approach were adopted, the result would be that gays and lesbians would be allowed to remain in a conflict of interest situation, and that was unacceptable.

Their document made the point that when people, including gays and lesbians, run for public office they must accept the fact they will have less privacy than private citizens. A professor of law at the University of Manitoba said the gays and lesbians she has spoken to would be willing to disclose their assets and those of their partner if they were elected. She discussed how limited the legislative provisions now are and noted that a disclosure of the personal details of a common-law relationship is not required.

The association's in-person presentation took the position that the law relating to the disclosure of assets and conflicts should be the same for everyone. It suggested there should be no requirement to identify a partner or to disclose the nature of a common-law relationship. Its representatives also recommended the statutes be amended, if necessary, so the exact nature of a possible conflict would not have to be disclosed. They said the disclosure of a possible conflict, and leaving a discussion, should be all that is required.

One of its representatives suggested it is important to have an independent person in attendance at a meeting exercising some general supervision, who has knowledge of the member's assets and family members so in case the elected official doesn't recognize when he or she is getting into a conflict of interest situation, they can be reminded and remove themselves from the meeting and discussion.

Manitoba statutes cover that issue. They require the clerk of a meeting to record, in the minutes of the meeting, when someone has declared a conflict of interest and has left the room. Presumably the minutes will indicate the topic that was under discussion when the person left. Some clerks also record the time when an individual returns to the meeting and I assume the same procedure is applied during the sittings of the legislature and its committees.

EGALE which we contacted by phone, believes that all elected officials should be required to disclose areas of actual or potential conflict. Its representative said it is not necessary to disclose details about the conflict. The fact that a conflict has been announced and is recorded in the minutes should be a sufficient deterrent to a person if the same topic comes up again. While he had no problem with a requirement to disclose the general nature of a conflict he would prefer to only have to say: "I have a potential conflict." He also suggested that there should be no requirement to disclose the gender of a common-law partner.

The Manitoba Federation of Labour took the position a disclosure of assets and possible areas of conflict should be made by all public officials and the assets of married or common-law partners should be disclosed as well. It would still like individual employees to be able to maintain some privacy, and disclose their assets and those of their partners, without having to say who owns which asset.

Its representatives also suggested that the word "family" be defined in legislation. They suggested the definition should include a spouse, common-law partner, children and anyone else who is dependent on them.

Two members of the Rainbow Resource Centre said gays and lesbians do not want to be seen as seeking special rights. All they want is equal treatment. They were critical of the position taken by *Women and the Law* and said it would be inconceivable to have any public servant remain in a conflict of interest situation. They felt comfortable with the requirements of the Acts as they stand, believing that the disclosure of the general nature of a conflict does not mean naming names or saying that you have a same-sex partner.

Gays and lesbians and those who supported them, unanimously supported the same position. They too believe that maintaining the integrity of the governmental and administrative process is necessary in the public interest. If anything, gays and lesbians were the most vociferous in saying they wanted no special status and no special protection in this area. They said they wanted to be treated the same as other citizens, with no special privileges or concessions and urged us to recommend they have the same rules of disclosure applied to them.

The two school Trustees I mentioned when dealing with adoption believe disclosures should be made by everyone. They have to disclose the name and assets of their partner and have no problem doing that. They feel comfortable disclosing the information as they know it will be kept confidential. On another matter that turned out to be a recurring theme, they pointed out that, in practice, they do not and are not asked to disclose the general nature of their conflict during a meeting. They merely announce they have a "conflict" and leave the meeting.

They agreed with the law's requirement they disclose a possible conflict of interest that might involve their common-law partner or other members of their family. They also had no trouble declaring a conflict of interest during a Board or committee meeting and absenting themselves while a matter is discussed by other trustees.

We spoke with a member of the Manitoba Legislature whose personal relationship had been disclosed by the media during an election campaign. In spite of some discomfort that may have

caused, he was strongly of the view no exception should be made for any gay or lesbian member of an elected body. He said even though there was no obligation to register his partner's assets, he did so. He said he asked himself, "what is my ethical responsibility?" If he feels he should leave a debate, all he says is, "I have a conflict" and leaves the room. He still thinks not enough disclosures are required and he suggested there should be a longer list of assets and associates that should be disclosed. At the present time, he said, conflict provisions affecting the legislature are almost impossible to enforce.

Another person with whom we spoke pointed out there is nothing in the law that requires any member to disclose the personal details of their living arrangements and felt a person could describe the "general nature of a conflict" without going into any further detail. He suggested a member could say, for example, "a friend of mine owns that land or owns a company that may bid on the contract."

I was surprised to learn the letter of the law is not being observed or enforced in at least two of the elected bodies in the province. Instead of disclosing the general nature of a conflict the elected officials merely indicate they have a conflict, leave the room, and remain out as long as the particular matter is being discussed.

We discussed the conflict issue with individuals and organizations who had expressed concerns in the other areas we were exploring. They too were unanimous in their belief gays and lesbians who are elected to public office should have to make disclosures. They felt there should be no exceptions or special rules for gay or lesbian elected officials and took the position they should have to declare their assets and those of their partner.

One person suggested the disclosure of the sex of the common-law partner should not be necessary. I assume the sex would be obvious in most cases from the name of the partner but the main concern seemed to be that the report might not remain confidential, particularly in small communities. We received no evidence to indicate there has ever been a breach of the confidentiality provisions by a Clerk of the House or by any Municipal or School Board Secretary-Treasurer. They are to keep the list of family members and their assets to themselves. This is nevertheless an issue that should be examined by government while changes are being made.

It was interesting, if not startling, to see the change in some people's attitudes when disclosure was discussed. Those who had opposed adoption rights being extended to same-sex partners were unanimously of the view that gays and lesbians should be subject to the same rules and regulations that apply to others. They said when someone accepts public office they must be prepared to list their assets and those of any partner and to declare a conflict of interest if it appears that a decision might benefit them, a friend, or a member of their family. They argued that if a married member has to disclose the assets of a spouse, a member living in a common-law relationship should have to disclose the assets of their partner.

They were unanimous in their belief that any and all obligations to list assets and to refrain from discussing an issue with respect to which they might have a conflict of interest, should be universally applied. They said the conflict of interest rules which apply to married people should

apply in the same way to those living in a common-law partnership. It was pleasant to see some unanimity.

Several gays and lesbians told us the realities of these and other requirements of running for public office are well known in the gay community and should not be altered. They said the existing laws do not apply an onerous requirement on any public official and most said that if the rules are not acceptable to a person they should not run for public office.

There was no other suggestion as to how those living in a common-law relationship, that is not known to their family and friends, could avoid these requirements. On the other hand, I add, there does not appear to be anything in the statutory provisions requiring private matters to be made public. There is not, in my opinion, any ground for a *Charter* challenge based on the requirements that an elected person file a statement of their and their partner's assets or on the need to disclose a conflict of interest and refrain from participating in a debate.

Advice and Recommendations

Issue No. 1

It is my opinion and advice on the broad question posed in our terms of reference, all elected or appointed public officials effected by the statutes should be treated in the same manner. On the second issue, it is my advice that it would be inappropriate to establish any distinction for gays and lesbians. If they wish to seek public office they should accept the fact that they, along with others who are elected, may not be able to enjoy the same degree of privacy enjoyed by those who are not in public life.

I came to these conclusions in two ways. The first is the position was espoused by those with whom we spoke. Their statements and positions make good sense to me. The second is I can't think of any way in which gays and lesbians could receive a benefit or advantage that others would not have, without discriminating against others.

Recommendation No. 1.

Amend the statutes that require a member to disclose the assets of a spouse to require the disclosure of the assets of a common-law partner as well.

Issue No. 2

When "common-law partner" appears in a statute, there should be a definition of the term in Section 1, where other definitions appear. I suggest the same wording I did when dealing with adoption.

Recommendation No. 2.

Amend Section 1 in each statute by adding:

"common-law partner" means a person who is living with another in a conjugal relationship.

Issue No. 3.

There is a great deal of similarity between the three statutes that deal with disclosures; in fact they are almost identical. They all require elected officials to file a statement of assets with the Clerk or Secretary-Treasurer and to keep it current. Each statute makes the statements confidential.

The conflict statutes refer to a "dependant" of an elected person. A definition of that term appears in Section 1 of the *Legislative Assembly and Executive Council Conflict of Interest Act* and the *Municipal Council Conflict of Interest Act* and in Section 36 of the *Public Schools Act.* Using the *Legislative Assembly and Executive Council Conflict of Interest Act* as an example,

> "dependant" means
>
> (a) a spouse of a member or minister, including a person who is not married to the member or minister but whom the member or minister represents as his spouse, and
>
> (b) any child, natural or adopted, of a member or minister,
>
> who resides with the member or minister;

Even though the definition of "spouse" need not be disturbed, same-sex common-law partners must be treated in the same way as opposite-sex partners. A partner of the same sex is not likely to be represented as a spouse.

The existing provisions limit their application to a spouse or a partner of the opposite sex and would not withstand a *Charter* challenge as they discriminate between same and opposite-sex partners. When applied to the operative sections of the Act, the definition requires that the assets of a person held out to be a wife or husband of the member be listed and declared but does not require any disclosure of the assets of a same-sex partner.

This is the opposite of the situation seen in the Adoption Act that permits opposite-sex couples to adopt but denies that opportunity to same-sex couples. It is discriminatory nevertheless as it makes a distinction based on sex or sexual preference.

Recommendation No. 3.

Delete the definition of "dependant" in the *Legislative Assembly and Executive Council Conflict of Interest Act, Municipal Council Conflict of Interest Act,* and the *Public Schools Act* and replace it with:

> **the spouse or common-law partner of a member or minister,**

Issue No. 4.

Section 10 of the *Municipal Council Conflict of Interest Act* and Section 39.3(4)(h)(i) of the *Public Schools Act* refer to gifts from a "family" member. There are also a number of other statutes that deal with property and use the term "family". Some define the term but most do not and my recollection is that not all statutes use the same definition. When the government is considering the use of the term, I think it important to have "family" defined so there will be no doubt who is intended to be included. I suggest the same definition I developed when dealing with property be used.

Recommendation No. 4.

Include the following definition in each of those Acts:

"family" includes a person's spouse, common-law partner, child, parent, brother, sister, aunt, uncle, niece, nephew, cousin, and grandparent.

Issue No. 5.

Each of the Acts makes provision for how an elected person is to react if a matter arises during a debate in the House, in committee or in cabinet, that might result in some benefit or advantage accruing to a member, a dependent or another person or corporation with whom the member is associated. Sections 4(1), 5(1) and 38(1) of the three statutes deal with the point. The *Legislative Assembly and Executive Council Conflict of Interest Act* provides:

> 4(1) Where during any meeting there arises
>
> (a) a matter in which a member or any of his dependants has a direct or indirect pecuniary interest; or
>
> (b) a matter involving the direct or indirect pecuniary interest of any person, corporation, subsidiary of a corporation, partnership, or organization to whom or which a member or any of his dependants has a direct or indirect pecuniary liability;
>
> the member shall
>
> (c) disclose the general nature of the direct or indirect pecuniary interest or liability;

(d) withdraw from the meeting without voting or participating in the discussion; and

(e) refrain at all times from attempting to influence the matter.

Subsection (c) is the provision that is no longer being applied or enforced. If it is no longer applied and if the reactions we heard are persuasive, government might wish to amend the section.

I should mention that the provision is much more specific than those who spoke to us suggested. The requirement is not merely that the member disclose the general nature of his conflict but "disclose the general nature of the direct or indirect pecuniary interest or liability."

There are two options available to government; amend the requirement, or see that it is enforced.

Recommendation No. 5.

Delete 4(1)(c) of the *Legislative Assembly and Executive Council Conflict of Interest Act,* 5(1)(c) of the *Municipal Council Conflict of Interest Act* and 38(1)(c) of the *Public Schools* Act and replace it with:

(c) indicate he has a conflict of interest;

Issue No. 6.

In addition to the statutes that relate to the responsibilities of those elected to public office, there are a number of others that require a member of a board or committee that makes loans, grants, benefits or administers funds on behalf of a government created agency to avoid any conflict of interest. The provisions are intended to protect the public interest by ensuring those in positions of responsibility do not obtain any benefit for themselves or for members of their family.

For example, section 98(4) of the City of Winnipeg Act, speaks of the use of a candidate's own funds "or those of the candidate's spouse." To impose the same obligation upon a person living in a common-law relationship, the provision should be amended to add "or common-law partner" after the word "spouse".

Personnel within the Ministry of Justice have already reviewed a number of these provisions and have identified particular sections requiring amendment. It is not necessary for me to go over each section and recommend a specific amendment. Where sections refer to the "spouse" of

member, the addition of "or common-law partner" will likely cure the problem. Additional re-wordings may be advisable as well.

When suggesting the definition of "common-law partner" I intentionally exclude the one or three-year limitations that have been used in the amendments to some property-related statutes in Bill 41. Those waiting periods should definitely not apply in the conflict of interest statutes. If a person is party to a common-law partnership at the time of election he should immediately be subject to the disclosure requirements.

I deal further with the constitutionality of the different waiting periods in Part III.

Recommendation No. 6.

Amend all other statutes containing conflict of interest and disclosure provisions:

(1) By defining "spouse",

(2) By adding "common-law partner" after "spouse" wherever it appears,

and

(3) By defining "family".

These recommendations are intended to enable people in every form of marital or common-law relationship to be treated alike. They are also intended to protect the legislation from a *Charter* challenge.

Part III

PROPERTY

Introduction

Our terms of reference on this topic were:

> *Taking into account legislative developments across Canada, particularly in Saskatchewan and Nova Scotia, recommend an approach to addressing rights and duties of common-law partners in legislation that gives married spouses an interest in and right to inherit/share their spouses property.*

As I was uncertain of exactly what was sought by this direction, I asked for clarification and was advised that my task was:

(a) *Provide advice on whether, in law, it is necessary to amend property legislation, and*

(b) *if so, recommend an approach to do so.*

The major question still remains. Where do common-law partners stand in relation to married spouses? Are they entitled to the same right to inherit and share in their partner's property? These are major issues and my report will deal with them and will suggest changes that should be looked at by the Minister of Justice in consultation with other Ministers and those responsible for the administration of a variety of administrative bodies.

This part of our terms of reference can only be examined after analyzing the most recent decisions of the Supreme Court of Canada. The Court's decisions now establish some basic equality rights that were not thought of when Manitoba's property legislation was drawn. The cases to which I will refer speak to a number of the concerns expressed during our consultations and during the legislative committee meetings. They speak of stereotyping and discrimination and how they must be considered when legislation is being examined. In particular they say those matters have no place in the legislation of today.

A related issue arose during our consultations - whether Manitoba should establish a system to permit the registration of common-law partnerships. If established, such a system would have ramifications with respect to property-related legislation but I will only make passing reference to it in this Part. I will deal with registration as a separate issue in Part IV.

Consultations

Those who discussed property rights with us fell into three camps; a minority who were opposed to any property rights being accorded to gays and lesbians, those who wanted equal treatment for everyone and a third group which looked at the matter from a legal and practical point of view. Overall, this topic did not generate the depth of feeling that was apparent when adoption was being discussed. That was probably because property rights were seen as a more neutral issue, dealing with individual rights and responsibilities, as in the conflict of interest issue.

There was a consensus that Manitoba, when amending property statutes, should not amend the definition of "spouse" as a way to extend rights to common-law partners. I agree with that position. The term "spouse" is used to describe the other partner in a marriage and those who support marriage as the traditional form of family organization do not want anything done that would diminish its importance and its distinct identity. The gays and lesbians and organizations we consulted took exactly the same position. Although they seek more rights for themselves they do not want to interfere with marriage or with those who support it.

Most of those we spoke with recommended we stay away from setting out three separately defined categories of people as has been done in Ontario and some other provinces. They suggested a married category and a common-law category are the only ones that are needed. I agree with that as well. A definition of "common-law partner" and "common-law relationship", and the inclusion of one of those terms in specific sections, is all that is needed to make certain rights now available to married couples are made available to other couples as well.

The Manitoba Human Rights Commission suggested common-law couples should have the same rights to property benefits as married people, after a specified period of cohabitation. Its position was there should be consistent provisions in all statutes and the rights of all individuals should be the same. I will refer to their submission again when dealing with the registration of common-law relationships.

The two women I referred to earlier who opposed same-sex adoptions but thought the rules on disclosure should be the same for everyone, said all children should have the same right to support and other benefits from those raising them, as they would have from natural parents.

In another meeting a person who held strong views against providing property rights to gays and lesbians suggested if common-law couples (not just gays and lesbians) want the same rights as married people they should get married. She took the position that if their relationship breaks up, marital property legislation should not apply. She wanted clear differences between marriage and common-law relationships and accused us of "messing with marriage." She felt any laws that now provide benefits to common-law partners should never have been passed.

She was concerned society would be weakened by any recognition of gays and lesbians, that it would send a wrong message to youth and lead to the further breakdown of society. She wants marriage to be recognized as sacred and the creation of a life to be respected. In that regard I believe she was speaking of people who have children out of wedlock. She would not support a system for the registration other relationships. She thinks if children are born out of wedlock they

should be protected by a will. Referring to gays and lesbians, she felt if people “make these choices there are going to be consequences. If things don’t work out they want “us” to step in and make sure they have rights." She added, “responsibility makes people grow up.”

One lawyer we spoke to wrote a follow-up and more extensive commentary on the state of the law. He suggested the case of *Walsh v. Bona* indicates the direction in which the law is moving and argued the *Charter* requires all couples to be treated equally. He suggested Manitoba laws should be amended to ensure all married, opposite-sex common-law couples, and same-sex common-law couples, are treated in the same way.

A gay person who has been seeking equal rights for years, told us that some provincial government administrators will still not accept the fact that a common-law partner of a civil servant is entitled to the same benefits as a spouse. Even if a notice of the relationship has been sent to some government offices, he said there is no guarantee it will be recognized or acted upon when benefits are due to be paid.

Several suggested the three-year waiting period to receive recognition of a common-law partnership that is included in Bill 41 amendments is unnecessary and unreasonable. Some suggested there should be a standard waiting period for all common-law partners, whether there is a child involved or not. Others thought the present distinction could be justified. The majority preferred the federal legislation that requires one year of cohabitation for everyone. Saskatchewan uses two years. I will comment on the constitutionality of these distinctions later in this part.

One group recommended the *Marital Property Act*, *Human Tissue Act*, *Wills Act* and *Homesteads Act* be re-examined and amended to provide similar rights for all individuals and relationships. Concerns about the consents now required on the sale or mortgaging of a marital home and intestate succession were raised, but made no concrete suggestions as to how comprehensive rights should be dealt with were made. They also pointed to other areas of concern such as consents for medical treatment, mental health and school reports.

One member of the Bar recognized the complexity of the situation and suggested some creative work is required to effectively deal with the concept of homestead. She suggested inquiries be made to see what other countries have done in that area. We heard little on provisions that would provide all children with similar rights and advantages.

Mr. Barry Effler, Deputy Registrar General and District Registrar of the Winnipeg Land Titles Office provided some valuable information as well as some difficult issues to consider. He commented on a system for the registration of non-marital relationships and I will deal with those later. For the moment, the following are some of the concerns he expressed about matters that would have to be considered if property rights are extended to common-law couples.

He pointed out that, at the present time, the Land Titles system does not recognize common-law spouses for any purpose under the *Homesteads Act, Power of Attorney Act* or the *Real Property Act.* Other statutes provide some rights to common-law couples but he said they do not apply to the Land Registry system. He said if rights are to be extended, terms such as “common-law

relationship," "domestic partnership" or "common-law partner" would have to be defined and the same definitions would have to be contained in all statutes that deal with real property.

While amendments are being made, he suggested the provisions that relate to who can take the consent of a person with homestead rights, be upgraded. He said the *Powers of Attorney Act* would also have to be amended. The *Revenue Act* should also be amended he said, to enable a common-law partner to have the same exemption from taxation on the value of land being transferred, as now exists for married people. The *Farm Lands Ownership Act* would also have to be amended if it is to apply to a common-law partner.

In his paper, which followed his discussion with us, Mr. Effler pointed out some of the problems that already exist. He said his staff is constantly examining situations to see what rights a spouse has. If there are changes he asks those issues be kept in mind:

Above all, he asked us to stress that if and when changes to property legislation are made, it is essential administrative bodies be certain who is included and who qualifies for any rights that are extended. He also indicated his were personal observations and were not to be taken as changes suggested by him, by his office, or by the Department of government responsible for his office.

Case Law

The Supreme Court carefully limited the scope of *M. v. H.* to an examination of a specific legislative provision in the *Ontario Family Law Act* which provided certain family-related property rights to common-law couples of the opposite sex while denying the same rights to common-law couples of the same sex. It found the distinction to be discriminatory and contrary to the *Charter*. My assumption is that the Supreme Court could not, due to the limited fact situation in M. v. H., deal with the broader issues of discrimination it had considered but had not agreed upon in earlier cases.

In **Egan v. Canada [1995] 2 S.C.R. 513,** the Supreme Court dealt with the situation of two homosexual men who had lived together for over thirty-five years. When one reached sixty-five he began to receive old age security and guaranteed income supplements under *The Old Age Security Act.* The other applied for a spousal allowance but was rejected because he did not fall within the definition of "spouse" in the Act. The definition included "a person of the opposite sex who is living with that person, having lived with that person for at least one year, if the two persons have publicly represented themselves as husband and wife." The appellant had claimed that the provision discriminated on the basis of sexual orientation and was in beach of the protections guaranteed by the Charter.

Four of the judges found the provision to be discriminatory while five found it was not. The case was therefore dismissed. The judges' reasons nevertheless dealt at length with the *Charter* and how it should be approached and a great deal was written on the discrimination facing gays and lesbians. The final result was the Supreme Court, while providing a wealth of judicial analysis and commentary, had not made a majority finding in favour of same-sex common-law partners.

In **Miron v. Trudel [1995] 2 S.C.R. 418** a common-law husband had been injured in an automobile accident and sought accident benefits from his common-law wife's insurer. The policy provided for the payment of benefits to the "spouse" of the policyholder and the insurer denied the claim. The case considered whether the policy, which was based on the *Ontario Insurance Act*, discriminated against him in violation of the *Charter*.

Several judges wrote extensively on how the *Charter* provisions should be interpreted and the nature of discrimination itself. The unfortunate outcome was that four judges found that the section in question was not discriminatory under Section 15(1) of the *Charter*, while five found it was discriminatory, but one of the five found the discrimination was saved by Section 1. With the court so badly split the result was inconclusive and did not provide binding authority.

In **Walsh v. Bona (2000), 5 R.F.L., (5th) 188,** the Nova Scotia Court of Appeal found the legislation in question infringed the *Charter* where it effectively denied benefits to a person in a common-law relationship that were bestowed upon a similar person in a marriage relationship. The couple had lived together for ten years and had two children. The Court found the definition of "spouse" as either of a man or a woman who are married to each other, violated s. 15 and was not justified under s. 1 of the *Charter.* In doing so it relied on comments made by a number of the judges of the Supreme Court of Canada in the cases I mentioned. The fact remains that the

Walsh case is from a provincial Court of Appeal and is not binding in Manitoba. In any event the Supreme Court has yet to reach a consensus on the issue.

I mention the limitations on some of these cases as lawyers often quote positions taken by Supreme Court Judges. While those comments may be persuasive and deserve the greatest attention and respect, in the current debate about whether common-law couples have or should have the same rights as married couples, that issue has yet to be definitively decided by the Supreme Court.

It is valuable from the standpoint of my review and the advice I have been asked to provide, to examine the statements by Supreme Court judges in the past before expressing an opinion on what they may decide in the future. *M. v. H.* is of course a binding decision of the court. In addition to discussing the limited question of equality between different common-law relationships, the majority made comments that can be applied to the broader question of whether the equality of which they speak is likely to be extended to equate the rights of common-law and married partners.

Bastarache J., in *M. v. H.* near the beginning of his reasons, pointed out that things are not as simple as they may appear. He said:

> On June 9, 1994, the Ontario legislature defeated Bill 167, which sought to extend the definition of "spouse" in various Acts to include same-sex couples. This has been interpreted as a deliberate exclusion of same-sex couples from the definition of "spouse" in s. 29 of the Family Law Act, R.S.O. 1990, c. F.3 ("FLA"), which is impugned in the case before this Court. In that sense, it is true that this case is about the status of same-sex couples in the family law regime of Ontario. Things are, however, not as simple as they may appear. It has been argued before us that this case is essentially about the degree of deference to be given to legislatures in designing public policy and that the central legal issue here is to determine whether there is a constitutional obligation on the legislature to afford same-sex couples the same status under the family law regime as that afforded to opposite-sex couples. These are very contentious questions. The scope of the legal issues raised and the implications of our decision may in fact be greater than expected when the action was first initiated. This explains why we have heard forceful presentations by interveners, and why emotions run high. It is easy to understand, in this context, why the Court has been invited by some parties to take sides; but this is not the role of a court. A court's role is to give a generous and liberal interpretation to s. 15(1) of the Canadian Charter of Rights and Freedoms, and to apply s. 1 of the Charter in a fair and reasonable way in order to determine, in legal terms, whether the legislature has breached its obligations under the *Charter.*
>
> This case, like all Charter challenges to legislation, represents another episode in the continuing dialogue between the branches of government. As this Court recently outlined in **Vriend v. Alberta, [1998] 1 S.C.R. 493**, when Canadians collectively chose to adopt the Charter, Canada changed from a system of parliamentary supremacy to a system of constitutional supremacy. In doing so, Canadians assigned the role of judicial review to the courts so that the rights given to individuals under the Charter could not be

> unjustifiably infringed by any legislature or government. This Court, in Vriend, set out the proper role of the courts on judicial review of government action. At para. 136, Cory and Iacobucci JJ. for the majority, state:
>
> Because the courts are independent from the executive and legislature, litigants and citizens generally can rely on the courts to make reasoned and principled decisions according to the dictates of the constitution even though specific decisions may not be universally acclaimed. In carrying out their duties, courts are not to second-guess legislatures and the executives; they are not to make value judgments on what they regard as the proper policy choice; this is for the other branches. Rather, the courts are to uphold the Constitution and have been expressly invited to perform that role by the Constitution itself. But respect by the courts for the legislature and executive role is as important as ensuring that the other branches respect each other's role and the role of the courts.

In *Miron*, McLachlin J. (now the Chief Justice of Canada) also made a number of important statements that are relevant to this review. She said,

> This appeal requires us to decide whether exclusion of unmarried partners from accident benefits available to married partners violates the equality guarantees of the Canadian Charter of Rights and Freedoms. I conclude that it does.
>
> If a violation of s. 15(1) is established, the burden shifts to the party upholding the denial of equality to justify it under s. 1 of the Charter. Section 15(1) and s. 1 of the Charter must be read together. Neither, in itself, is complete. Together, they provide a comprehensive equality analysis that provides effective remedies against discrimination while preserving the power of the state to deny protections and benefits to individuals where differences between them justify it.
>
> *Andrews* instructs us that our approach must also reflect the human rights background against which the Charter was adopted. In evoking human rights law as the defining characteristic of discrimination under s. 15(1) of the Charter, this Court in *Andrews* engaged the principle of equality which underlies the constitutions of free and democratic countries throughout the world. This principle recognizes the dignity of each human being and each person's freedom to develop his body and spirit as he or she desires, subject to such limitations as may be justified by the interests of the community as a whole. It recognizes that society is based on individuals who are different from each other, and that a free and democratic society must accommodate and respect these differences.
>
> The corollary of the recognition of the dignity of each individual is the recognition of the wrong that lies in withholding or limiting access to opportunities, benefits, and advantages available to other members of society, solely on the ground that the individual is a member of a particular group deemed to be less able or meritorious than others. This is the evil we call discrimination. It denies to the individual the right to realize his or her potential and to live in the freedom accorded to others, solely because of the group to which the individual belongs. In the course of the past century, free and democratic

societies throughout the world have recognized that the elimination of such discrimination is essential, not only to achieving the kind of society to which we aspire, but to democracy itself. "The principle of equality, which is but the other side of the coin of discrimination and to which the law of every democratic country strives to realize in pursuit of justice and decency, means that one must apply, for the purpose of the [legislative] goal in question, equal treatment for all people, where there are no real differences amongst them that are relevant to that goal": *Boronovsky v. Chief Rabbis of Israel,* P.D. CH [25] (1), 7, 35.

The theme of violation of human dignity and freedom by imposing limitations and disadvantages on the basis of a stereotypical attribution of group characteristics rather than on the basis of individual capacity, worth or circumstance is reflected in qualities which judges have found to be associated with analogous grounds. One indicator of an analogous ground may be that the targeted group has suffered historical disadvantage, independent of the challenged distinction:

What then of the analogous ground proposed in this case -- marital status? The question is whether the characteristic of being unmarried – of not having contracted a marriage in a manner recognized by the state -- constitutes a ground of discrimination within the ambit of s. 15(1). In my view, it does.

First, discrimination on the basis of marital status touches the essential dignity and worth of the individual in the same way as other recognized grounds of discrimination violative of fundamental human rights norms. Specifically, it touches the individual's freedom to live life with the mate of one's choice in the fashion of one's choice. This is a matter of defining importance to individuals. It is not a matter which should be excluded from Charter consideration on the ground that its recognition would trivialize the equality guarantee.

Second, marital status possesses characteristics often associated with recognized grounds of discrimination under s. 15(1) of the Charter. Persons involved in an unmarried relationship constitute an historically disadvantaged group. There is ample evidence that unmarried partners have often suffered social disadvantage and prejudice. Historically in our society, the unmarried partner has been regarded as less worthy than the married partner. The disadvantages inflicted on the unmarried partner have ranged from social ostracism through denial of status and benefits. In recent years, the disadvantage experienced by persons living in illegitimate relationships has greatly diminished. Those living together out of wedlock no longer are made to carry the scarlet letter. Nevertheless, the historical disadvantage associated with this group cannot be denied.

A third characteristic sometimes associated with analogous grounds --distinctions founded on personal, immutable characteristics -- is present, albeit in attenuated form. In theory, the individual is free to choose whether to marry or not to marry. In practice, however, the reality may be otherwise. The sanction of the union by the state through civil marriage cannot always be obtained. The law; the reluctance of one's partner to marry; financial, religious or social constraints -- these factors and others commonly

> function to prevent partners who otherwise operate as a family unit from formally marrying. In short, marital status often lies beyond the individual's effective control. In this respect, marital status is not unlike citizenship, recognized as an analogous ground in Andrews: the individual exercises limited but not exclusive control over the designation.
>
> Comparing discrimination on the basis of marital status with the grounds enumerated in s. 15(1), discrimination on the ground of marital status may be seen as akin to discrimination on the ground of religion, to the extent that it finds its roots and expression in moral disapproval of all sexual unions except those sanctioned by the church and state.

At paragraph 155 of her reasons McLachlin J. makes a comment that applies to the situation in which Manitoba finds itself at the moment. It also addresses the request that we consider what legislative steps other provinces have taken.

> Of late, legislators and jurists throughout our country have recognized that distinguishing between cohabiting couples on the basis of whether they are legally married or not fails to accord with current social values or realities. As the *amicus curiae* has pointed out, 63 Ontario statutes currently make no distinction between married partners and unmarried partners who have cohabited in a conjugal relationship. For example, the right to spousal maintenance is not conditioned on marriage: see Part III, Family Law Act, R.S.O. 1990, c. F.3, which establishes a right to spousal support for those who have cohabited continuously for a period of not less than three years or who have cohabited in a relationship of some permanence and who have a child. Other provinces have adopted similar benefit thresholds. In the judicial domain, judges have recognized the right of unmarried spouses to share in family property through the doctrine of unjust enrichment: Pettkus v. Becker, [1980] 2 S.C.R. 834; Peter v. Beblow, [1993] 1 S.C.R. 980. All this suggests recognition of the fact that it is often wrong to deny equal benefit of the law because a person is not married.
>
> These considerations, taken together, suggest that denial of equality on the basis of marital status constitutes discrimination within the ambit of s. 15(1) of the Charter. If the evil to which s. 15(1) is addressed is the violation of human dignity and freedom by imposing limitations or disadvantages on the basis of the stereotypical application of presumed group characteristics, rather than on the basis of individual capacity, worth or circumstance, then marital status should be considered an analogous ground. The essential elements necessary to engage the overarching purpose of s. 15(1) -- violation of dignity and freedom, an historical group disadvantage, and the danger of stereotypical group-based decision-making -- are present and discrimination is made out.

At paragraph 157 the learned judge deals with a matter raised time and time again by people we spoke to and by many who made submissions to the Legislative Committee:

> These observations are sufficient to dispose of the insurer's arguments based on alleged absence of historical disadvantage and the "mutable" nature of the unmarried state. It remains to consider, however, the theme underlying the whole of the insurer's submissions -- that marriage is a good and honourable state and hence cannot serve as a

ground for discrimination. To most in our society, marriage is a good thing; to many a sacred thing. There is nobility in the public commitment of two people to each other to the exclusion of all others. How can it be wrong to use this commitment as the condition of receiving legal protection and benefit?

These sentiments, valid as they are, do not advance the insurer's case. The argument, simply put, is that marriage is good; the grounds of discrimination evil; therefore marriage cannot be a ground of discrimination. The fallacy in the argument is the assumption that the grounds of discrimination are evil. Discrimination is evil. But the grounds upon which it rests are not. Consider the enumerated grounds -- race, national or ethnic origin, colour, religion, sex, age and mental or physical disability. None of these are evil in themselves. Indeed, people rightfully take pride in their race and ethnic origin; they find identity in their colour and their sex. Even mental and physical disabilities should be regarded not as deficiencies, but differences -- differences which, while they will make some aspects of life more difficult, do not affect others, and may, moreover, contribute to society's richness and texture. What is evil is not the ground of discrimination, but its inappropriate use to deny equal protection and benefit to people who are members of the marked groups -- not on the basis of their true abilities or circumstance, but on the basis of the group to which they belong. The argument that marital status cannot be an analogous ground because it is good cannot succeed. The issue is not whether marriage is good, but rather whether it may be used to deny equal treatment to people on grounds which have nothing to do with their true worth or entitlement due to circumstance. L'Heureux-Dubé J. stated in Canada (Attorney General) v. Mossop, [1993] 1 S.C.R. 554, at p. 634: "It is not anti-family to support protection for non-traditional families." One might equally say it is not anti-marriage to accord equal benefit of the law to non-traditional couples.

I conclude that marital status may serve as an analogous ground of discrimination under s. 15(1) of the Charter.

Law v. Canada (Minister of Employment and Immigration) [1999] 1 S.C.R. 497, is the latest in this unusual succession of cases that has examined discrimination. This unanimous decision is particularly significant in the way it was arrived at. A panel of three judges initially heard the case on January 20, 1988, and dismissed it. A re-hearing was ordered on December 3, 1998 and the rehearing took place in the presence of a full court of nine judges on March 25, 1999.

The decision of the court was written by Iacobucci J. but it is reasonable to assume that the other judges participated in its formation as it represented their collective thinking. The re-hearing was likely held for that specific purpose. The unanimity seems unusual as in *Miron v. Trudel* and *Egan v. Canada* the court had been deeply divided. In this decision the court concentrated on the principles and process to be applied in the future when a judge or judges are asked to examine a case based on discrimination and Sections 15(1) and 1 of the *Charter.*

What the case did was provide an opportunity for the Court to review the process and principles to be followed by a court before coming to grips with specific legislation that is alleged to be

discriminatory. The Court made it clear it was establishing standards and principles to be applied when considering whether legislation is discriminatory or not.

As the following extracts from the case are fairly lengthy, I have underlined the parts I consider to be particularly applicable to the issues I wish to discuss. Hopefully that will enable those who may not be interested in reading the extracts in detail to identify some of the significant principles that must be applied in Manitoba.

Iacobucci J. explained the purpose of the Court releasing this statement on the law and procedure to be applied:

> Indeed, in the brief history of this Court's interpretation of s. 15(1) of the Charter, there have been several important substantive developments in equality law, relating to, among other things, the meaning of adverse effects discrimination, the role of context in identifying discrimination more generally, and the indicia of an analogous ground. All of these developments have been guided by the Court's evolving understanding of the purpose of equality protection under s. 15(1). All have augmented and enriched anti-discrimination jurisprudence under the Charter.
>
> Throughout these developments, although there have been differences of opinion among the members of this Court as to the appropriate interpretation of s. 15(1), I believe it is fair to say that there has been and continues to be general consensus regarding the basic principles relating to the purpose of s. 15(1) and the proper approach to equality analysis. In my view, the present case is a useful juncture at which to summarize and comment upon these basic principles, in order to provide a set of guidelines for courts that are called upon to analyze a discrimination claim under the Charter.
>
> In accordance with McIntyre J's caution in *Andrews*, supra, I think it is sensible to articulate the basic principles under s. 15(1) as guidelines for analysis, and not as a rigid test which might risk being mechanically applied. Equality analysis under the Charter must be purposive and contextual. The guidelines which I review below are just that – points of reference which are designed to assist a court in identifying the relevant contextual factors in a particular discrimination claim, and in evaluating the effect of those factors in light of the purpose of s. 15(1).

It is not necessary for me to go into the details of the process that is defined in the case, but there are a number of statements that relate to discrimination in the legislative sense that warrant repetition and consideration when the property-related statutes in Manitoba are being revised. The judgement continues:

> Similar observations were made in *Miron*, supra, by McLachlin J. and in *Egan*, supra, by L'Heureux-Dubé J. and Cory J., all of whom found that the fundamental purpose of s. 15(1) is the protection of human dignity. Cory J. stated in Egan, supra, at para. 128, that the equality guarantee "recognizes and cherishes the innate human dignity of every individual". As he explained, at para. 179, "the existence of discrimination is determined by assessing the prejudicial effect of the distinction against s. 15(1)'s fundamental

purpose of preventing the infringement of essential human dignity". Similarly, in Miron, supra, at para. 131, McLachlin J. stated the overarching purpose of s. 15(1) as being "to prevent the violation of human dignity and freedom by imposing limitations, disadvantages or burdens through the stereotypical application of presumed group characteristics rather than on the basis of merit, capacity, or circumstance".

In Egan, supra, at para. 39, L'Heureux-Dubé J. stated in a similar vein:

> . . . at the heart of s. 15 is the promotion of a society in which all are secure in the knowledge that they are recognized at law as equal human beings, equally capable, and equally deserving. A person or group of persons has been discriminated against within the meaning of s. 15 of the Charter when members of that group have been made to feel, by virtue of the impugned legislative distinction, that they are less capable, or less worthy of recognition or value as human beings or as members of Canadian society, equally deserving of concern, respect, and consideration.
>
> Most recently, in Vriend, supra, at para. 67, Cory and Iacobucci JJ. stated the purpose of s. 15(1) as being to take "a further step in the recognition of the fundamental importance and the innate dignity of the individual", and in the recognition of "the intrinsic worthiness and importance of every individual . . . regardless of the age, sex, colour, origins, or other characteristics of the person".
>
> All of these statements share several key elements. It may be said that the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration. Legislation which effects differential treatment between individuals or groups will violate this fundamental purpose where those who are subject to differential treatment fall within one or more enumerated or analogous grounds, and where the differential treatment reflects the stereotypical application of presumed group or personal characteristics, or otherwise has the effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society. Alternatively, differential treatment will not likely constitute discrimination within the purpose of s. 15(1) where it does not violate the human dignity or freedom of a person or group in this way, and in particular where the differential treatment also assists in ameliorating the position of the disadvantaged within Canadian society.
>
> What is human dignity? There can be different conceptions of what human dignity means. For the purpose of analysis under s. 15(1) of the Charter, however, the jurisprudence of this Court reflects a specific, albeit non-exhaustive, definition. As noted by Lamer C.J. in Rodriguez v. British Columbia (Attorney General),[1993] 3 S.C.R. 519, at p. 554, the equality guarantee in s. 15(1) is concerned with the realization of personal autonomy and self-determination. Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and

empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society per se, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?

As has been consistently recognized throughout this Court's jurisprudence, probably the most compelling factor favouring a conclusion that differential treatment imposed by legislation is truly discriminatory will be, where it exists, pre-existing disadvantage, vulnerability, stereotyping, or prejudice experienced by the individual or group: see, e.g., Andrews, supra, at pp. 151-53, per Wilson J., p. 183, per McIntyre J., pp. 195-97, per La Forest J.; Turpin, supra, at pp. 1331-33; Swain, supra, at p. 992, per Lamer C.J.; Miron, supra, at paras. 147-48, per McLachlin J.; Eaton, supra, at para. 66. These factors are relevant because, to the extent that the claimant is already subject to unfair circumstances or treatment in society by virtue of personal characteristics or circumstances, persons like him or her have often not been given equal concern, respect, and consideration. It is logical to conclude that, in most cases, further differential treatment will contribute to the perpetuation or promotion of their unfair social characterization, and will have a more severe impact upon them, since they are already vulnerable.

One consideration which the Court has frequently referred to with respect to the issue of pre-existing disadvantage is the role of stereotypes. A stereotype may be described as a misconception whereby a person or, more often, a group is unfairly portrayed as possessing undesirable traits, or traits which the group, or at least some of its members, do not possess. In my view, probably the most prevalent reason that a given legislative provision may be found to infringe s. 15(1) is that it reflects and reinforces existing inaccurate understandings of the merits, capabilities and worth of a particular person or group within Canadian society, resulting in further stigmatization of that person or the members of the group or otherwise in their unfair treatment. This view accords with the emphasis placed by this Court ever since Andrews, supra, upon the role of s. 15(1) in overcoming prejudicial stereotypes in society. However, proof of the existence of a stereotype in society regarding a particular person or group is not an indispensable element of a successful claim under s. 15(1). Such a restriction would unduly constrain discrimination analysis, when there is more than one way to demonstrate a violation of human dignity. I emphasize, then, that any demonstration by a claimant that a legislative provision or other state action has the effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society (whether or not it involves a demonstration that the provision or other state action corroborates or exacerbates an existing prejudicial stereotype), will suffice to establish an infringement of s. 15(1).

The **Walsh v. Bona (2000), 5 R.F.L., (5th) 188**, decision of the Nova Scotia Court of Appeal has now been appealed to the Supreme Court of Canada. It is likely that the *Law* decision, and its analysis of the law, will be referred to in the hearing of that case. Earlier comments of the Judges may also be discussed, varied or contradicted, but it is unlikely that the basic principles so clearly expressed in *Law* will change, at least in the foreseeable future. It is impossible to say which Judges will hear the appeal when it is argued, impossible to tell how widely or narrowly the issue in *Walsh* will be defined, or what the result will be.

Advice and Recommendations

As the Government of Manitoba is anxious to examine its legislation in the near future, and has asked that our advice be submitted by December 31, 2001, I will have to base my advice on my own analysis of the legislation and the case law to which I have referred. It would of course be easier, and possibly more prudent, to wait and see what the Supreme Court says in the future, but that avenue is not open to me.

Issue No.1

The *M. v. H.* decision of the Supreme Court, that I discussed in Part I, has equal application to all property-related matters. It held that legislation can no longer distinguish between the rights of heterosexual common-law partners and same-sex common-law partners. Rights given to one must be given to the other.

The next and broader question is whether all common-law partners are entitled to the same rights as married partners. The answer to that question, I believe, can be discerned from an examination of the case law to which I have just referred. In my opinion, any and all Manitoba legislation that provides rights to married couples but withholds the same rights from common-law partners, would be held to be discriminatory and in contravention of the Charter of Rights and Freedoms of the Canadian Constitution. Such provisions would be struck down and that would be the case whether the common-law couples are of the same or different sexes.

Gays, lesbians, same-sex common-law partners and opposite –sex common-law partners all fall within the prohibited categories if they are subject to differential treatment, as do individual men and women who live as husband and wife without being married. They have historically had stereotypical assumptions applied to them. They have been "marginalized, ignored and devalued" rather than being assessed for their individual abilities. The law has discriminated against them, either by applying limitations on their rights that are not applied to others, or by denying them similar rights. They can no longer be discriminated against and that means they must be treated in the same way and have the rights and benefits as married couples and other citizens.

Conversely, they and their relationships must be accorded the same rights and benefits as other individuals whether they are married or single. While it is quite proper to recognize and respect a marriage, a common-law partnership must be recognized and respected as well. As McLachlin J. said, "The question is whether the characteristic of being unmarried – not having contracted a marriage in a manner recognized by the state – constitutes a ground of discrimination within the ambit of s. 15(1). In my view it does."

It is my opinion that the Supreme Court, the next time it has a suitable case before it, will rule that, wherever possible, common-law partners be accorded the same rights as those provided to married partners.

Recommendation No. 1.

I recommend, in the amendment or passage of any and all legislation, the Province of Manitoba provide identical rights and benefits to all married and common-law couples.

Issue No. 2.

The terms of reference asked us to recommend an approach for dealing with common-law partners' rights in legislation that now gives a person a right to inherit or share in their spouse's property. They specifically asked us to consider the methods applied in Nova Scotia and Saskatchewan.

Nova Scotia has taken a circuitous method of correcting, or trying to correct, its legislation that might be challenged under *M. v. H.* It amended its *Vital Statistics Act* by adding the term "domestic partner" and by providing certain rights attached to it. To qualify as a "domestic partner" common-law partners must file a declaration with the Registrar of Vital Statistics. Once that is done the partners become entitled to all the rights and obligations of a "spouse" under seventeen specified statutes.

There are problems with this approach. The spousal benefit only applies to common-law couples who choose to register. In my opinion they should be entitled to the same benefits whether they register or not. As there has not been a flood of applications to register a relationship to date, it can be assumed there must be thousands of unmarried couples who have not registered and do not share the benefits of a "spouse". Another problem is that not all statutes are covered by the amendments. It seems to me the possibility of a *Charter* challenge still exists.

The Nova Scotia case of *Walsh v. Bona* does not address this legislative change so it is impossible to say whether the Supreme Court, to which it has been appealed, will comment on the amendments or not. The *Walsh* case was decided on other grounds that may neutralize these legislative changes or make them ineffective, but it is impossible to say. I will have more to say on the registration system in Nova Scotia in the Part IV of this report.

Saskatchewan has decided to leave its statutes the way they were. It apparently believes that Saskatchewan courts will continue to define "spouse" to include a common-law partner. The judgment of Scheibel J. in **Ferguson v. Armbrust, 187 D.L.R. 367**, released on May 12, 2000 is, I assume, the authority for that position. In that case the parties had lived together for eleven

years and had three children. When the man died, the woman brought an application for a declaration that she was the spouse of the deceased, entitled to administer his estate and to receive spousal benefits. The Intestate Succession Act as amended in 1999 provided that the children of a deceased would inherit the whole estate if there were no spouse. It did not mention common-law spouses and the children opposed the woman's application.

Justice Scheibel allowed the woman's application by interpreting the word "spouse" to include a common-law spouse, because of the functional similarities between spouses and common-law spouses. His alternative finding was that if common-law spouses are not included in the definition of "spouse", the applicant's right to equality based on the analogous ground of marital status that is guaranteed by the *Charter,* was infringed.

There is no similar case in Manitoba and as the *Ferguson* case is not binding or applicable in Manitoba, that procedure should not be followed. Another reason for not following that approach is that the terminology already used in Manitoba legislation forecloses that option.

Recommendation No. 2.

I recommend Manitoba not follow either the Saskatchewan or the Nova Scotia approach to amending its statutes.

Issue No. 3.

There are a number of Manitoba statutes that would not withstand a *Charter* challenge based on discrimination and s. 15(1) of the *Charter.* The offending provisions will have to be altered or removed. At this point I will suggest the minimal changes that have to be made and in subsequent issues I will suggest more extensive amendments that I believe should be made.

First, I wish to say that the general approach taken by the government in Bill 41 is the best one to take. Including a definition of "common-law partner" and similar terms and adding them after "spouse" wherever it appears in any Act, will answer most of the shortcomings of the legislation.

There is however more work to be done, both in amending statutes that have not yet been touched and by making further changes to those amended by Bill 41. All the needed changes can be done at once or, if the task is too great, certain amendments can be made quickly and a general revision of many of the statutes can be done at a more leisurely pace. The changing of a few words here and there can remove problems, but that often leaves other wordings that are no longer necessary and should be amended or removed. There may also be other obscure distinctions that should be amended

I will provide a few examples of provisions that are now invalid and suggest how they can be repaired. Officials of the Department of Justice are aware of most of the problematic provisions, as they identified them for us, and legislative counsel can easily make the necessary amendments. I will later propose some additional changes that were not dealt with in Bill 41, that I believe will strengthen and improve the statutes. The following suggestion deals only with amendments that should be made immediately.

Recommendation No. 3.

I recommend all Manitoba statutes be amended by adding the term "common-law partner", or a similar term, after "spouse" wherever it appears.

Issue No. 4.

Bill 41, passed by the Manitoba government in 2001 was intended to extend the rights of married couples to common-law partners. The Bill resulted in the amendment of the *Civil Service Superannuation Act, Court of Queen's Bench Act, Dependants Relief Act, Family Maintenance Act, Fatal Accidents Act, Legislative Assembly Act, Pension Benefits Act, Manitoba Public Insurance Corporation Act, Teachers' Pensions Act* and the *Workers Compensation Act.*

Using the *Workers Compensation Act* as an example, before Bill 41 was passed, section 1 provided:

> 1(1) In this Act,
>
> "spouse" means a person who, at the time of the death of the worker
>
> (a) is married to the worker, or
>
> (b) is not married to the worker, is a person of the opposite sex, and has cohabited with the worker
>
> (i) for five years immediately preceding the death of the worker, or
>
> (ii) for one year immediately preceding the death of the worker, and there is a child of the union.

Bill 41 amendments added a definition of common-law partner and altered but retained the distinctions contained in the former section. Section 1, in part, now provides:

"common-law partner" of a worker means a person who, not being married to the worker, cohabited with him or her in a conjugal relationship

(a) for a period of at least three years immediately preceding the death of the worker, or

(b) for a period of at least one year immediately preceding the death of the worker and they are together the parents of a child.

The result is that while one problem was cured – treating married and common-law partners in a somewhat similar manner - the new provisions are still discriminatory in several respects.

(1) There is a waiting period for an employee living common-law while there is no waiting period for a married person.

(2) There is discrimination between common-law couples on the basis of whether they have a child.

(3) The child that is referred to in the definition must be a child of the couple. This excludes a common-law couple where the child they are raising is the child of one of the partners from a previous relationship.

During our consultations, several people referred to these distinctions. Some said the difference could be removed if common-law partnerships could be registered. If that were possible, they suggested, common-law couples could be treated in the same way as married people and no waiting period would be necessary. Apart from that suggestion, there were no arguments advanced that the provisions might be unconstitutional. The closest remark of that nature I can recall was, I think made by the Chairperson of the Manitoba Human Rights Commission. Her remark was: "I guess the distinction is justified."

It appears to me that the legal community, faced with so many other issues dealing with same-sex relationships, has not yet turned its collective mind to this issue. In my opinion the distinctions are not justified, but I do not want to be too positive on the point as I haven't had the opportunity to debate it with counsel, which was my practice on the bench when an issue of this significance arose. The issue was not pressed during our meetings but at that time I had not completed my examination of the Supreme Court decisions. I would have liked to discuss this issue with the lawyers in the constitutional law branch of the Department of Justice, but did not think that was appropriate as the terms of reference ask for my own opinion.

The issue may have been addressed by those who drafted the amendments that appeared in Bill 41. I do not know that either. I mention these caveats on my opinion, but trust that the issues I raise will receive careful scrutiny by those within the department who are dealing with these issues on a regular basis.

The question to be asked, having in mind the comments of the Supreme Court, is how the presence or absence of a child affects the provision of a disability or employment benefit and how the distinction between married and unmarried partners can be justified.

In the course of her discussion in *Miron v. Trudel,* McLachlin J, quoting from *Boronovsky v. Chief Rabbis of Isreal.* stressed that:

> The goal of the legislation in question must be examined to see that all people are treated equally and that there are no real differences amongst them that are relevant to that goal.

She went on to say that:

> Discrimination on the basis of marital status touches the essential dignity and worth of the individual. --- The disadvantages inflicted on the unmarried partner have ranged from social ostracism through denial of status and benefits.

Among her subsequent comments, was the following:

> If the evil to which s. 15(1) is addressed is the violation of human dignity and freedom by imposing limitations or disadvantages on the basis of the stereotypical application of presumed group characteristics, rather than on the basis of individual capacity, worth or circumstance, then marital status should be considered an analogous ground.

In *Law v. Canada,* Iacobucci J. said:

> I emphasize, then, that any demonstration by a claimant that a legislative provision or other state action has the effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society (whether or not it involves a demonstration that the provision or other state action corroborates or exacerbates an existing prejudicial stereotype), will suffice to establish an infringement of s. 15(1).

My personal opinion is that the differentiation made between those who have cohabited for three years, without a child, and those who have cohabited for one year with a child would be upset in a *Charter* challenge. The federal and some provincial legislation avoids any distinction based on the presence of a child by having the rights of all common-law partners commence after cohabitation for one or two years. That still does not address the different treatment of common-law and married people. To be acceptable, the legislation should state that the benefits are available to a “spouse” and a “common-law partner” without providing any waiting period unless it applies to both.

The limitations of one or three years appear to be based on the stereotypical assumption that a common-law partnership is not as stable as a marriage. The waiting periods appear to have been included so someone can see if the common-law partnership is stable.

That limitation and distinction has absolutely nothing to do with the purpose of the Act, which is to provide certain employee benefits. I can see that some proof of the existence of any type of relationship that gives rise to benefits might be required. A program administrator might require a copy of a marriage certificate from those who claim to be married, a copy of a certificate that a common-law partnership has been registered (if such a system existed), or some other proof that a common-law relationship actually exists.

Tying entitlements to having a child is also unreasonable and discriminatory. It is of course impossible for same-sex couples to have a child between them so the requirement further discriminates against that type of common-law partnership. Again I assume the presence of a child in a partnership is supposed to be an indicator of stability. I don't know if that is the case or not but, to take the matter further, I ask what other legislation discriminates against a woman or a couple who do or do not have a child?

The effect of the present wording also eliminates from the definition a person who is living in a heterosexual common-law relationship where one of the partners is already married. Those living in that sort of relationship cannot be ignored. While there may be problems in sorting out entitlements between a spouse and a common-law partner, that is no reason to exclude the couple from benefits received by married partners or other common-law partners.

In fairness to those who drafted Bill 41 I appreciate the limitations of which I have spoken were included in previous legislation and the possible impact of the Charter upon them may not have been considered, or my concern may have been considered and dismissed.

In my opinion the terms of entitlement to benefits under all Acts must now be the same for everyone. Proof of the existence of a relationship is an entirely different matter. The government administrators can demand whatever proof they require.

Recommendation No. 4.

I recommend Manitoba amend its legislation to remove any provisions that distinguish between the rights of a married and common-law partner to employee benefits.

Issue No. 5.

There are other obscure provisions in statutes that will have to be amended to make certain that married and common-law relationships are treated in the same way. The one I will refer to caught my attention when I was writing on the previous issue. The problem with the provisions is that they appear in the middle of a section and is not as readily apparent as those involving the use of terms such as "spouse" or "common-law partner." I suggest government ask its legislative

counsel and others familiar with specific Acts to examine them with the concept of equality of treatment in mind and ask them to propose amendments to remove any distinctions.

Section 3(1) of *The Civil Service Superannuation Act*, provides that surviving common-law partners are entitled to certain benefits, but 3(2) provides that if the board has not received written notice of a common-law relationship, and it pays out an amount under the Act, it is not liable for not making the payment to a common-law partner.

The section could well be challenged under the *Charter* as it appears to treat those in a common-law relationship in a different manner than those who are married. There is apparently no avenue of escape for the board if it fails to pay an amount that is due to a married person. As the section reads at the moment, it applies an additional obligation on a common-law employee.

If the word of an employee that he or she is married is all that is required, the same should apply to common-law partners. If a certificate of marriage or registration or some other proof is required of one relationship it should also be required of the other. Those matters are administrative in nature and should not be reflected in a statute, at least if they differentiate between employees.

It appears to me, instead of placing an additional onus on employees to report their living arrangements to it, the Board should have access to and rely on the human resource records that are kept by each department and centrally as well. It should of course be up to each employee to keep those records current and to indicate a change such as marriage, entry into a common-law partnership or the death of a beneficiary, if any of those events occur, and are reported to the employer, I cannot understand why there should be a responsibility to report changes to the Board as well.

My inquiries reveal that on becoming employed by the provincial government an employee must indicate whether he or she is single, married or living common-law and declare the date the relationship commenced. It is the responsibility of each employee to keep his or her statistics up-to-date. Presumably if a person does not wish to disclose the existence of a marriage or common-law partnership, he or she would not expect any benefits for a partner. It seems odd they now have to advise the board separately and it is possible, if that exists, they may have to advise other boards or offices as well.

Recommendation No. 5.

I recommend all statutes be examined for obscure provisions in legislation or other government requirements that might not be immediately apparent to persons dealing with an Act. Any and all provisions that impose additional conditions upon common-law partners should be removed.

Issue No. 6.

The rights of a child of common-law partners, or of one of the partners, including any child being cared for and raised by them, requires special attention.

I recommend all Manitoba legislation be examined and amended where necessary to ensure that all children receive the same support and succession benefits from their care-givers as do children of married parents. I recognize that adoption will permit children to obtain all the rights of a natural child but not all common-law partners adopt their children and those who are still married to another person cannot adopt.

A child is in a difficult position when its natural parent is living in a common-law relationship with someone who is still married to another. The law cannot force people to divorce, nor can it or should it force people who are living common-law to marry. The situation is different when looked at from the position of a child. To ask a question based on the discussion and declarations of the judges of the Supreme Court, why should all children not be entitled to receive the same benefits from their care-givers whether they are married, single, or common-law partners?

One option would be to permit common-law couples, where one is still married to someone else, to register a common-law partnership to confirm and record their present situation. Some may not want to do that, any more than they want to marry. For those that are caring for and raising children, it might be possible to include a statutory provision that, for the purposes of a particular Act, they be "deemed to be in a common-law relationship". That would provide their children with additional rights and the care-giver's choice could not diminish the rights of the children.

Children, like adults, are entitled to rely on the protection of s. 15(1) of the *Charter*. It would be a considerable task to examine all the legislation that deals with, or could deal with the rights of children in particular situations and I have not attempted to do that. The constitutional question alone, as it applies to the rights of children as individuals, will require careful consideration. All I wish to do is raise the issue for those dealing with property statutes on a regular basis to consider. I will nevertheless express my concerns and the changes I think, subject to further study, would likely be required.

The issue of protecting children being raised and cared for by common-law couples is of particular importance in Manitoba which has only recently recovered from the decision of the Manitoba Court of Appeal in **Carignan v. Carignan 22 R.F.L. (3d) 376** that permitted a man who had been living in common-law with a woman and her two children, to renounce the responsibility he previously had for the child who had been born to the woman before the common-law relationship began. Although the man had been *in loco parentis* to the child, that is, he was in the position of a parent to the child, the court's decision permitted him (and of course others in a similar position) to renounce that designation and responsibility. The decision was not appealed to the Supreme Court and remained in force in Manitoba between November 1989 and January 1999.

In the more recent Manitoba case of **Chartier v. Chartier [1999] 1 S.C.R. 242, 43 R.F.L. (4th) 1**, that I referred to when discussing adoption, the trial judge and the Manitoba Court of Appeal again relied on the *in loco parentis* principle and the decision in *Carignan*. The Supreme Court decision in *Chartier* in effect overturned the *Carignan* decision and confirmed the position taken by other western provinces, including that of the Alberta Court of Appeal in **Theriault v. Theriault (1984), 149 A.R. 210 (Alta. C.A.),** which held that a person who stands in the place of a parent cannot unilaterally withdraw from that relationship.

I mention the Reports of Family Law citation as it includes an editorial annotation by James S. McLeod, a recognized expert in family law. He said, during a lengthy review of the case, it "puts to rest the long-running dispute about whether a person who assumes a parental role to a partner's child can abandon that role by canceling his or her relationship with the child. The Supreme Court clearly rejected the right of a person who had accepted parental responsibilities to withdraw them.

In *Chartier* it had been agreed that the rights and obligations under *The Family Maintenance Act* and the *Divorce Act* were identical for the purposes of the court action and appeal. In addition to the quotes that I refer to at pages 20 in Part I of this report, Bastarache J., said, at page 20 of the R.F.L. report,

> Once a person is found to stand in the place of a parent, that relationship cannot be unilaterally withdrawn by the adult---the provisions of the *Divorce Act* that deal with children aim to ensure that a divorce will affect the children as little as possible. Spouses are entitled to divorce each other, but not the children who were part of the marriage. The interpretation that will best serve children is one that recognizes that when people act as parents toward them, the children can count on that relationship continuing and that these persons will continue to act as parents toward them.

At page 21 he added,

> Until Mr. Chartier's unilateral withdraw from the relationship, Jessica saw the respondent as her father in every way. He was the only father she knew. To allow him to withdraw from that relationship, as long as he does it before the petition for divorce, is unacceptable. The breakdown of the parent/child relationship after separation is not a relevant factor in determining whether or not a person stands in the place of a parent for the purposes of the *Divorce Act.* Jessica was as much part of the family unit as Jeena and should not be treated differently from her because the spouses separated.

At page 22 of the R.F.L. report Bastarache J. made a statement that is particularly apt to this discussion.

> Whether a person stands in the place of a parent must take into account all factors relevant to that determination, viewed objectively. What must be determined is the nature of the relationship. The *Divorce Act* makes no mention of formal expressions of intent. The focus on voluntariness and intention in *Carignan, supra,* was dependent on the common law approach discussed earlier. It was wrong. The Court must determine the nature of the relationship by looking at a number of factors, among which is intention. Intention will not only be expressed formally. The court must also infer intention form actions, and take into consideration that even expressed intentions may sometimes change. The actual fact of forming a new family is a key factor in drawing an inference that the step-parent treats the child as a member of his or her family, i.e., a child of the marriage. The relevant factors in defining the parental relationship include, but are not limited to, whether the child participates in the extended family in the same way as would a biological child; whether the person provides financially for the child (depending on ability to pay); whether the person disciplines the child as a parent; whether the person represents to the child, the family the world, either explicitly or implicitly, that he or she is responsible as a parent to the child; the nature or existence of the child's relationship with the absent biological parent. The manifestation of the intention of the step-parent cannot be qualified as to duration, or be otherwise made conditional or qualified, even if this intention is manifested expressly. Once it is shown that the child is to be considered, in fact, a "child of the marriage", the obligations of the step-parent, at this point, does not only incur obligations. He or she also acquires certain rights, such as the right to apply eventually for custody or access under s. 16(1) of the *Divorce Act.*

Referring to some of the concerns of the Manitoba Court of Appeal, Bastarache, J., also said,

> Huband J.A., in *Carignan, supra*, also expressed the concern that a child might collect support from both the biological parent and the step-parent. I do not accept that this is a valid concern. The contribution to be paid by the biological parent should be assessed independently of the obligations of the step-parent. The obligation to support a child arises as soon as that child is determined to be "a child of the marriage". The obligations of parents for a child are all joint and several. The issue of contribution is one between all of the parents who have obligations towards the child, whether they are biological parents or step-parents; it should not affect the child. If a parent seeks contribution from another parent, he or she must, in the meantime pay support for the child regardless of the obligations of the other parent.

The Supreme Court concluded its decision by saying,

> The respondent's unilateral withdrawal from the relationship with Jessica does not change the fact that he acted, in all ways, as a father during the time the family lived together. Therefore, Jessica was a "child of the marriage" when the parties separated and later divorced, with all of the rights and responsibilities which that status entails under the *Divorce Act*. With respect to support from the respondent, Jessica is to be treated in the same way as Jeena.

This case has changed the law in Manitoba but is equally important as an indication of the care that must be taken when amending and defining rights in legislative enactments. *Chartier* and *Theriault* discuss the use of the term *in loco parentis* and raise a question about its applicability today. I suggest that Manitoba discontinue its use, as has the *Divorce Act*, and use the term "stands in the place of a parent" used in the *Divorce Act* or what I consider to be the even better term alluded by Bastarache J. "has acted like a parent toward a child". Legislation should clearly indicate the extent of the responsibility of parents and of common-law partners towards the children in their care.

The Manitoba legislature could have amended its legislation when *Carignan* was initially released if it did not accord with the intent of the legislature. This is a good example of the division of powers in Canada and the responsibilities of courts and of parliament and legislatures. The court's task is to interpret and apply the law and the responsibility of the legislature is to make law. When a legislature disagrees with a decision of a court it has the ultimate authority to amend the law to correct any harm the courts have uncovered.

I recommend all Manitoba statutes that provide a child with rights and benefits on the separation or death of their natural parents be amended to extend the same rights to children who have been or are being raised by a common-law couple. If the same rights are not made available to all children, it is possible a successful *Charter* challenge could be launched on behalf of a child by a common-law parent or by the Public Trustee. If this change is adopted by government it may not be necessary to use the "deeming" provision I suggested earlier.

The question of determining whether a person stands or has stood in the place of a parent to a child depends on the circumstances and Bastarache J. gave some examples. It is possible if a child is in his or her later teens and is living independently or answers only to the natural parent the other might not fit the category, but in most cases where young children are being raised I would expect that common-law parents act toward them in the same manner they would a natural child.

Recommendation No. 6.

(a) Introduce legislation in appropriate statutes to provide that children raised by a common-law couple have the same rights they would have if their care-givers were married to each other.

(b) Replace the term *in loco parentis,* wherever it appears in provincial legislation, with "stands in the place of a parent to the child" or "acts or has acted like a parent toward the child".

(c) If necessary, provide that a single person and those in a common-law partnership become responsible for the care and support of a child being raised by them when they have acted like a parent toward the child.

(d) Provide that a child who is raised by a person who is not their natural parent, has the same inheritance rights with respect to them as if the person was a natural parent of the child.

Issue No. 7.

Many statutes do not define all the terms that are referred to in them. A "term" is any word that may be interpreted in a number of ways or can have more than one meaning. When a person comes across a term when reading or studying a statute, he or she should be able to look in the definition section to see the sense in which the word is used and to determine the extent of its meaning.

It may be necessary on occasion to give a word or term different meanings in different statutes but that should be avoided if possible. If a person refers to a statute and sees that the word is defined in a certain way, it would be a reasonable assumption that it is defined the same way in other statutes. If it is not, some confusion among those not intimately familiar with all the statutes is quite likely to arise.

An example of a term that appears in many statutes, but is not usually defined, is "family." Without going through all the statutes again, it is my recollection that the City of Winnipeg Act uses the term only once when dealing with conflict of interest. When I saw the term I looked for its definition but failed to find one. That is such a voluminous Act I may have missed other references to the term and might have missed a definition that appears with reference to only certain provisions. That aside, I should have been able to find out what relatives were intended to be included in the term "family."

In the *Adoption Act* " family" means:

> a "child's parents, step-parents, siblings, grandparents, aunts, uncles, cousins, any person in loco parentis to the child and the spouse of any of those persons." A minimal correction that will protect the provision from a *Charter* attack would be to add "common-law partner" after "spouse."

Rather than using all the plurals, I suggest that a clearer wording be developed. A more neutral definition might be:

> "family" includes a person's spouse, common-law partner, child, parent, brother, sister, aunt, uncle, niece, nephew, cousin, and grandparent.

Another term I suggest be defined in all statutes where the term is used, is "spouse." It is used a great deal but it is presently not defined. Some statutes now provide rights formerly enjoyed by spouses to common-law couples as well. If the present wordings prevail a statute may say that the word "spouse when referred to in this section" means or includes --- but that still does not define the basic term.

In addition to clarifying exactly what the term means, government might want to include a definition of the term "spouse" to address the concern of those who feel that the institution of marriage is being diminished or is losing its identity. I have no legislative definition to follow but suggest that something like the following might be appropriate.

> "spouse" means the partner of a man or a woman who are married to each other.

Immediately after a spouse is defined each statute should, as I have indicated a number of times, include a definition of a "common-law partner" and "common-law partnership." My suggestions are,

> "common-law partner" means a person who is living with another in a conjugal relationship.
>
> "common-law partnership" means two persons who are living together in a conjugal relationship.

I think, although it is difficult to define "conjugal relationship" in a few words, it might be well to define it even though the Supreme Court explanation of the term in *Maldowich* would be difficult to reduce to a few words. Although a better one can likely be developed, the following might suffice:

> "conjugal relationship" means two people who live together in a personal or marriage-like relationship.

The term “dependant” often appears in the middle of a statute and only applies to certain sections. If it is possible to do so I suggest its definition appear in Section 1 and apply to the whole Act. It is also my recollection that the term is not defined in the same way in every Act.

As the issue was raised by a number of people with whom we spoke, government might also wish to examine the term “nearest relative” that is used in some health related statutes to make sure a common-law partner has the authority to provide a consent.

Recommendation No. 7.

(a) Define “common-law partner” as

a person who is living with another in a conjugal relationship.

(b) Define “family” as

a person's spouse, common-law partner, child, parent, brother, sister, aunt, uncle, niece, nephew, cousin, and grandparent.

(c) Define “spouse” as

the partner of a man or a woman who are married to each other.

(d) Define “conjugal relationship” as

two people who live together in a personal or marriage like relationship.

(e) Develop a common definition of “dependant”.

As I conclude this Part on property I would like to emphasize again if changes in legislation are being made, and they have to be, they should treat all individuals the same. Amendments must remove any hint of stereotypical distinctions between individuals and between different forms of personal relationships.

Part IV

REGISTRATION OF COMMON-LAW PARTNERSHIPS

Introduction

The registration of common-law relationships was not specifically referred to in our terms of reference, but it was raised during our consultations in connection with adoption and property issues. There was considerable interest in the concept of registering common-law relationships. The majority of those with whom we spoke, even if they were previously unaware such a system existed, seemed to favour the concept. A few did think it was of no value at all and some others said they couldn't see how the system would help to equalize rights.

It is possible therefore, that Ms. Cooper and I have different opinions about the degree of support there was for a registration system. Our opinions may have been influenced by the persuasiveness of some presenters, our own reactions to comments that were made, or by our reactions to the systems that exist.

After hearing of two registration systems, I became even more impressed, not so much by the systems themselves, but by the possibilities they raised. After our second meeting, I asked almost everyone with whom we met, what they thought of a system that would enable common-law partners to register their relationship. I may have taken particular note of the comments that supported registration.

During our meetings, we never did discuss the equalization of all rights between common-law and married couples and I had not yet explored the second line of cases I referred to in Part III of this report. During our consultations we were concentrating on the rights of same-sex couples to adopt. By the time I had completed my review of the case law I became convinced with there were benefits a system of registration could provide.

After reviewing the systems that now exist in some detail and seeing what is happening in other parts of the world, I arrived at the opinion they would fit in our legislative system but that Manitoba could establish its own unique system for the registration of common-law partnerships. The following will indicate how I came to that conclusion.

Consultations

The question of registration arose during our first meeting when consultants discussed the Nova Scotia approach to same-sex adoption. In Nova Scotia common-law couples, whether they are of the same or another sex, may register their "domestic relationship". Its attraction to those who support the approach was it immediately entitled those who registered to the rights and benefits of a “spouse” under a number of provincial statutes.

Some with whom we spoke were absolutely opposed to doing anything that might enhance the rights of common-law couples, believing that any such movement would diminish the strength and standing of a marriage. Any other relationship that was similar to a marriage was dismissed out of hand. One person felt all children should have the same rights *vis a vis* their care-givers as other children, including the same rights of succession to property. She inferred that children in a common-law relationship do not have all the rights they should have at the present time. She said she would be in favour of a system of registration if it provided more rights for children

Some who thought a registration system might be beneficial liked the thought of a system that would give greater recognition to the position of same-sex couples. Churches, with a few exceptions, do not perform commitment ceremonies. The opposing view, that was not expressed in so many words, was that gay and lesbians, whether living together or not, are not worthy of support, should have no additional rights, and certainly should not have their relationship to one another legally recognized.

Another who was concerned about the waiting period required of common-law partners before they receive certain employee benefits, said statutes should be amended to provide the same rights and did not see how the registration of a common-law partnership would improve the situation. She favoured the federal legislation that provided benefits when a common-law relationship has existed for one year.

Another felt an advantage of creating a registry would be, pending a final decision by the courts on same-sex marriage, it would allow same-sex couples to have access to various rights immediately. Others opposed the registration of common-law relationships as they were in favour of common-law couples being able to marry. They felt certain that change is coming and did not want to see another system put in place that might delay the right to marry. Others who felt the marriage of same-sex couples will eventually be approved, said that the registration of partnerships would be a good interim measure and might hasten the day when marriage is possible.

Two gay men said, “registration is always valuable.” They suggested it would enable relationships to be immediately recognized without having to wait the year or three years that now appears in some amended statutes. One advised there is still a problem having a common-law partner recognized as a common-law spouse by personnel in the provincial Pensions Benefits office. Registration, he said, would provide more rights and responsibilities. Both felt children should have the same rights from all care-givers.

One of the School Trustees to whom we spoke has teen-age children but no agreement with her common-law partner. She would prefer to see a Common Law Union “in the meantime” rather than Nova Scotia’s registration system. She too seemed to assume that, before long, same-sex partners would be able to marry.

Several representatives of Child and Family Service Agencies told us gay and lesbian people are now adopting children, but not as couples. They believe changes to the *Adoption Act*, not registration, is what common-law couples require if they wish to jointly adopt a child. The agencies do their own careful screening of adoption applicants and said a registration system would not change their process or responsibilities.

The representatives of labour organizations believed permitting couples to join in the adoption of children would strengthen the family unit. They were nevertheless interested in registration if it would add to the protection of children and the extension of their property rights. They hadn't considered the matter and were unsure if registration would help.

A lawyer and board member of Adoption Options (Manitoba) Inc. suggested “registration is the only way to go.” He pointed out that you register a marriage and there are rules that flow from that. He said: “It is a voluntary decision. If people register they accept the rules that apply. With registration, you know when the association began.” He also believed the registration of a relationship would be good for children and their need for support and estate benefits. He suggested childrens’ rights should be the same for all whose "parents" are married or are same or opposite-sex partners.

The Executive Director of EGALE in Ottawa spoke to us by telephone. His main concern was to see same-sex couples able to jointly adopt children and he did not think that goal would be advanced by having a system that would register common-law partnerships. He nevertheless made an interesting comment that may indicate an advantage of registration if it adds stability to a relationship. He said, in written material that followed our discussion:

> It is hardly in the best interests of the child to deny him or her the emotional, psychological and legal benefit of having two parents recognized at law. A law which fails to recognize the equal co-parenting roles of the two partners in a relationship places one partner in a legal limbo, and creates inequalities within the relationship. The non-legal parent may not be recognized for the purpose of making medical or care-related decisions about the child, or may lack authority to deal with the child's educational needs. If the legally recognized parent is ill, unavailable or dies, the non-legally recognized parent may find that his or her relationship to the child is not recognized or respected.

A National Vice President of REAL Women, who we also spoke to us by telephone believes that marriage is unique and should have priority. At the same time she felt if common-law partners are going to receive benefits they should have the same responsibilities as other people. She stated as well, that all children should have succession rights with respect to those that raise them. She made no comment on registration that I noted.

The Director of Research for Focus on the Family of Vancouver felt registration would be beneficial as it is close to a married relationship. He said same-sex couples should have the same obligation as others to provide support for one another and child support.

At the second of our meetings we again discussed the Nova Scotia system and, for the first time, heard of a Civil Union. The Manitoba Human Rights Commission told us of the system that has been established in the State of Vermont. It suggested their approach is preferable to the registry system in Nova Scotia that only deals with property interests, and urged us to recommend the establishment of a Civil Union system in Manitoba. The Chairperson kindly left with us a copy of the enabling statute and a variety of other material that describes how the system works.

Another representative of the Human Rights Commission, while supporting a registration system, pointed out that people voluntarily enter into a marriage and there are legislated rules that apply to married couples. A marriage is registered in a government office and the status receives legal recognition. He said a similar system should be established in Manitoba so common-law couples can register their relationship and receive recognition of its existence.

Our final meeting was with Mr. Barry Effler, the Deputy Registrar General for Manitoba and District Registrar of the Winnipeg Land Titles Office. He made it clear that his comments were personal and were not to be construed as the official position of either The Property Registry or the Department of Consumer and Corporate Affairs.

His was nevertheless a very significant presentation and he was very open with us on some of the problems that now exist and how they might be dealt with in the future. His comments provided another perspective on a number of matters, some of which I referred to when writing on property, but I have chosen to include his comments in this part of my report as they raise issues that bear directly upon the registration of common-law relationships. They also raise a number of other issues government will want to keep in mind when amending legislation.

He made the point that he "took no sides" on any registration debate, but is looking at the possibility from the practical position of someone who has to deal with the registration of various instruments affecting interests in real property on a daily basis. In a written memorandum he forwarded after our meeting, he said, "the relationship, whatever it is called, should be registered somewhere."

He also made the more general comment:

> I ask that whatever approach you select with regard to both common-law spouses and same-sex common-law spouses that you keep in mind the principle that administrative bodies will require the ability to be certain as to who is in these relationships and (who) are qualified (to receive) the rights granted by legislation.

He said the *Homesteads Act*, *Powers of Attorney Act* and the *Real Property Act* are constantly being examined by him and his staff to determine what rights a spouse now has in certain situations. He said it is imperative that government define a "common-law relationship",

"common-law partner" or "domestic partnership", if any of those or similar terms are used, and that they be the same in all property statutes.

In addition to registration, we also discussed the deregistration of a common-law relationship, and he said the Land Titles Office could create a "Notice of Termination of Homestead" if the legislation called for one. He asked the rhetorical questions: "If there is not a termination, when does a common-law partnership end? Is it one year after a separation, or should someone be able to apply to court for an order of termination if the other partner won't sign a termination?

He suggested that if there is to be a registration of a "common-law partnership" under the *Vital Statistics Act*, the name of the parties should be able to be amended as they are on marriage. A common-law wife, for example, might wish to adopt the surname of her partner, or visa-versa. The exact names are important for Land Registry purposes.

Under the existing rules, he told us the Land Titles Offices do not recognize common-law spouses for any purpose under the *Homesteads Act, Power of Attorney Act* or the *Real Property Act.* Other statutes that provide some rights of support on separation do not apply to the Land Titles system. He thought there could be a registration system and requirements in the *Real Property Act*, but rejected that, as its provisions would then have a limited application.

Mr. Effler said his office would have no difficulty administering a regime in which a certificate of domestic partnership could be obtained and where the same rights now enjoyed by a spouse under the *Homesteads Act* would be available to a common-law partner. A certificate proving the registration could be filed in the Land Titles Office. He said certainty is their key problem but they would have no difficulty with a system permitting someone to be registered as a spouse by marriage or as a domestic partner.

He indicated the situation of opposite sex common law partners is much more difficult. Unless the parties are prepared to enter into some kind of formal acknowledgement of their relationship by the registration of a domestic partnership or by marriage, he could not see how the *Homesteads Act*, as it is now worded, could apply to opposite-sex partners. He suggested it might be possible to codify the relevant trust law on this issue and provide rights under that regime instead.

He cautioned that if a registration system is to be introduced, the legislation should be precise so there would be no possibility of a number of persons qualifying as a spouse or domestic partner and both having rights under the *Homesteads Act.* Even the present scheme raises concerns as to whether a divorce terminates pre-existing homestead rights. The same issue might arise following the termination and de-registration of a common-law partnership.

I merely raise these issues at this time as ones that should be kept in mind, not only if a registration system is instituted, but also if amendments to property legislation are made to add the words "common-law partner" after "spouse" in a number of statutes.

Advice and Recommendations

At the present time, many people living in "common-law" are not in a very stable relationship. Some relationships are of short duration while others continue as long as a marriage. The rights of the partners (assuming for the moment there are no children) are either tenuous or non-existent. Excluding the rare "palimony" suits, the partners have no right to claim against one another for financial support or estate benefits.

While the decision not to marry is often mutual, sometimes one of the partners would like to marry but the other refuses. They may not want to be "tied down." That term sometimes means they do not want to assume the legal obligations that come with marriage. My personal view is that situation should not be able to continue indefinitely, and although I am not proposing it, it may be that all the requirements to support a partner should apply after the parties have been living together for (say) two or five years. Otherwise, on separation, it is often society at large that has to assume the support of the one who is unable to care for themselves.

A common-law relationship is looked upon by many, and by the legal system itself, as a loose arrangement between two people that can be terminated at the whim of either of them. The parties voluntarily take the risk, no matter how many years they live together, of having no right to financial support if they separate and no right to the estate if their partner dies. That situation can sometimes be corrected by a properly drawn and executed will, but as we were told in a pitiful letter we received in response to our advertisement, everyone doesn't get around to making a will. The person I speak of was left penniless when her long-time partner died.

If a child is born to a common-law couple, the situation improves somewhat. The mother becomes entitled to financial support from the male partner if they separate and the woman is still caring for the child. The opposite also applies if the man has custody. As far as I am aware, unless there have been recent changes in the law or cases on point, the situation of children whose parent and another are in a common-law relationship is still tenuous. The right of a child to inherit any of the assets of the non-parent partner do not exist, even if the child is the closest living "relative."

Even though *Chartier* corrected the *in loco parentis* problem, I am still concerned that common-law partners might be able to escape their responsibility to a child they have raised. I would like to see legislation to provide the children raised by common-law couples with the same rights, against both partners, a child has against natural parents.

Government has tried, over the years, to provide as much protection as possible for common-law spouses and their children, but it is clear it has never addressed the situation from the standpoint of providing the same benefits to a common-law partner as those provided to a "spouse". It has never addressed the problem by saying children of common-law couples have the same rights as children of married parents. The problem, in part, has been that common-law couples and children have been treated as a less deserving category. The Supreme Court has pointed out that can no longer be done. It is discrimination.

If couples are entitled to commit themselves to one another in a marriage, those who choose not to marry should also be able to commit themselves to one another in a similar manner. Even those who are still married to another should be entitled to register their current relationship. If they have or are raising children I suggest they be "deemed to be common-law partners" for the purpose of all legislation that deals with the rights of children.

I believe government should seriously consider the establishment of a system for the registration of common-law partnerships. By officially recognizing the existence of a common-law partnership, it would cloak it with an aura of permanence and stability that does not exist at the present time. It would certainly make the proof of its existence easier to establish. It would not give marital status to the registrants but it would provide a recognition that would be important when legislative rights and responsibilities are being considered.

A registration would be of value when estate and property matters are being recorded or are in dispute. Certainly, when property is being dealt with in the Land Registry System, a certificate of registration would provide the sort of proof that is required. It would answer some of the misgivings I had during our consultations about how government, the administrators of various departments and services and the courts, would even know if a common-law partnership exists. A certificate of registration would also indicate a degree of permanence when matters such as adoption are being considered.

It would enable people to advise their employer of their status so they would be assured of receiving conjugal benefits and it would address the problem with the *Civil Service Superannuation Act* that I referred to when dealing with property. The problem would be cured if a certificate proving the registration of a common-law partnership were on file with government or could be obtained by its departments. I can foresee that in a civil action dealing with the ownership of or succession to property an argument could arise as to whether the surviving partner was actually a common-law partner of the deceased or merely a friend who had been living with him or her. If a system of registration were available, common-law couples could formalize their arrangement and protect themselves from that sort of attack.

The problem of determining when a common-law union actually began will continue to exist, at least for those who do want to register their partnership. As one who discussed a variety of issues with us, so eloquently put it: "When does it move from "shacking up" to some sort of legal status"? He added the rhetorical question of how long a person has to wait to acquire "status"? His remark was made while commenting on the Civil Union provisions in Vermont but to answer his perfectly reasonable concerns, I say – there is only one way I can think of – register the relationship.

If there were a system of registration, it might be necessary to offer some incentives to encourage common-law couples to register. One might be to require the presentation of a certificate of registration before receiving benefits. Another would be absolutely necessary, that is to receive benefits with respect to the ownership of land

The benefits to a same-sex couple and the children raised by them could be equally dramatic. With the registration of their common-law partnership their partnership would receive legal

recognition and the extent of their rights and responsibilities could more easily be defined or equated with those of married couples. The presentation of a certificate would enable them to acquire rights within the school and medical systems that are now denied to one partner.

I apologize if I mention the Supreme Court decisions too often, but is important to keep their decisions in mind. The Court has said that it is the law itself, the Canadian Constitution, that recognizes the equality of all people, and if the Manitoba government responds to those directives it will not be making new law or breaking new ground, it will only be recognizing a reality. The opening words of the *Charter* are: "Everyone is equal before and under the law and has the right to the equal protection and equal benefit of the law". A child is of course included in the term "everyone" and is entitled to receive the same benefits as all other children.

The Supreme Court's message to lawmakers is to be certain that legislation is drawn and amended with the equality principle in mind. Any citizen, including a child, may challenge any provision in a statute that does not treat them equally or imposes restrictions on their access to a benefit provided to others. The message to a judge and a court is that, if a challenge is raised, they must strike down any legislative provision that departs from the principle of equal protection and benefit.

The government may have to re-think its approach to the amendment of its property and other statutes to see that all the rights of common-law couples and children are the same as those in a marital situation. One of the stumbling blocks, if that were attempted, would be the question of proof. How would government be satisfied, or how would an individual prove that they are in fact a "common-law partner" or that they are in a "common-law relationship?" If registration is introduced it would answer those questions, at least for those who take advantage of it.

When dealing with property, I suggested that the one and three year waiting periods for common-law couples to receive benefits be removed. If some proof of the existence of a stable relationship is nevertheless required in certain cases, that would not be necessary or appropriate where a certificate of registration is produced. It would permit those who present a marriage certificate and those who present a certificate of a common-law partnership, to be treated in the same way and to receive the same benefits.

The requirement to register a relationship, instead of having to provide other proof of the existence of it, should not impose an unreasonable burden on common-law partners wishing to obtain benefits. As one consultant said: "You have to register a marriage to receive the benefits of being married."

Existing Systems Which Record Common-law Associations

Nova Scotia

Section 52(a) of The Vital Statistics Act of Nova Scotia provides that a "domestic partner" means an individual who is a party to a registered domestic-partnership declaration made in

accordance with section 53. The term does not apply to a relationship that is not registered. The effect of a registration is that:

> Upon registration of a domestic-partner declaration, domestic partners, as between themselves and with respect to any person, have as of the date of the registration the same rights and obligations as
>
> (a) a spouse under the *Fatal Injuries Act*;
> (b) a spouse under the *Health Act*;
> (c) a spouse under the *Hospitals Act*;
> (d) a spouse under the *Insurance Act*;
> (e) a spouse under the *Intestate Succession Act*;
> (f) a spouse under the *Maintenance and Custody Act*;
> (g) a spouse under the *Matrimonial Property Act*;
> (h) a spouse under the *Members' Retiring Allowances Act*;
> (i) a spouse or a person who is married under the *Municipal Government Act*;
> (j) a spouse under the *Pension Benefits Act*;
> (k) a spouse under the *Probate Act*;
> (l) a spouse under the *Provincial Court Act*;
> (m) a spouse under the *Public Service Superannuation Act*;
> (n) a spouse under the *Teachers' Pension Act*;
> (o) a widow or widower under the *Testators' Family Maintenance Act*;
> (p) a wife or husband under the *Wills Act*;
> (q) a spouse under the *Workers' Compensation Act*,
>
> and the domestic partners, the registration of their domestic-partner declaration and their domestic partnership are subject to and give rise to the same operations of law that relate to those classes of persons under those Acts and those Acts apply *mutatis mutandis* with respect to the domestic partners, the registration of their domestic-partner declaration and their domestic partnership.

Section 55(1) provides that a domestic partner becomes a former domestic partner where "the parties" file an executed statement of termination, where they have lived apart for more than one year and one or both intend that the relationship not continue, where one of them marries, or where they have registered an agreement with the court under the Maintenance and Custody Act.

Section 57, in Part II of the Act that deals specifically with domestic partners, provides that the Registrar shall note on the register the termination of a domestic-partner declaration---upon the receipt of:

> (a) a statement of termination in the prescribed form signed by both domestic partners."

There is no provision which permits only one of two domestic partners to register a statement of termination, nor is there any proceeding in the legislation by which a court can make an order that a domestic partnership has come to an end. It is possible that jurisdiction comes within the

inherent jurisdiction of a court of superior jurisdiction, but it is not referred to in the statute and there has apparently been no such application to date.

On the other hand, under Section 40, where an application for the registration of a domestic partnership has been refused by the Registrar, a person may apply to the court to require the Registrar to accept the registration.

Section 36 provides that any person may have the Registrar of Vital Statistics search for the registration of a birth, marriage, adoption and other matters, including the registration and termination of a domestic partnership. A Registrar's report will indicate whether those matters are registered or recorded and give the registration number, but no further information. Section 37 provides that, by a separate application, a certificate may be obtained, which includes the names of the parties, the date of registration and some other particulars.

Section 39(1) provides that every certificate issued under section 37 "shall be admissible in any court in the Province as *prima facie* evidence ---of the facts recorded therein." It should be noted that the *prima facie* presumption is limited to the courts. In my opinion it should be wider than that and be *prima facie* proof for all purposes. It should be all the proof that a department of government needs and it should carry the same weight as a marriage certificate, unless there is some reason to question the validity of either certificate.

Nova Scotia is the first Province in Canada to establish a formal registration process, through the office of Vital Statistics, that gives legal recognition to a domestic partnership. In providing for the registration of a relationship and the issuance of a certificate to prove its registration, it has provided government sanctioned proof, not only of the existence of a partnership, but the date when it was declared to have commenced and of course the date on which it was registered.

In spite of this initiative, and the fact that the system is still in its infancy, there are some features of the system that could not be adapted to the manner in which common-law partners are now recognized in Manitoba statutes. Instead of amending each statute to have it extend rights to common-law partners, as Manitoba did with Bill 41, Nova Scotia has indirectly extended the definition of "spouse" and spousal benefits but only to those who register.

I do not care for this indirect manner of providing spousal rights to common-law partners in any event. Nova Scotia did not redefine "spouse" but provided spousal benefits to those who register. I think Manitoba should stick with its current method of adding benefits to common-law partners on a statute by statute basis. The benefit of the Manitoba system is that each statute is complete in itself and stipulates the rights and responsibilities that exist. In Nova Scotia it is necessary to examine the *Vital Statistics Act* to see if spousal benefits have been added to a particular statute or not.

There are also some omissions I think might cause problems later on. Although the process of registration of a common-law relationship is carefully set out, the only way a relationship can be de-registered is if the parties jointly file a statement that it has come to an end. There will likely be situations where partners separate and where one of them will refuse to sign a de-registration. It should be possible for only one of the partners to file a de-registration. If there is a dispute

about the propriety of a de-registration there should then be an opportunity to have the matter resolved by a judge. That option does not exist in the Nova Scotia system.

Another option would be to provide that a partnership can only be dissolved and de-registered on the order of a judge. Like divorce, the consent of both partners would make the order easy to obtain, but there would be a formally recognized end to the relationship. Similarly, if there are outstanding property and child support issues, the parties could have them resolved by a court at the same time.

De-registration could be important for an employer that continues to pay benefits to a former partner and of course keeping its records current would also be important for government and others who may have relied on the existence of a common-law partnership. There should probably be provisions permitting the recovery of unwarranted payments made after a termination has occurred and a court should have jurisdiction to deal with that as well. It should certainly be possible for a person who is asked to rely on the veracity of a marriage or a registered partnership to challenge its *bona fides* in court.

The Nova Scotia registration system became effective on June 4, 2001 and by December 14, 2001, 94 couples had registered. A record of the sexual orientation of the registrants is not kept but a person in the registry office believes that most who have registered to date are in a same-sex relationship.

Recommendation No. 1.

I recommend the Nova Scotia Registry system not be introduced in Manitoba.

Ontario

The *Ontario Family Law Act* provides for the making of agreements by common-law partners. Section 53 follows a sub-heading entitled *Cohabitation Agreement,* and provides:

> 53 (1) Two persons of the opposite sex or the same sex who are cohabiting or intend to cohabit and who are not married to each other may enter into an agreement in which they agree on their respective rights and obligations during cohabitation, or on ceasing to cohabit or on death, including,
>
> (a) ownership in or division of property;
>
> (b) support obligations;
>
> (c) the right to direct the education and moral training of their children, <u>but not</u> the right to custody of or access to their children; and

(d) any other matter in the settlement of their affairs.

53(2) If the parties to a cohabitation agreement marry each other, the agreement shall be deemed to be a marriage contract.

Section 54 and 55 provide:

54 Two persons of the opposite sex or the same sex who cohabited and are living separate and apart may enter into an agreement in which they agree on their respective rights and obligations, including,

(a) ownership in or division of property;

(b) support obligations;

(c) the right to direct the education and moral training of their children;

(d) the right to custody of and access to their children; and

(e) any other matter in the settlement of their affairs.

55 A domestic contract and an agreement to amend or rescind a domestic contract are unenforceable unless made in writing, signed by the parties and witnessed.

The contracts are subject to the best interests of the child.

56(1) In the determination of a matter respecting the education, moral training or custody of or access to a child, the court may disregard any provision of a domestic contract pertaining to the matter where, in the opinion of the court, to do so is in the best interests of the child.

The contracts are subject to child support guidelines.

56(1.1) In the determination of a matter respecting the support of a child, the court may disregard any provision of a domestic contract or paternity agreement pertaining to the matter where the provision is unreasonable having regard to the child support guidelines, as well as to any other provision relating to support of the child in the contract or agreement.

56(4) A court may, on application, set aside a domestic contract or a provision in it,

(a) if a party failed to disclose to the other significant assets, or significant debts or other liabilities, existing when the domestic contract was made;

(b) if a party did not understand the nature or consequences of the domestic contract; or otherwise in accordance with the law of contract.

I have made inquiries in Ontario and it appears there is no requirement to register a cohabitation agreement. The statute nevertheless provides guidance to common-law couples on matters that

could be contained in an agreement they would like to have but if Manitoba statutes cover all of these matters there would be no need for an agreement.

Ontario limits the use of the agreement to couples who are not married to each other. The provision does not say that those entering into the cohabitation agreement, or one of them, cannot be married to someone else. I think that is an important distinction, as I believe the same approach should be taken when Manitoba statutes are being amended. It should be possible for all types of common-law relationship to be registered.

Recommendation No. 2.

I recommend the Ontario provisions not be included in Manitoba legislation.

Vermont

The Civil Union system in Vermont, that was brought to our attention by the Manitoba Human Rights Commission, is very comprehensive and permits same-sex couples to enter into a formal state-supported relationship. As *The Vermont Guide to Civil Unions* explains, "This law permits eligible couples of the same sex to be joined in civil union."

It permits a same-sex couple to obtain a license, deliver it to an official authorized to certify a civil union - a judge, justice of the peace or member of the clergy, and a ceremony of union may then take place. A possible form of ceremony is included in the explanatory literature. It contains wordings such as:

> Will you_____have_____to be united as one in your civil union? I_____take you_____to be my spouse in our civil union, to have and to hold from this day on, for better, for worse, for richer, for poorer, to love and to cherish forever. The officiating person concludes the ceremony (which may adjusted as the parties wish) by saying "I hereby join you in civil union."

There are a number of policy statements in the Act

Section 1(3) says:

> The state's interest in civil marriage is to encourage close and caring families, and to protect all family members from the economic and social consequences of abandonment and divorce, focusing on those who have been especially at risk.

1(7) The state has a strong interest in promoting stable and lasting families, including families based upon a same-sex couple.

1202 Where a civil union is to be established in Vermont, it shall be necessary that the parties to a civil union satisfy all of the following criteria:

(1) Not be a party to another civil union or a marriage.

(2) Be of the same sex and therefore excluded from the marriage laws of this state.

1204

(a) Parties to a civil union shall have all of the same benefits, protections and responsibilities under law whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage.

(b) A party to a civil union shall be included in any definition or use of the term "spouse," "family," "immediate family," "dependent," "next-of-kin," and other terms that denote the spousal relationship as those terms are used throughout the law.

(c) Parties to a civil union shall be responsible for the support of one another to the same degree and in the same manner as prescribed under law for married persons.

(d) The law of domestic relations, including annulment, separation and divorce, child custody and support and property division and maintenance shall apply to parties to a civil union.

1206 Dissolution of Civil Unions

The family court shall have jurisdiction over all proceedings relating to the dissolution of civil unions. The dissolution of civil unions shall follow the same procedures and be subject to the same substantive rights and obligations that are involved in the dissolution of marriage ---

5001 Vital Records; Forms of Certificates

Certificates of birth, marriage, civil union, divorce, death and fetal death shall be in the form prescribed by the commissioner of health and distributed by the health department.

In view of what we heard during our consultations, and the submissions made to the committee meetings when Bill 41 was being considered, I think it fair to say that any consideration of the Vermont Civil Union would be considered very *avant garde* in Manitoba and would be

denounced by many who believe in the sanctity of a marriage between a man and a woman. Any encroachment on that institution by establishing a secular union, would be met with opposition.

A number of gays and lesbians would also oppose such a move in the belief that such an approach might distract the federal government from permitting their marriage. Some gays and lesbians, we were told, want nothing to do with marriage. I am uncertain whether that attitude would also result in opposition to a civil union.

Those opposed to special rights being accorded to same-sex couples would be upset with a civil union but it is my assessment that a less formal registration of an existing common-law partnership would not engender the same emotional response. I believe most members of the public would support a system that would offer greater protection to those living common-law and to any children being raised by them.

Quite apart from those issues, the major problem with the Vermont legislation is that it only applies to same-sex partners. Giving special rights to them would discriminate against heterosexual partnerships and would therefore be struck down as contrary to the Canadian *Charter*.

If Manitoba were to establish a regime that is similar to a marriage it might also be struck down if the government of Canada, or those opposed to the concept, chose to challenge it. Marriage comes within federal jurisdiction in Canada and Manitoba would be well advised to stay well away from that topic. I suggest the question of common-law marriage be left to the Government of Canada to consider or to the Supreme Court of Canada to rule upon if an appropriate case comes before it. On the other hand, although challenges have now been launched I see nothing to indicate that the Supreme Court is about to rule that any two couples may marry.

If Manitoba establishes a registration system it might include in its establishing legislation, some of the purposes of the registration in Vermont. In that way the public could be advised that the purpose of the legislation is to provide proof of the existence of a common-law partnership, to indicate its stability, and to indicate that it will strengthen the responsibility of common-law couples to care for and support one another and any children they are raising.

Recommendation No. 3.

I recommend a Civil Union similar to that in Vermont not be established in Manitoba.

Quebec

It was only when I was putting the final touches on my report that I became aware of the Quebec draft of an Act (un avant-projet de loi) to which the Minister of Justice is seeking public reaction.

The Bill would amend the Civil Code and other legislation to establish a civil union to provide same-sex couples with the opportunity to formalize their relationship and to receive the same advantages, rights and obligations as married people under provincial law. In 1999 the National Assembly had extended rights to common-law couples (conjoints de fait) and same sex couples have been able to adopt children since 1982.

The Bill provides homosexual couples with the same rights as heterosexual common-law couples. Amendments, for example, replace "his spouse" with "his or her married spouse or partner" and "spouses" with "married spouses or partners." Although it is difficult to determine the exact effect of the changes, it appears that a civil union can be solemnized by anyone who is now authorized to marry people. It is that person who will have to forward the prescribed form to the registrar who records marriages. To protect the clergy from doing something their conscience does not allow, there is a provision that no minister of religion is compelled to solemnize a civil union.

The civil union may be dissolved by a joint declaration executed before a notary, if the parties agree, or by a court if they do not. The court may, while dissolving a union, deal with the payment of support by one partner to the other, custody, the maintenance and education of the children and gifts made by one partner to the other while they lived together.

The rationale for taking this step, according to the Minister's (version francaise) release, is that the 1996 recensement (census) figures showed 20% of couples in Quebec, of which 3% are of the same sex, to be living common-law. The other reasons given are that the proposal respects the evolution of society and responds to needs expressed by the population.

I would be surprised if the Quebec statistics apply in Manitoba or that there would be general support for the establishment of a Civil Union in Manitoba at this time. My other concern with adopting the Quebec approach is that, in Manitoba, many opposite-sex common-law couples would still be excluded from the benefits that system extends. I certainly do not dismiss the Quebec approach out of hand. It contains a number of provisions that could well be applied to a registry system in Manitoba. It may also be an indication of changes yet to come.

Recommendation No. 4.

I recommend the Quebec form of Civil Union not be introduced in Manitoba.

Europe

As I was obtaining further information from Vermont I found that forms of registering relationships exist in other countries as well. My inquiries, as superficial as they were, indicate there are a variety of systems in place in the United States and in Europe. The following

information on Europe is included as a matter of interest. I have not analysed any of them in detail but they do indicate the extent of the movement towards the registration of non-marital relationships.

London, England established a Partnerships Register in September 2001. Any same-sex or heterosexual couple can register their relationship. The register is confidential but couples receive a certificate showing they have registered. People cannot register if they are married or are in another relationship that is already registered. A partnership may be de-registered by at least one party notifying the Partnership Register Manager in writing. In that case the original entry remains but is marker "De-registered".

In France, Civil Solidarity Pacts were initiated in 1999. Same sex and opposite sex couples can present a joint written submission to a local Court. On registration, the couples "owe each other mutual and material help" and are "jointly responsible for debts incurred by either of them in the course of everyday life" and any heritable property acquired while in a registered partnership is deemed to be owned jointly. 46,000 couples registered in the first year and it is estimated that 50-70% of them are of the same sex.

Germany established registered "Life Partnerships" for gay and lesbian couples in August, 2001. These provide some of the benefits of a traditional marriage and a court order is necessary to terminate the partnership. These couples do not have the right to adopt children, but if one of the partners already has a child, the other has custody and other decision-making rights.

The Netherlands began registering same-sex and opposite-sex partnerships in 1998. Its system appears to provide marital rights and the new marriage law permits those who have already registered a partnership to convert it into a marriage.

Denmark, Greenland, Iceland, Norway and Sweden, between 1989 and 1996, all provided for the registration of domestic partnerships. In Denmark there is a fairly formal ceremony reminding the couple of the importance of the promises they are making to each other and in which the municipality expresses the wish that throughout their partnership they will live together in a harmonious and meaningful relationship.

Manitoba Common-law Registry

Having commented on the benefits I believe a registration system would provide and on the systems I suggest Manitoba not adopt, I will now move to a consideration of how a system that would enable common-law partnerships to be registered in Manitoba might be established.

As in Nova Scotia, I believe the Vital Statistics Office is the place where a registry system could most easily and effectively be established. That office deals with the recording of births, deaths, marriages, adoptions and other matters. As the name indicates, it is the place where personal information is recorded. It would not be difficult to add a provision for the registration of common-law partnerships and any special rules that would apply to them.

The Manitoba *Vital Statistics Act* permits registrations to take place throughout the province as each Municipality and unorganized territory, as well as other areas that are annexed to them, is designated as a "registration division." Each has its own district registrar appointed by the Minister. Applications for registration are submitted on a prescribed form and the person submitting an application has to satisfy the district registrar that the information is legitimate and that the form is properly completed. If not satisfied that an application is legitimate, the registrar may reject the application. The rejection may then be appealed to a court.

Searches and requests for certificates are not provided locally but must be directed to the director, who may conduct an investigation or a hearing to make certain no unlawful or improper use will be made of the information. There are provisions in place to protect the privacy of the information provided by a registrant and the Act contains a provision that if there is any inconsistency, the provisions of the *Vital Statistics Act* prevail over those of the *Freedom of Information and Protection of Privacy Act*.

A search may be made for research or statistical purposes but only if the director is satisfied the information is essential to the research and has received a written undertaking not to disclose the contents of the record in any way that would identify an individual. The registrar must, in any event, make his or her own statistical report to the Minister every year. In view of the lack of certainty in other jurisdictions, it might be well, for statistical purposes only, if registrants indicate their sex.

A certificate of marriage may be provided to a person on payment of the prescribed fee, if the director is satisfied it will not be used for an unlawful or improper purpose, but it will only show the names of the parties to the marriage, its date, place of solemnization, the date of registration and the number of the registration. A copy of the registration of the marriage will only be provided to a party to the marriage, a person on the authority of the minister, or on the order of a judge.

Section 34 provides that every certificate is admissible in evidence in any court in the province as *prima facie* proof of the particulars certified to be recorded. Where an application to register is refused by a registrar, an appeal may be taken to the Court of Queen's Bench. If satisfied it was made in good faith, and of the truth and sufficiency of the evidence, the court may order the registrar to accept the application and register the marriage.

There are headings throughout the Act that apply to each type of registration and the conditions differ somewhat. An amendment to the Act could add another heading and sections to deal with common-law partnerships that would enable the subsequent enforcement provisions to apply, but because of Section 50 of the Act it might be better to do what Nova Scotia has done and add a separate part to deal specifically with common-law registrations.

Section 50 provides that the Act "shall be so interpreted and construed as to effect its general purpose of making uniform the law of the provinces that enact it." This indicates that the basic Act was developed by the uniformity of law commissioners and should not be unduly disturbed. Nova Scotia added Part II to its Act to deal with the registration of domestic partnerships.

A Part II of a Manitoba Act could also deal exclusively with the registration of common-law partnerships and set out a complete scheme that pertains to them. I will not cover all the matters that should be copied from the existing Act but do think it important the following matters be included:

(1) Any two people who are living together in a conjugal relationship may register a "common-law partnership" by completing a statement in the prescribed form, which shall be signed by

(a) each of the parties to the partnership, and

(b) two credible witnesses.

(2) If satisfied as to the truth and sufficiency of the statement, the district registrar shall register the common-law partnership by signing the statement as district registrar, giving the date of filing in his office, and thereupon the statement constitutes the registration of the common-law partnership, and the registrar shall deliver the statement to the director.

(3) Provisions dealing with the registration, dissolution or de-registration of a partnership.

(4) The provision of a certificate to each of the registering parties.

(5) The provision of a certified or photographic copy to an officer of the Crown, a Court, Hospital, School, Child and Family Services Agency or any similar institution that requires it for use in the discharge of its official duties.

(6) A statement that a certificate or certified copy of a certificate issued by the registrar is *prima facie* proof of the existence of a common-law partnership.

(7) An appeal mechanism to permit a court to review, confirm or reverse a decision of a Registrar, District Registrar or the Director of Vital Statistics.

(8) Penalties for the improper use of a certificate

A registration form should include the following information:

We, and
of street, Winnipeg, Manitoba, jointly and severally declare:

1. We are each of the full age of eighteen years.

2. We are living together as common-law partners in a conjugal relationship.

3. We have been living together in a conjugal relationship since, ----------.

4. It is our wish to have our relationship recorded as a common-law partnership.

5. We are not married to one another.

6. I, am married to , having been married on the day of , 2001

A form requesting the de-registration of a common-law partnership, signed by the partners and giving the date of termination, should also be established to enable the director to mark an original registration as de-registered. The form should refer to the original registration and give the date of termination of the relationship

If both partners do not agree to sign a form of de-registration, there should be a provision in the Act to permit a de-registration to be recorded on the receipt of an Order of the Court of Queen's Bench. The Court of Queen's Bench Act would have to be amended to permit the court to dissolve a common-law relationship and to Order its de-registration. As with the system in London, England, I suggest that the original registration remain on file but be marked "De-Registered" or "Dissolved".

A dissolution proceeding could deal with any and all issues between the partners such as the financial support that one or another is entitled to by law or under the terms of a partnership agreement the parties have signed. The court should also be able to deal with the custody of a child that has been adopted or raised by the couple and the division of accumulated assets. For all intents and purposes the court should be able to deal with the same issues that arise in a divorce.

The *Family Maintenance Act* and the *Marital Property Act* would likely have to be amended to provide each common-law partner with the right to financial support and to participate in the division of assets if they separate. The appropriate Act should also guarantee that any children being raised by the couple have a right to support, maintenance and succession rights.

This system of registration should also, in my opinion, permit couples, one of whom is still married to another, to record their relationship, particularly if they are raising a child. A registration need not and should not interfere with any rights and obligations that exist as the result of a previous marriage but it would permit the new association to be recorded as well.

The other systems to which I have referred excluded this type of family from their legislation. That may be because some difficulties might arise if conflicting claims are made by a spouse and a common-law partner or it may be because that sort of relationship has been seen as inappropriate and unworthy of support. In my opinion government can no longer exclude this

type of common-law family from its legislation. Problems of administering rights may arise from time to time, but the courts are equipped to deal with them, as Bastarach J. said in *Chartier*.

At the present time, if there are competing claims from a spouse and a common-law "wife" they can be resolved by the court and if a person has been in several relationships the merits of various claims can also be dealt with. It is impossible for a legislature to anticipate every situation, but if there are children of a common-law relationship their rights should be no less than those born to a married couple.

The law at this point has steered away from a recognition of the rights of children, in this type of common-law relationship, possibly assuming that the effect of a continuing marriage to another makes their recognition or administration either impossible or inappropriate. Looking at the matter from the standpoint of the unmarried partner and the child, I can see no reason why the married partner who is living common-law in another relationship should not be as liable as other common-law partners to provide all the rights and benefits married partners or unmarried common-law partners have to provide. The law should not make a distinction.

I recognize there could be some problems for those who administer employee benefits if they are faced with a request that benefits be paid to a common-law partner where the employee also has a wife or husband. That situation may arise at the present time and there may be procedures in place to deal with it. I don't know that. I can appreciate that benefits cannot be paid to two dependants unless a court order requires a division between them. The *Pension Benefits Act* might have to be amended, if it has not already been amended, to provide a means of resolving competing claims.

These problems, and others like them, can hopefully be worked out at the administrative level. It would be a shame if they could not be or if other problems made it impossible or impracticable for that type of common-law arrangement to be registered. If that were the case, I would revert to my "deemed common-law partnership" proposal that I referred to in the property part of this report.

In my opinion, the registration of common-law relationships would go a long way to establishing and providing the equality of rights to which common-law couples and their children are entitled. As one presenter said to us, "If you want the benefits of marriage you have to marry." I do not suggest the registration be compulsory, but it should provide those who take advantage of it to enjoy a new degree of recognition and responsibility. It should lead to the equalization of rights for them and for the children they are raising.

Recommendation No. 5.

I recommend Manitoba amend the Vital Statistics Act to provide for the registration of Common-Law Partnerships.

Conclusion

In the provision of my advice and recommendations to the Minister of Justice and Government of Manitoba, I have attempted to deal with the questions put to my colleague and me. In addition, I have dealt with other matters to which those questions lead in the hope that my comments and analysis will provide a basis upon which government can further examine the issues and decide what direction it wishes to take.

Some of the topics we were asked to address were not ones that had come before me as a judge. Although I had some experience with adoption, I was not familiar with the detailed work done in every case by a Child and Family Services Agency or the other organizations that are involved in assisting those wishing to place a child for adoption or those hoping to adopt a child. I had a general understanding there were more children in need of a good home than there are people willing to adopt, but the information provided during our consultations clearly indicated a considerable and growing need.

The comments of judges who have recently considered applications to adopt and who have commented on the expert testimony they have heard, were important to my understanding of how same-sex couples are being accepted as appropriate adoptive parents. Even without considering the arguments presented to us, the existing judicial authority leaves no doubt about the ability of some same-sex common-law couples to be good adoptive parents.

As I studied the cases it became evident that the law, when dealing with discrimination and equality, is developing at a rapid pace. The Supreme Court of Canada stated in *M. v. H.* that advantages provided to heterosexual common-law couples must also be provided to same-sex common-law couples. By the time *Law v. Canada* was released, the court was speaking of providing common-law and married couples with the same rights. Its comments on stereotyping and the resulting discrimination have had a direct bearing on the issues I have examined and the recommendations I have made.

The Supreme Court decision in *M. v. H.* caused the federal parliament and provincial legislatures to change their statutes to treat opposite-sex common-law couples and couples of the same sex in the same manner and to provide them with equivalent rights and responsibilities. The second round of cases now underway has not yet been completed. In my opinion the next decisions of the Supreme Court will require all people, whether they are married or living common-law to be given the same rights. The re-hearing and unanimous decision of the Court in *Law v. Canada* is as clear a statement of the law I can imagine, short of dealing with a specific case. In any event, that case should alert parliament and provincial legislatures to the necessity of examining their statutes once again.

If I am correct in my prediction, there will be a great deal of work to be done by departmental lawyers and legislative counsel. All provincial legislation, whether it deals with property-related or other matters will have to be reviewed to see that every Act and every provision deals with

everyone on the same basis. Some difficult decisions will have to be made and some imaginative drafting will be necessary to achieve the required result.

In the meantime, most statutes can be saved from attack by making minimal changes. The addition of a few words here and there should provide the same rights to spouses and common-law partners but, as I suggested when discussing property, more extensive changes will be required to make certain that every person, including children, married couples and common-law partners have the identical rights and benefits.

The *Law v. Canada* case makes it clear that it is up to each legislative body to apply its authority in any manner it thinks appropriate. The Supreme Court has defined the parameters and principles that should be reflected in legislation, but has left the detailed decision on what to do to parliament and to the provinces and territories.

In the short run I suggest the Province of Manitoba re-examine its property legislation, including the amendments it passed in Bill 41, to make certain no one is deprived of rights and benefits that are accorded to others, based on distinctions that have nothing to do with the purpose and intent of each Act. In particular, I suggest it remove the distinctions that differentiate between married and common-law couples, and between common-law couples on the basis of whether there is a child in their household or not. If my first suggestion of complete equality is accepted it will of course not be necessary to deal further with the discrimination between different common-law couples.

The registration of common-law partnerships which arose during our discussions raised a number of issues which bore directly on the adoption process and how the equalization of property rights might be achieved. I was surprised to discover the extent to which the registration of common-law partnerships would answer questions raised by statutory requirements. When dealing with property-related statutes and benefits I found that I was continuously asking myself how the existence of a common-law partnership could be proved. That is one reason that led me to recommend the registration of common-law relationships. The other is my belief that registration would provide a substantial degree of legitimacy and official recognition to those that are now marginalized and deprived of rights accorded to others.

My review of the issues and the law, I must admit, took me in directions I had not anticipated. They took me into areas I would not have considered possible if it were not for the directives provided by the Supreme Court of Canada.

In this new and difficult area of equality, the onus falls on government to devise its legislation in a way that will protect it from a *Charter* challenge. The courts, including the courts of Manitoba and the Supreme Court of Canada, will not interfere with legislation as long as it provides every person with the same rights and responsibilities. It will nevertheless fall to government to decide whether it wishes to introduce such as system. If it decides to proceed a great deal of work will be required of its staff to devise a system that will meet the concerns government wishes to address.

In closing I thank those who gave generously of their time and ideas by coming to speak with us. Apart from the few who wished to remain anonymous, their names appear in a schedule to this report. I thank Jennifer Cooper for the work we did together and Laurie Messer for the research and administrative work she did on our behalf. I also thank Joan MacPhail Q.C. and others in government who provided information and issues for us to explore. All were of inestimable value in what turned out to be an interesting but lengthy and difficult study.

In my opinion, the Supreme Court of Canada has done the country a favour by raising the same-sex question to one of fairness and equality. It has approached a very delicate topic on the basis of law and principle. It has reminded us of the need for tolerance and respect for the differences that exist in society. The Court has shown us that the world is changing and that the law must react to those changes in a responsible manner.

The government of Manitoba has options that were not available to me. By having to provide my opinion by December 31, 2001, I had to enter the dangerous world of speculation. I have indicated the direction in which I believe the Supreme Court is moving and the ultimate position at which I think it will arrive. The government may, if it wishes, wait to see what the Supreme Court actually does in the *Walsh v. Bona* appeal, or in another case, on the major question of whether legislation must treat all married and common-law people identically.

It has not been necessary for me to "take sides" on the issues I have examined, although I heard strong positions expressed on both sides of the question of gay and lesbian rights. While I understood the sincere moral arguments that were presented to us I tried to look beyond them, to apply the law, and to concentrate on the legitimate needs of common-law couples and the children being cared for by them. I have tried to follow the lead provided by the courts to arrive at an opinion that is based on Justice and the Rule of Law.

All of which is respectfully submitted to the Minister of Justice, Province of Manitoba, this 21st day of December, 2001.

Honourable A.C. Hamilton Q.C., LL.D.
Retired Associate Chief Justice,
Manitoba Court of Queen's Bench.

Schedule A

List of Recommendations

Part I

Adoption

1. My opinion and advice is that a number of the sections of the Adoption Act of Manitoba would not withstand a *Charter* challenge and will have to be amended.

2. Delete Section 10 of the Adoption Act and substitute therefor:

> Any adult who resides in Manitoba, alone or jointly with another, may adopt a person in accordance with this Act.

3. Amend Section 1 of the Adoption Act in the following ways:

(1) By adding the following definitions:

(a) "common-law partner" means a person who is living with another in a conjugal relationship.

OR

"common-law partner" means a person of the same or opposite sex who is living with another in a conjugal relationship.

(b) "common-law partnership" means two persons who are living together in a conjugal relationship."

(2) By amending the definition of "extended family"

by adding after "spouse" the words "or common-law partner" and by deleting all the words after "persons" in the second last line.

(3) By amending the definition of "family"

by adding, after the word "spouse", the words "or common law partner".

4. I recommend that the term “spouse” not be changed or re-defined, but that, where appropriate, “or common law partner” be added after “spouse” in each case where the government wishes to extend the rights of a spouse to a common-law partner.

5. Amend the Act by deleting section 36(b) and substituting "common-law partners".

6. Amend Section 73(1) of the Act by deleting paragraph (a) and substituting therefor:

(a) jointly by a husband and wife or common-law partners, where at the time the application is made

7. Amend the heading of Division 6 that precedes Section 88 to say:

ADOPTION BY PERSON WHO HAS MARRIED OR IS THE COMMON-LAW PARTNER OF A CHILD’S PARENT

8. Delete Section 88(b) and replace it with:

(b) "is a common-law partner of the parent”

9. Delete Section 94(1)(a).

10. Amend paragraph 2 of the form by deleting the words “as though husband and wife” where they appear in the first and last lines.

11. I recommend that consideration be given to permitting a judge, when making an Order of Adoption, to include reasonable conditions to ensure some continuing contact between birth parents and the child.

12. I recommend that the birth certificate issued under the Vital Statistics Act following an adoption show same-sex parents by adoption as “parent” and “parent”.

Part II

Conflict and the Public Interest

1. Amend the statutes that require a member to disclose the assets of a spouse to require the disclosure of the assets of a common-law partner as well.

2. Amend Section 1 in each statute by adding:

> "common-law partner" means a person who is living with another in a conjugal relationship.

3. Delete the definition of "dependant" in the *Legislative Assembly and Executive Council Conflict of Interest Act, Municipal Council Conflict of Interest Act,* and the *Public Schools Act* and replace it with:

> (a) the spouse or common-law partner of a member or minister,

4. Include the following definition in each of those Acts:

> "family" includes a person's spouse, common-law partner, child, parent, brother, sister, aunt, uncle, niece, nephew, cousin, and grandparent.

5. Delete 4(1)(c) of the *Legislative Assembly and Executive Council Conflict of Interest Act,* 5(1)(c) of the *Municipal Council Conflict of Interest Act* and 38(1)(c) of the *Public School Act* replace it with:

> (c) indicate he has a conflict of interest;

6. Amend all other statutes containing conflict of interest and disclosure provisions:

> (1) By defining "spouse",
>
> (2) By adding "common-law partner" after "spouse", wherever it appears
>
> and
>
> (3) By defining "family".

Part III

Property

1. I recommend, in the amendment or passage of any and all legislation, the Province of Manitoba provide identical rights and benefits to all married and common-law couples.

2. I recommend Manitoba not follow either the Saskatchewan or the Nova Scotia approach to amending its statutes.

3. I recommend all Manitoba statutes be amended by adding the term "common-law partner", or a similar term, after "spouse" wherever it appears.

4. I recommend Manitoba amend its legislation to remove any provisions that distinguish between the rights of a married and common-law partner to employee benefits.

5. I recommend all statutes be examined for obscure provisions in legislation or other government requirements that might not be immediately apparent to persons dealing with an Act. Any and all provisions that impose additional conditions upon common-law partners should be removed.

6. (a) Introduce legislation in appropriate statutes to provide that children raised by a common-law couple have the same rights they would have if their care-givers were married to each other.

(b) Replace the term *in loco parentis,* wherever it appears in provincial legislation, with "stands in the place of a parent to the child" or "acts or has acted like a parent toward the child".

(c) If necessary, provide that a single person and those in a common-law partnership become responsible for the care and support of a child being raised by them when they have acted like a parent toward the child.

(d) Provide that a child who is raised by a person who is not their natural parent, has the same inheritance rights with respect to them as if the person was a natural parent of the child.

7. (a) Define "common-law partner" as

a person who is living with another in a conjugal relationship.

(b) Define "family" as

a person's spouse, common-law partner, child, parent, brother, sister, aunt, uncle, niece, nephew, cousin, and grandparent.

(c) Define "spouse" as

the partner of a man or a woman who are married to each other.

(d) Define "conjugal relationship" as

two people who live together in a personal or marriage like relationship.

(e) Develop a common definition of "dependant".

Part IV

Registration of Common-Law Partnerships

1. I recommend the Nova Scotia Registry system not be introduced in Manitoba.

2. I recommend the Ontario provisions not be included in Manitoba legislation.

3. I recommend a Civil Union similar to that in Vermont not be established in Manitoba.

4. I recommend the Quebec form of Civil Union not be introduced in Manitoba.

5. I recommend Manitoba amend the Vital Statistics Act to provide for the registration of Common-law Partnerships.

Schedule B

Review Panel on Common-Law Relationships

Written Submissions - Individuals

M. Adam, Winnipeg

Crawford & Jody Bartel, Beausejour

Robert L. Bedard, Selkirk

Karen Busby, Professor of Law, University of Manitoba

Kerry Cazzoria, Winnipeg

Mary Dyck, Altona

Jocelyn Giesbrecht, Altona

Harold Jantz, Winnipeg

Darlene Kernot, Winnipeg

Victoria E. Lehman, Winnipeg

Karen P. LeMay, Lorette

Elliot Leven, Winnipeg

Sally Naumko, Winnipeg

Tim and Betty Neufeld, Lowe Farm

W. Penner, Morden

Krista Piche, Winnipeg

Tony Riley, Strathclair

Sylvia Smith, Selkirk

Noreen Stevens & Jill Town, Winnipeg

Patricia Strong, Ste. Anne

Margaret Temple, Winnipeg

Bernie Thiessen, Winkler

Written Submissions - Organizations

Adoption Options (Manitoba) Inc.

Deputy Registrar of Manitoba, Land Titles

EGALE Canada

Focus on the Family (Canada)

Manitoba Bar Association, Gay & Lesbian Issues Section

Manitoba Human Rights Commission

Office of the Children's Advocate

Public Interest Law Centre

Rainbow Resource Centre

REAL Women of Canada

Winnipeg Child and Family Services, Adoption Program [petition signed by 22 staff members]

In Person Consultations

Janet Baldwin, Chairperson, Manitoba Human Rights Commission

Kristine Barr, School Trustee, Winnipeg School Division No. 1

Debra Beauchamp, Policy Analyst, Manitoba Human Rights Commission

Aaron Berg, General Counsel, Manitoba Justice (counsel to Manitoba Human Rights Commission)

Bob Boulet, Adoption Supervisor, Winnipeg Child & Family Services

Karen Busby, Professor of Law, University of Manitoba

Marianne Crittenden, Winnipeg

Barry Effler, Deputy Registrar General of Manitoba, Land Titles

John Fisher, Executive Director, EGALE (Canada)

Rob Hilliard, President, Manitoba Federation of Labour

Sarah Inness, Co-chair of the Gay & Lesbian Issues Section, Manitoba Bar Association

Garry Johnson, Adoption Supervisor, Winnipeg Child and Family Services

Lori Johnson, School Trustee, Winnipeg School Division No. 1

Gwendolyn Landolt, National Vice-President, REAL Women

Manitoba Association of Women and the Law

Michael Law, Sexual Orientation and Gender Identity Conference, Canadian Bar Association

Elliot Leven, Rainbow Resource Centre

Harry Mesman, Manitoba Federation of Labour

Janet Mirwaldt, Children's Advocate, Office of the Children's Advocate

Herbert Rempel, Board Member, Adoption Options (Manitoba) Inc.

Derek Roguski, Director of Research, Focus on the Family (Canada)

Jim Rondeau, M.L.A., Assiniboia

Dennis Schellenberg, Acting Director, Manitoba Family Services

Chris Vogel, Winnipeg

Valerie Wadephul, Winnipeg

Byron Williams, Attorney, Public Interest Law Centre