An Opinion Respecting Persons in Common-law Relationships

Volume One

FINAL REPORT

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December 31, 2001

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Volume One

FINAL REPORT
INDEX

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SCHEDULES

I. Executive Summary

A. Introduction

The writer was retained together with A. J. Hamilton to give advice about three issues concerning persons in common-law relationships: adoption, conflict of interest and protection of the public interest, and property legislation. After inviting written submissions, conducting in person consultations, and reviewing the current law in Manitoba as well as in other provinces, the following advice is given.

B. Adoption

In Manitoba the only way to adopt a child is through an application to Court pursuant to *The Adoption Act.* Heterosexuals can apply individually to adopt any child. Gays and lesbians can also apply individually to adopt a child, but not the child or extended family member of their partner. Further, although spouses and common-law opposite-sex partners can apply jointly to adopt a child, gays and lesbians cannot apply jointly to adopt a child, even a child that they have been jointly parenting.

These provisions of *The Adoption Act* as they pertain to homosexuals would not survive a challenge under the *Canadian Charter of Rights and Freedoms*, ["the *Charter*"] because they deny citizens equal rights to adopt based solely upon sexual orientation. The Supreme Court of Canada has found sexual orientation to be an irrelevant personal characteristic which is analogous to the other characteristics set out in section 15 of the *Charter.* Restrictions on *Charter* rights may be justified under section 1 of the *Charter* if they constitute a reasonable limit in a free and democratic society. However, in my opinion there is no justification for this unequal treatment, particularly in light of the fact that the *Adoption Act* does permit some adoption by gays and lesbians. Further, the fact that some children are denied the benefit of having two legal parents is in conflict with the stated objectives of the *Adoption Act* to give paramount consideration in every respect to the child's best interests.

In Manitoba there is a vocal minority who strongly oppose adoption by gays and lesbians, based upon the conviction that children are better off with two parents, one of each gender. There are also strong advocates for the rights of gays and lesbians to have greater rights to adopt. These citizens believe just as strongly that it is in the best interests of the children to receive the love and support which many gay and lesbians are prepared to offer.

Many persons seem unaware that homosexuals are in fact able to adopt children in Manitoba, albeit only as individuals and not as a couple. Many are also unaware that there are more children in Manitoba wishing to be adopted than there are suitable parents, particularly for older or special needs children. Adoption applications by persons identifying themselves as homosexuals have been relatively recent, (within the past 4 or 5 years only), and quite infrequent (perhaps a half dozen applications). Many homosexual persons choose other ways of caring for children such as fostering, teaching, and volunteering with youth.

Other provinces with similar legislation have in recent years amended it in order to permit homosexuals to adopt on the same basis as heterosexuals. There has also been some case law which has changed the practice in certain provinces. Presently, gays and lesbians have received recognition for adoption purposes in B.C., Alberta, Saskatchewan, Ontario, Quebec, and Nova Scotia with legislation in progress in Newfoundland.

If Manitoba chooses to amend the *Adoption Act*, there are two legislative models which would comply with the *Charter*. The first would be to simply extend the current legislative model to fully include homosexuals. This would mean that a homosexual person living in a conjugal relationship of some permanence with their same-sex partner could apply jointly with that partner to adopt a child on the same basis as opposite-sex common-law partners. It would also mean that a homosexual person could apply to adopt the biological child or extended family member of their same-sex partner in the same way that a heterosexual person in a common-law relationship can apply.

Alternatively, Manitoba could enact a model which takes a new and broader approach to adoption. The legislation could be amended to permit any adult to apply to adopt a child, either individually or together with any other adult. This would mean that two persons would be free to adopt a child whether or not they were living in a conjugal relationship, and regardless of their relationship to one another. This is the route which B.C. and Newfoundland, for example, have chosen to follow. It is a considerably broader approach than is necessary in order to cure the *Charter* problem.

I recommend that the legislation be amended so as to extend the right to apply to adopt only as far as is necessary in order to ensure *Charter* compliance, namely, to permit homosexual persons to adopt on the same basis as heterosexual persons.

C. Conflicts of Interest and Protection of the Public Interest

Manitoba has a variety of statutes governing conflict of interest for members of the legislature, city and municipal councillors, school trustees, and citizens serving on publicly appointed boards and committees. They generally require disclosure of a conflict and then non-participation in the decision-making concerning the issue. For public officials there is the additional requirement of advance disclosure of assets and interests to another public servant on a confidential basis. There are also a number of provisions in Manitoba legislation which are designed to protect the public interest. All of this legislation includes spouses and none includes same-sex common-law partners. Some includes opposite-sex common-law partners, utilizing a variety of definitions of what constitutes a common-law relationship.

There is a strong consensus among the public that these provisions need to be extended to common-law partners, including same-sex common-law partners, even among those members of the public who are strong advocates both for and against the rights of homosexuals.

I recommend that all relevant legislation be amended so as to include common-law partners in its application. While new disclosure provisions may discourage some persons in same-sex partnerships from seeking or holding public office, this concern will likely be temporary and is outweighed by the greater objective that decision-making in the public interest be made, and be seen to be made, without fear of improper bias or influence.

The criteria as to whom the conflict provisions should apply should be standardized as far as possible. This would ensure equal treatment among Manitobans regardless of the nature of their public service. It would also facilitate general understanding of, and increased compliance with, conflict of interest provisions. The test for a common-law partner should be modernized by removing the reference to the requirement that the person be a dependent or be held out as a spouse, and by including same-sex common-law partners.

D. Property Legislation

Manitoba has extensive property legislation giving spouses the right to acquire an interest in, or share the property of, their partner at death or dissolution of the relationship. This legislation excludes common-law partners, both same-sex and opposite-sex.

These provisions in Manitoba's property legislation may not survive a challenge under the *Charter* because they deny citizens equal rights based solely upon marital status and, in some cases, sexual orientation as well. The Supreme Court of Canada has found both marital status and sexual orientation to be irrelevant personal characteristics which are analogous to the other characteristics set out in section 15 of the *Charter.* Restrictions on *Charter* rights may be justified under section 1 of the *Charter* if they constitute a reasonable limit in a free and democratic society. However, in my opinion it would be difficult to justify this unequal treatment.

As a result, it may be advisable for the government of Manitoba to amend the legislation to include common-law partners before it is challenged. If the government wishes to wait, the issue will shortly be clarified by the Supreme Court of Canada in the case of *Walsh v Bona* on appeal from Nova Scotia, to be heard in Spring, 2002.

There is no general public consensus about whether or not property rights ought to be extended to include common-law partners. Few opposite-sex common-law partners spoke out on this issue. As far as same-sex common-law partners, the community is divided with some members preferring to have partners remain economically independent and others supporting this extension of rights. Organizations and individuals with a more feminist orientation support this extension of rights since it most benefits the economically weaker partner, which in heterosexual relationships is normally the woman. As with adoption, those individuals and organizations who support the importance of marriage are reluctant to see rights which normally only apply to spouses be extended to those who are "merely" living together. Those that have discomfort with the gay/lesbian lifestyle are opposed to property rights including same-sex common-law partners as it may appear to be an endorsement of that lifestyle.

If the government chooses to amend the legislation, there are two models which can be utilized to extend property rights to common-law partners. Either model would comply with the *Charter*. The first is a registration model whereby property rights and responsibilities are acquired if the partners publicly register their relationship. This is the model recently enacted by Nova Scotia. It is also being proposed by Quebec in a recent Bill tabled in the National Assembly, albeit only in relation to same-sex partners. This model has the advantage of a clear start date for the relationship, and no one acquires the rights or responsibilities unless they consent.

The second alternative is a model whereby property rights and responsibilities are acquired once certain criteria are met. This is the model used in the Saskatchewan legislation where persons who have lived together for 2 years in a conjugal relationship acquire the property rights of spouses. This is also the model which Manitoba legislation uses to cause common-law partners to acquire rights to spousal support and pension benefits. It is also the model used by the other common-law provinces, and the federal government, when rights and responsibilities within their jurisdictions are given or ascribed to common-law partners.

This is the model which I recommend be used to extend property rights and responsibilities in Manitoba whether acquired during marriage, after its termination, or upon the death of one of the spouses. I recommend that the criteria for the acquisition of these rights be the same as for spousal support, namely, 3 years of living together, or 1 year if there is a child of the union, and that they apply equally to same-sex partnerships.

E. Conclusion

Volume I of the report contains a total of 95 recommendations affecting some 35 pieces of legislation. Volume II contains those portions of the 33 statutes which require amendment set out in table form with the existing sections of the Act opposite the recommended amendments. These recommendations give common-law partners the rights and responsibilities of spouses as they pertain to adoption, conflict of interest and protection of the public interest, and property legislation.

II. Introduction

The Honourable Gord Mackintosh, the Minister of Justice and Attorney General of the Province of Manitoba, retained the writer, and retired family court judge A. C. Hamilton, on June 19, 2001, pursuant to Terms of Reference which were released publicly and a copy of which are attached hereto as Schedule 1.

We were retained to give advice on three issues respecting persons in common-law relationships, namely:

- adoption;
- conflict of interest and protection of the public interest; and
- legislation dealing with property interests;

and were requested to provide our opinion on these issues by December 31, 2001.

The Terms of Reference authorized us to consult with experts in relevant areas of the law, as well as with interested individuals or groups. We were specifically directed not to conduct public hearings.

We chose to commence our consultations by publishing in July, 2001, in urban and rural newspapers throughout the province, a notice inviting written submissions. Attached hereto as Schedule 2 is a copy of the notice and a list of the 56 newspapers in which it was placed. The notice permitted submissions to be sent on a confidential basis so that every person who was interested in the issue would feel free to respond if they so desired. Of the 37 written submissions received, only 3 requested that their names be kept confidential. A detailed listing of the submissions received, both from individuals and from organizations, is contained in Schedule 3.

In addition to reviewing these written submissions, we also read the transcripts of the oral submissions before the Standing Committee on Law Amendments hearings conducted on June 18th and 21st, 2001, as well as copies of all written submissions provided to that Committee.

We then arranged for private consultations with 26 persons representing a wide variety of views on the issues including legal experts, representatives of various local and national organizations, and individual Manitobans. The great majority of consultations took place in person, in small groups of like-minded individuals and concerned all three areas that we were retained to study. Several, particularly those involving national organizations with head offices in other provinces, involved telephone consultations. Attached as Schedule 4 is a list of the persons with whom consultations were undertaken together with the name of their organizations where applicable.

We are grateful to those who took the time to write to our Panel or meet with us in consultation. Experts and lay persons alike gave freely of their time and were of great assistance in producing a comprehensive analysis and report.

We were also authorized by our Terms of Reference to access relevant employees within the Department of Justice if we found that such access was helpful in providing our advice. We obtained from employees of the Manitoba Justice Department some background information, assistance in placing our notice, and assistance in setting up our office, computer, and telephone lines. Employees of the Departments of Justice in other Provinces and Territories were also helpful to the writer in providing information pertaining to their various legislative models. Finally, Laurie Messer contracted to provide very able administrative support. For all of this assistance and advice we are most appreciative.

At the conclusion of our research and consultations, we decided to provide two separate reports to government although it had been our initial intention to deliver a common report. It was once we began the analysis phase of our project that it became apparent that we saw the same issues through different eyes and we wished to give the government the benefit of our separate analyses and thinking on the three issues that we had been retained to consider. We sought and obtained government approval for this approach in October, 2001.

Also in October, 2001 we were requested by the Minister to provide our opinion on adoption as soon as possible, and separately from the other matters if they were not yet complete. Accordingly, we each expedited our advice on adoption and provided an interim report by October 31, 2001 pertaining to the adoption issue, which report has been included as a part of this final report.

III. Adoption

The Terms of Reference require that the following two questions be addressed in relation to the adoption issue:

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. **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.**

With respect to the first question, section A describes in detail the current provisions of Manitoba's *Adoption Act* as it applies to adoption applications by same-sex common-law couples. Section B provides more information on adoption in Manitoba as gathered through our process of submissions and consultations. Section C analyzes the provisions in the *Adoption Act* relating to same-sex adoption in relation to the *Charter*, and answers the question as to whether they would be likely to survive a *Charter* challenge.

With respect to the second question, section D reviews the legislative approaches in other Canadian jurisdictions and section E contains my analysis of which legislative approaches I believe would comply with the *Charter* and which would be recommended. A summary of my recommendations pertaining to adoption are set out in the recommendations section F.

A. Adoption Law in Manitoba

The *Adoption Act*[1] sets out the law pertaining to adoption in the Province of Manitoba. A child may only be adopted if a judge of the Court of Queen's Bench grants an order of adoption pursuant to the *Adoption Act*. After an adoption order is granted, the child's registration of birth is redrafted and resubmitted to Vital Statistics. An unmarried mother is permitted to leave the space for the father's name blank. Otherwise, where two parents are named in a birth certificate they must be one of each gender: a "mother" (female) and "father" (male). It is not possible to register a child with 2 mothers or 2 fathers pursuant to *The Vital Statistics Act* regulations.

A child, once adopted, ceases to be the child of their previous parent(s) and becomes the child of their adoptive parent(s) for all purposes in law. This includes the right of the child:

- to receive a portion of the parent's estate if the parent dies intestate;
- to receive a portion of the parent's estate if they have been dependent upon that parent and money is needed for their continued support; and
- to secure support from the parent during that parent's lifetime without having to prove a relationship of *loco parentis* with the parent, that is, without having to prove that the person has been actively parenting them.

Adoption also creates rights for the parent(s):

- to secure medical attention for the child;
- to make decisions for the child including those related to medical, religious and educational concerns;
- to travel with the child and determine their place of residence;
- to seek custody of the child in the event of a separation from the other parent, if that is in the child's best interests; and
- to seek access to the child in the event of a separation from the other parent, without having to prove that exceptional circumstances exist.

There are 7 kinds of adoptions set out in the *Adoption Act*: adoption of a permanent ward, private adoption, inter-country adoption, de facto adoption, extended family adoption, adoption by a person who has married the child's parent, and adoption of an adult.

There are two ways to adopt: as a couple jointly, or singly as an individual. In general, a single individual, whether heterosexual or homosexual, can apply to adopt a permanent ward, a child through private adoption, a child from another country, or another adult. However, a single individual can only apply to adopt a family member of their partner, including a child of that partner, if the couple is heterosexual. Further, joint applications for adoption are restricted to heterosexual couples, even if the homosexual couple has been parenting a child jointly and are seeking to formalize that relationship. Only one of the two homosexual partners can apply to adopt the child.

[1] *The Adoption Act*, S.M. 1997, c. 47 – Chap. A2.

The specific provisions of the *Adoption Act* regarding whom may adopt and when are set out in 7 separate Divisions, each one dealing with a different kind of adoption.

Division 1 -Adoption of a Permanent Ward
This Division applies to the adoption of a child who is a permanent ward of Child and Family Services, usually because his or her parent(s) were unable or unwilling to care for the child properly. Sometimes the adopting parent(s) are unknown to the child, and sometimes they have been acting as the foster parent(s) to the child.[2]

The following persons are permitted to apply for adoption of a child who is a permanent ward of Child and Family Services:

(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.[3]

The *Adoption Act* provides that an application to court for an adoption order under this Division must include, where applicable, "the marriage certificate of married applicants or the prescribed declaration of commitment of the cohabiting couple".[4] Only opposite-sex couples can marry in Canada. While same-sex partners can cohabit, the declaration of commitment requires the couple to declare that they have been living together as "husband and wife"[5].

Therefore, while a gay or lesbian person can apply as a single adult to adopt a permanent ward, he or she cannot apply jointly with his or her same-sex partner to adopt a permanent ward. This right to apply jointly is specifically reserved for opposite-sex couples.

Division 2 - Private Adoption
This Division applies to children who are surrendered by their parent(s), usually at birth, to be adopted by a person or persons who are otherwise unknown to the child.

This section says nothing about joint applicants having to be either married or opposite-sex cohabiting couples. However, an application to court for an adoption order under this Division must include, where applicable, "the marriage certificate of married applicants or the prescribed declaration of commitment of the cohabiting couple".[6] Married joint applicants are always opposite-sex couples because only they can marry in Canada. Cohabiting joint applicants are also opposite-sex couples because the form requires that they declare that they have been living as "husband and wife". Furthermore, it is not currently possible to register a child with 2 mothers or 2 fathers. Therefore, while a gay or lesbian person can apply as a single adult to adopt a child privately, the right to apply jointly to adopt such a child is reserved for opposite-sex couples only.

[2] *The Adoption Act*, S.M. 1997, c. 47 – Chap. A2, section 41.
[3] Ibid, section 36.
[4] Ibid, section 50(h).
[5] *The Adoption Act*, Adoption Regulation A2 – 19/99, form AA – 14.
[6] *The Adoption Act*, S.M. 1997, c. 47 – Chap. A2, section 67(h).

Division 3 – Inter-Country Adoption
This Division applies to the adoption of children from countries other than Canada. In such case, the provisions of the *Adoption Act* in Division 1 apply, which means that joint applications are restricted to heterosexual couples.[7] Therefore, while a gay or lesbian person can apply as a single adult to adopt a child from another country, he or she cannot apply jointly with his or her same-sex partner to adopt such a child. This right to apply jointly is specifically reserved for opposite-sex couples.

Division 4 - De Facto Adoption
De facto adoption occurs where a person or a couple has been caring for and maintaining a child for at least two consecutive years and wishes to adopt that child. An application for a de facto adoption can be made by a single person or jointly, either by a husband and wife or by "a man and woman who are not married but are cohabiting as spouses".[8]

Therefore, while a gay or lesbian person can apply as a single adult to adopt a child that he or she has been parenting for at least 2 years, he or she cannot apply jointly with his or her same-sex partner to adopt such a child when the couple has been parenting the child jointly. This right of joint application is specifically reserved for opposite-sex couples.

Division 5 – Extended Family Adoption
This Division applies to the adoption of a child by a member or members of the child's extended family where the child has resided with them for at least 6 months.[9]

The definition of "extended family" includes the child's grandparents, siblings, aunts, uncles, and cousins, the spouse of such persons, and "an unmarried adult who is cohabiting in a relationship of some permanence" with any of those persons, so long as they are "of the opposite-sex".[10] Also, an application under this Division must include the marriage certificate of a married applicant or the prescribed declaration of commitment of the cohabiting couple.[11] Therefore, the right to apply under this Division for an extended family adoption excludes joint applications by same-sex couples and also excludes homosexuals from applying individually when their only relationship to the child is through their same-sex common-law partner.

Division 6 – Adoption by Person who has Married the Child's Parent
This Division applies to the adoption of the child of a person that the applicant is either married to, or is living with, where that child is being cared for by both the applicant and the child's parent. There is no minimum time that the applicants must have been caring for the child. Generally, this section is used by couples who are parenting the biological child of one of them and they wish the other parent to adopt the child because the child's other biological parent is unable or unwilling to parent.

[7] Ibid, section 71(2).
[8] Ibid, section 73(1).
[9] Ibid, section 83.
[10] Ibid, section 1.
[11] Ibid, section 85.

The *Adoption Act* specifically confines an application to either a spouse or an opposite-sex common-law partner[12]. Further, the application must include either a copy of the marriage certificate or declaration of commitment[13] which requires the couple to declare that they have been living as "husband and wife". Accordingly, same-sex couples are excluded from applying to adopt their partner's child.

Division 7 – Adoption of an Adult

This Division applies to the adoption of adults. It says nothing about joint applicants having to be either married or opposite-sex cohabiting couples. However, an application to court for an adoption order under this Division must include, where applicable, "the marriage certificate of married applicants or the prescribed declaration of commitment of the cohabiting couple".[14] Again, since the declaration form requires the couple to declare that they have been living as "husband and wife", and marriage is only legal between a man and a woman, joint adoptions of adults are reserved for opposite-sex couples only.

In summary, there is no absolute prohibition on adoption by gays and lesbians in Manitoba. They are free to apply to adopt as single individuals, so long as they do not wish to adopt their partner's child or extended family member. There are no such restrictions on heterosexuals who may apply to adopt any child, either as an individual or as a couple, even if they are not married to their partner, but are simply living together.

[12] Ibid, section 88.
[13] Ibid, section 90.
[14] Ibid, section 96.

B. Submissions and Consultations

We conducted private consultations and received written submissions from a variety of individuals expressing their personal views on adoption or the policies on adoption of local and national organizations.

During the course of reviewing the submissions and conducting the consultations we learned that there is a vocal minority who are strongly opposed to gays and lesbians being given the right to adopt. These persons were generally motivated by a sincere belief that children were better off with two parents, one of each gender, rather than by a desire to discriminate against other citizens on the basis of their sexual orientation. These opinions were rooted in deeply held beliefs about the nature of family and marriage and often were informed by religious convictions as well. For example, one submission quoted Genesis stating that God created man in his own image, male and female, and "their names were Adam and Eve, not Adam and Steve". While these submissions were in the minority, they nevertheless reflected strongly held views. Indeed there was often discomfort expressed with the current state of the law permitting any adoption at all by homosexuals. Generally this was felt to erode traditional values and particularly the sanctity of marriage as the "cornerstone of society".

We learned that there are also strong advocates for the rights of gays and lesbians to have greater rights to adopt. Often these are homosexual persons who themselves are either parenting, or wish to be able to have that opportunity in future. Their conviction that this is in the best interests of children is just as firmly held as with those opposing. Many described the difficulties inherent in parenting a child with whom one is prevented from having a legal relationship including arranging for medical care, education, and even simple things like signing permission slips, as well as difficulty traveling. It was pointed out that without the legal relationship, the child was not protected in the event of the death of the "parent" or the separation of the "parent" from the child's biological parent.

Amongst those who supported adoption rights for homosexuals, some supported extending the right to jointly apply to adopt a child to *any* two adults, regardless of whether they are cohabiting together in a conjugal relationship. They admitted that there isn't presently much demand for this type of adoption, but they felt that it would be more "inclusive" to extend the model. Others felt that the present model worked well, so long as it was fully extended to homosexuals in all circumstances.

Each person consulted with was asked whether they would favour a public registration system for common-law relationships, or at least for same-sex common-law relationships given that these couples cannot marry in Canada. In the context of adoption, it was pointed out that such a system would be irrelevant. The relationship between joint applicants is thoroughly screened for permanence, health and commitment whether the couple is married or living common-law. Representatives of Child and Family Services advised that it would "make no difference to us" whether the relationship was registered.

In addition to hearing a variety of opinions about whether, how, and when adoptions by homosexuals should be permitted, we also gathered some practical information which was of interest and assistance.

We learned that Winnipeg Child and Family Services handle the great majority of the adoptions in the Province, some 104 adoptions last year. Representatives of that agency advised that adoption practice has changed substantially in recent years. Historically gays and lesbians simply did not apply to adopt children. Occasionally in the past 20 years, a single man or woman would apply to adopt in circumstances where there might be a strong suspicion that they were gay or lesbian. However, they certainly did not identify their sexual orientation, and if they were involved in a same-sex partnership, there was no evidence of this during the interviews or home visits. It has only been within the past 4 to 5 years that a few gays and lesbians, perhaps half a dozen, have come forward to apply to adopt, and have made full disclosure about their sexual orientation including any involvement in a same-sex relationship. In such circumstances the Winnipeg Child and Family Services Adoption Program staff have evaluated the permanence and health of that relationship in the same way they would an opposite-sex common-law relationship (even though only one of the couple was going to be permitted to adopt). They have investigated the extent to which the applicant would be capable of assisting the child in coping with discrimination which might result from having parents of the same gender, in the same way that they would evaluate an applicant who was proposing a cross-cultural adoption or proposing to adopt a child from a racial minority.

We also learned that there is a waiting list of special needs children wishing to be adopted, particularly children who are permanent wards. Winnipeg Child and Family Services said that they would welcome more prospective adoptive parents to assist with the placement of such children. The Children's Advocate advised that they deal with children every day who are unable to get an adoption placement quickly enough, or at all, again, particularly children with special needs or who are slightly older. The Children's Advocate noted that gays and lesbians are often well placed to assist these children as they themselves may have faced challenges similar to those experienced by the children in terms of discrimination or other difficulties.

We spoke to a representative from Adoption Options (Manitoba) Inc. which facilitates about 20 adoptions in Manitoba per year. In that agency the general approach involves a birth mother placing her child with the parents of her choice and very often having some level of continuing contact with the adoptive parents and/or the child pursuant to an "openness agreement". We learned that the agency has never had a gay or lesbian couple ask to be placed on the prospective parents list, and has never had a birth mother request gay or lesbian parents for placement of her child.

We learned that many gays and lesbians in Manitoba who are unable to parent choose other ways of caring for children such as fostering, teaching, and volunteering with youth. And we learned that, despite the current restrictions on adopting, many gays and lesbians were in fact jointly parenting children, sometimes from prior relationships and sometimes conceived through assisted insemination or surrogacy. Two gay men who are

very active in the gay and lesbian community in Winnipeg estimated that 1 out of 10 gay male couples and 4 out of 10 lesbian couples were currently actively parenting.

We were unable to obtain statistics on the number of homosexuals who would like to adopt, but are prevented from doing so by the current legislation. A Winnipeg agency providing resources to gays and lesbians said that they hear about the problem of gays and lesbians wishing they could adopt "all the time." The same men who estimated how many homosexuals are currently parenting, anticipated that if the legislation changed, these numbers would increase substantially.

A Director of Research for a national advocacy group informed us that Statistics Canada was just starting to collect information about how many Canadians were living in same-sex relationships. He advised that certain samplings had been done from which it could be extrapolated that approximately 1% to 2% of Canadians are currently living in same-sex relationships. If those numbers are accurate for Manitoba, then there are perhaps five to ten thousand gay and lesbian couples who are cohabiting in relationships who could potentially utilize new provisions to adopt a child jointly, or to adopt the child of their partner.

C. The Impact of the *Charter of Rights*

In determining whether the *Adoption Act* would survive a C*harter* challenge, there is a two stage inquiry. Firstly, it must be determined whether the impugned legislation breaches the equality rights set out in section 15(1) of the *Charter.*

Section 15(1) of the *Charter* provides:

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

The person who challenges the legislation has the onus of proving the breach of s. 15(1). If this breach is proven, then the onus switches to the government to prove, pursuant to section 1 of the *Charter,* that the impugned legislation should be saved.

Section 1 of the *Charter* 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.*

I will examine firstly whether the provisions of the *Adoption Act* which exclude homosexuals from the right to apply to adopt a child offend section 15(1) of the *Charter* and, if I conclude that they do so offend section 15(1), then I will examine whether they can nonetheless be saved by the provisions of section 1 of the *Charter.*

The essential requirements of a s. 15(1) analysis are satisfied by two inquiries:

1. whether there is a distinction which results in the denial of equal benefit of the law; and
2. whether the denial constitutes discrimination on the basis of an enumerated or analogous ground.

Although s. 15(1) does not specifically include sexual orientation as a ground of discrimination, it is well-settled law that sexual orientation is included under s. 15(1) of the *Charter* as an "analogous" ground. In the recent Supreme Court of Canada case of *M. v H,* a lesbian woman who had been in a same-sex relationship successfully argued that her inability to access the benefit of a legislative spousal support scheme post-separation (which opposite-sex common-law couples could access), was a breach of her equality rights. As stated by the Court:

> *This differential treatment is on the basis of a personal characteristic, namely sexual orientation, that, in previous jurisprudence, has been found to be analogous to those characteristics specifically enumerated in s. 15(1).*[15]

[15] *M. v. H.* [1999] 2 S.C.R. 3 (S.C.C.) at paragraph 2.

With respect to the first inquiry, it is clear that the *Adoption Act* does draw a distinction which results in the denial of equal benefit of the law. It does this by specifically according rights to individual members of unmarried cohabiting opposite-sex couples, which by omission it fails to accord to individual members of cohabiting same-sex couples.

Firstly, the *Adoption Act* allows a man and a woman to apply jointly to adopt a child where the relationship has a degree of permanence and is conjugal. Since gay and lesbian individuals are capable of being involved in conjugal relationships of some permanence, the distinction of relevance is between persons in an opposite-sex, conjugal relationship of some permanence and persons in a same-sex, conjugal relationship of some permanence. Therefore the legislation draws a formal distinction between persons on the basis of a personal characteristic, namely, sexual orientation.

Further, the *Adoption Act* allows a person to apply to adopt a child who is the biological or adopted child of their opposite-sex partner, or who is a member of the extended family of their opposite-sex partner, in circumstances where the applicant has been parenting that child for a defined period of time. Since gay and lesbian individuals are capable of being involved in cohabitation relationships where they are parenting children, the distinction is between step-parents who are homosexual and those who are heterosexual. Again, the legislation draws a formal distinction between persons on the basis of a personal characteristic, namely sexual orientation.

With respect to the second inquiry, it is the opinion of the writer that this denial of equal benefits constitutes discrimination on the basis of an analogous ground, namely, sexual orientation. In reaching this conclusion I am aware of the requirement, as stated by the Supreme Court most recently in *M. v. H.*, that the inquiry is to be undertaken in a purposive and contextual manner. The focus must be on whether the differential treatment withholds a benefit in a manner that reflects the stereotypical application of personal or group characteristics or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy.

The *Adoption Act* creates a distinction which withholds a benefit from gay and lesbian individuals, namely the right to apply to adopt children. The legislation reflects a stereotypical application of presumed characteristics and fails to take into account the applicants' actual situation. Being in a same-sex relationship does not mean that it is impermanent or non-conjugal. The legislation implies that same-sex couples are incapable of forming intimate relationships of some permanence as compared to opposite-sex couples. Further, possessing a homosexual sexual orientation does not mean that the person lacks parenting skills. The legislation implies that homosexuals are incapable of providing the necessary love and support to adequately parent children, as compared to heterosexual persons, without regard to their actual living circumstances or personal characteristics.

Furthermore, gays and lesbians have been the subject of discrimination in our society. As stated by the Supreme Court in *M v. H*:.

> *Sexual orientation is a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs . . . [and] gays, lesbians, and bisexuals, whether as individuals or couples, form an identifiable minority who have suffered and continue to suffer serious social, political and economic disadvantage* [16]

Therefore, in my opinion a court would unquestionably find that the sections of the *Adoption Act* which deny homosexual persons the same rights to apply to adopt as heterosexual persons infringe s. 15(1) of the *Charter*.

A court would then necessarily move to the second stage of a Charter inquiry, namely, a consideration of whether the infringement is justified under s. 1 of the Charter. At this stage the onus shifts to the government to justify the legislation and prove that it is indeed a reasonable limit pursuant to s. 1 of the *Charter*.

In determining whether an infringement is justified one must ascertain the objectives of the legislation and whether the exclusion of same-sex couples from certain aspects of the adoption regime furthers those objectives. The purpose of the *Adoption Act* is to "provide for new and permanent family ties through adoption giving paramount consideration in every respect to the child's best interests"[17]. In my opinion, those objectives are not furthered by the exclusion of same-sex couples from full participation in the adoption regime. If anything, these goals are undermined by this exclusion.

Indeed, there is no rational connection between this goal and a prohibition against adoption by homosexual persons in certain circumstances. The *Adoption Act* has a process which provides for many safeguards to ensure that proposed adoptive parents will be able to meet the physical, psychological, emotional, and intellectual needs of the child that they propose to adopt. To the extent that a homosexual parent may be able to meet these needs, it is in a child's best interests that the parent be permitted to apply to adopt.

Finally, and most importantly, there is no absolute prohibition in the *Adoption Act* against adoption by gays and lesbians who can and do apply to adopt as individuals. In this context it is inconceivable that the government would be able to demonstrate that prohibiting joint adoption by homosexual couples is reasonable under section 1, while at the same time not prohibiting individual adoption by gays and lesbians. The effect of the legislation is that homosexuals are only prohibited from adopting in circumstances which would deny a child the right to two legal parents to care for them and support them. This is not in the best interests of children.

There are four reported cases which have been decided in Canadian courts which have considered the issue of adoption rights by homosexual persons. The first of these is the case of *K (re)* from Ontario which was decided in 1995[18]. In that case four lesbian couples made a series of joint applications for step-parent adoptions. At that time under

[16] *M* v. *H* [1999] 2 S.C.R. 3 (S.C.C.) at paragraph 64.
[17] *The Adoption Act*, S..M. 1997, c. 47 – Chap. A2, section 2.
[18] *K (Re)* (1995), 23 O. R. (3d) 679 (Ont. Prov. Div).

section 136(1) of the Ontario Act only a spouse could apply in Ontario to adopt the biological child of their partner. Spouse was defined in the Act to mean persons of the opposite-sex. The Court found the definition of spouse to be unconstitutional. The court reasoned that the right to adopt is a benefit of the law and that the denial of this right is based upon sexual orientation which is an analogous ground of discrimination under the *Charter.* The Ontario Act at that time permitted individual applications for adoption by homosexuals while denying joint applications by homosexuals in conjugal relationships. The court concluded, "I cannot imagine a more blatant example of discrimination"[19]. The court noted that the overall goal of the legislation was to promote the best interests of children within the family which was not served by an absolute prohibition against adoption by homosexual couples. The court concluded that the infringement of s. 15(1) was not justified under s. 1 of the *Charter* and "read in" to the definition of spouse appropriate wording to make it applicable to same-sex common-law couples.

In the case of *C.E.G. (No. 1) (Re)*[20] an Ontario court considered the same issue 3 months later. Again a lesbian applicant wished to adopt the child of her partner and challenged the definition of spouse in the Ontario Family Services Act. In allowing the application and modifying the definition of spouse to include same-sex couples the court relied upon and adopted the reasons in *K (Re).*

In 1996, Alberta's legislation was challenged by 2 lesbian woman in the case of *A (Re)*[21]. Again they wished to adopt the biological children of their partners. The court was initially asked to determine whether the definition of spouse in the Alberta Act was meant to include same-sex couples and, if not, whether that violated the *Charter*. The Attorney General initially opposed the applications but subsequently withdrew the opposition when the government announced that it intended to amend the Child Welfare Act. The amendment replaced the term "spouse" with "step-parent" in order to permit, inter alia, adoptions between same-sex couples. Using the standard rules of statutory interpretation, the court concluded that the legislature intended to permit same-sex adoptions by replacing "spouse" with "step-parent". The court found it unnecessary to consider the *Charter* issue but did consider in some detail, and in a positive way, the ability of homosexuals to parent.

An instructive part of this case is that the court ordered the government to pay the solicitor and client costs of the applicants, even though it had ultimately withdrawn its opposition. It was reported that these costs amounted to some $300,000.00.

Finally in June, 2001 the Nova Scotia Supreme Court considered the issue of same-sex adoption rights in the case of *Nova Scotia (Birth Registration No. 1999-02-004200) (Re)*[22]. Again it involved an application by two lesbian women, one of whom sought to adopt the child of her partner but was prevented from doing so under the Nova Scotia

[19] Ibid, at page 19.
[20] *C.E.G. (No. 1) (Re)* [1995] O.J. No. 4072 (Ont. Gen. Div.).
[21] *A (Re)* [1999] A.J. No. 1349 (Alta. Q.B.).
[22] *Nova Scotia (Birth Registration No. 1999-02-004200) (Re)* [2001] N.S.J. No. 261 (N.S.S.C. Fam. Div) decided June 28, 2001.

Child and Family Services Act. That Act only permitted married couples to apply jointly to adopt. The Court concluded that the law violated s. 15(1) of the *Charter.* The court found that it was not saved by section 1 as the government, who did not defend the legislation, had not discharged its onus to prove that it was a reasonable limit. The women were permitted to proceed with the adoption.

None of these court cases would be binding upon a Manitoba court. However, in my opinion a Manitoba court would necessarily be drawn to the same conclusion in relation to our *Adoption Act,* using the same reasoning as these other Canadian courts. Therefore, it is my opinion that a court would declare the existing provisions of the *Adoption Act* unconstitutional to the extent that they exclude homosexual persons from the right to apply to adopt children on the same basis as heterosexual persons.

The only option open to the government should it wish to preserve the existing sections of the *Adoption Act* would be to use the notwithstanding clause in section 33 of the *Charter.* This clause states that the legislature may expressly declare in an Act of the legislature that a provision of an Act of the legislature shall operate notwithstanding s. 15(1) of the *Charter*. The declaration would be in effect for a maximum of 5 years at which point it would have to be re-enacted. This is a provision which would be extremely controversial and would, in the opinion of the writer, require a far more pressing need than the preservation of the impugned provisions in our *Adoption Act.* The use of this provision is not recommended for consideration.

D. Legislative Approaches in Other Jurisdictions

The following is a description of the state of the law in the other provinces and territories in Canada:

British Columbia
In 1996, B.C. amended its *Adoption Act* to permit same–sex adoption, either by the partner of a parent, or in respect of the adoption of an unrelated child. It did so in neutral terms. The *Act* simply says that "a child may be placed for adoption with one adult or two adults jointly"[23] without specifying either gender or marital status.

Alberta
Alberta amended its C*hild Welfare Act* in May of 1999 to allow for step-parent adoptions by the gay or lesbian partner of a biological parent[24]. This amendment was in response to a court challenge by two lesbian partners of biological mothers who argued that the legislation, which permitted only spouses to apply to adopt the child of their partner, was unconstitutional. Prior to the case being heard the Alberta legislature amended the Act to change spouse to step-parent which term the court found was meant to include homosexual step-parents. Therefore, in Alberta, homosexuals may adopt their partner's children on the same basis as heterosexuals.

The Alberta legislation is silent on the question of joint adoptions of wards of an agency or other unrelated children and therefore there is no legal impediment to adoption by two persons of the same sex.

Saskatchewan
In 1998, Saskatchewan passed legislation to permit an application for adoption by "married adults jointly, an unmarried adult, or any other person or persons that the court may allow, having regard to the best interests of the child"[25]. This wording is clearly broad enough to permit joint applications for adoption by same-sex couples. However, step-parent adoption was only possible with respect to the child of the applicant's "spouse"[26]. In 2001, Saskatchewan passed omnibus legislation which, inter alia, changed the definition of spouse in *The Adoption Act* to include "a person with whom the person is cohabiting as spouses"[27] so that common-law partners could apply to adopt their partner's child. It was the government's intention by this amendment to include same-sex common-law couples as well as opposite-sex couples. They feel confident that a court would consider that same-sex couples can cohabit "as spouses" even though traditionally the label of "spouse" has only been available to heterosexual couples. This remains to be tested in court.

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[23] *The Adoption Act*, R.S.B.C. 1996, chapter 5, section 5(1).
[24] *The Miscellaneous Statutes Amendment Act*, S.A. 1999, c.26, s.4, s.25.
[25] *The Adoption Act*, S.S. 1998, c.A-5.2, section 17(2).
[26] Ibid, section 23(1).
[27] *The Miscellaneous Statutes (Domestic Relations) Amendment Act, 2001*, section 2.

Ontario
Ontario amended its *Child and Family Services Act* to allow for same-sex adoptions as part of its omnibus legislation passed in response to the Supreme Court of Canada case of *M. v. H.* Persons who are permitted to jointly adopt or to adopt the children of their partner include married persons, common-law partners, and same-sex common-law partners. Ontario was criticized for introducing a three tier system of rights for couples because of the hierarchy of status that implies.

Quebec
The Quebec legislation is written in gender neutral terms, both in respect of step-parent adoption and in respect of agency adoptions and has been since 1982. The Act simply provides that "any person of full age may, alone or jointly with another person, adopt a child"[28]. Therefore, sexual orientation is not an issue in terms of adoption applications in that province.

Nova Scotia
The Nova Scotia legislation permits persons to adopt individually and the issue of sexual orientation has no effect on the application. However, the legislation does not allow common-law couples, either same-sex or opposite-sex, to adopt jointly or to apply to adopt the biological child of their partner. In the recent case of *(Birth Registration No. 1999-02-004200) (Re)*[29], one member of a lesbian couple sought to adopt the biological child of her partner and the court concluded that the provisions of the Nova Scotia *Adoption Act* which prevented same-sex couples from applying to adopt were unconstitutional. The result has been that in Nova Scotia, both same and opposite-sex common-law couples are now permitted to adopt a child jointly as a couple and are also permitted to adopt the child of their partner.

New Brunswick
Their *Child and Family Services and Family Relations Act* does not permit a gay or lesbian partner to adopt the child of his or her partner nor does it permit a gay or lesbian couple to adopt jointly.

P.E.I.
Their legislation does not permit a gay or lesbian partner to adopt the child of his or her partner nor does it permit a gay or lesbian couple to adopt jointly.

Newfoundland
Their *Adoption Act* was amended in 1999 to permit both stranger and step-parent adoptions by same-sex couples. It provides that "one adult alone or two adults jointly may apply to a court to adopt a child under this Act", and that "one adult may apply to a court to jointly become a parent of a child with a birth parent of that child" [30]. Although the Act was passed and given Royal Assent on December 14, 1999, it was subject to proclamation which will not likely come into force until approximately Apri1, 2002.

[28] *The Adoption Act,* Article 546.
[29] 2001, NSSF24, Supreme Court of Nova Scotia (Family Division).
[30] *The Adoption Act*, S.N.1999 c. A-2.1, section 20.

Northwest Territories
Their legislation does not permit a gay or lesbian partner to adopt the child of his or her partner nor does it permit a gay or lesbian couple to adopt jointly.

Yukon and Nunuvut
No information was available for these two territories.

In summary, it is clear that the majority of the provinces have changed their adoption law and/or practice to include persons in same-sex common-law relationships.

E. Analysis

Although there is some opposition amongst Manitobans to the extension of full adoption rights to same-sex couples, it is the opinion of this writer that, short of invoking the notwithstanding clause which is certainly not recommended, the government has no choice but to amend the legislation to extend these rights. A court case which defended the existing legislation would undoubtedly be lost. Not only would it inconvenience the citizens who are forced to initiate such a challenge in order to obtain benefits which are rightfully theirs in law, but it would likely expose the citizens of Manitoba to a significant costs order.

In amending our *Adoption Act*, I do not recommend the use of the legislative model that would permit "any two adults" to adopt. There is clearly some discomfort on the part of some citizens in Manitoba with changing the traditional definition of parents to include two persons in a loving, conjugal relationship who are of the same gender. To extend the definition of parents to two persons who are not in a conjugal relationship, who do not share economic resources or see themselves as life partners, and who perhaps do not even live in the same home, would undoubtedly create even more discomfort. Further, there is no expressed need in Manitoba for this type of adoption. Finally, extending the definition of a parent in this way is not necessary to ensure *Charter* compliance.

I recommend that the legislative model to be used be our present model, extended to fully include homosexual persons in its provisions. The only *Charter* problem is the fact that homosexual persons are excluded from the full benefits of the *Adoption Act.* I recommend that the legislation be amended only to the extent necessary to cure this *Charter* problem. This would include permitting homosexual couples who are cohabiting in conjugal relationships of some permanence to be able to jointly adopt a child. It would also include the right of one member of a same-sex couple to apply to adopt the child or extended family member of his or her partner, which child they would have already been parenting.

It could be argued that the broader model of "any two adults" has the benefit of simplicity, but this is not the objective of the legislation in my opinion. Even if it were, the model which I recommend requires surprisingly little change to meet the objective of *Charter* compliance, and it has the benefit of being the model with which Manitobans are already familiar.

The legislative changes required to implement these recommendations are set out below, together with an analysis of their necessity and the reasoning behind the wording proposed. The recommended changes are summarized page __, "Summary of Recommendations", and the specific wording which I recommend is set out in table form in Schedule 5.

The Adoption Act **– s. 1** - The definition of "extended family" in section 1 would need to be amended to include not only opposite-sex common-law partners, but also same-sex common-law partners. At minimum the requirement that the common-law partner be someone "of the opposite-sex" should be deleted. However, I would recommend that the government go further and provide a definition of common-law partner which is inclusive of same-sex couples so that it is made clear in the legislation that adoption by such persons is clearly contemplated.

I would further recommend that the definition of common-law partner, to the extent applicable, be the same as the definition that was used in the 10 pieces of legislation amended by Bill 41 in June, 2001. In my opinion, where possible legislation within Manitoba should be consistent with other legislation affecting the same group of citizens, particularly when that legislation deals with the criteria necessary in order to obtain rights and benefits.

Bill 41 defined a common-law partner as a person who, not being married to the other person, cohabited with him or her in a conjugal relationship for a prescribed period of either 1 year or 3 years depending upon the legislation. The only difference in the definition in the *Adoption Act* would be that instead of requiring the common-law partnership to have subsisted for 1 year or 3 years as set out in those other Acts, the union would simply have to be "of some permanence". This is the test which is applied to opposite-sex common-law partners in the *Adoption Act* and which should therefore apply consistently to all common-law couples, regardless of sexual orientation.

The result would be that the definition of "extended family" in section 1 would include certain family members and their spouses or common-law partners, with common-law partner to be defined as follows:

> ***"common-law partner"*** *of a person means a person who, not being married to the other person, cohabits with him or her in a conjugal relationship of some permanence.*

Changing the definition of extended family would enable homosexual persons to be able to apply for Division 5 "extended family" adoptions, namely, for the adoption of children who are related by blood or adoption to their partner.

The Adoption Act **– s. 36** - This section is contained in the part of the *Adoption Act* pertaining to the adoption of children who are permanent wards of Child and Family Services. The section would need to be amended by substituting "common-law partners" for the current description of "a man and a woman who are not married but are cohabiting as spouses" as one of the types of joint applications permitted. This would enable homosexual persons who are living in a conjugal relationship of some permanence to jointly apply to adopt a permanent ward under Division 1 of the *Adoption Act.* Because Division 3 of the *Adoption Act* pertaining to the adoption of a child from another country incorporates the provisions of Division 1, this amendment would open adoptions under Division 3 of the *Adoption Act* to homosexual persons as well.

***The Adoption Act* – s. 73(1)** – This section is contained in the part of the *Adoption Act* pertaining to the adoption of children that the applicant has in fact been parenting for at least 2 years. The section would need to be amended by substituting "common-law partners" for the current description of "a man and woman who are not married but are cohabiting as spouses" as one of the types of joint applications permitted. This would enable homosexual persons who are living in a conjugal relationship of some permanence to jointly adopt a child that they have been parenting together under Division 4 of the *Adoption Act.*

***The Adoption Act* – s. 88** – This section is contained in the part of the *Adoption Act* pertaining to the adoption of the child of an applicant's partner. The section would need to be amended by removing the phrase "is cohabiting with the parent of a child and is of the opposite-sex to the parent" from the description of who may apply to adopt under this section and substituting "a common-law partner" of the parent of a child. This would enable homosexual persons to apply to adopt the child of their partner under Division 6 of the *Adoption Act.* The descriptive heading for this Division should also be amended to reflect more inclusive language.

***The Adoption Act* - regulations** - The Declaration in Form AA-14, which a cohabiting couple must complete in order to demonstrate their commitment as a couple, should be amended by removing the reference to "husband and wife" and replacing it with a reference to "common-law partners. The important aspect of this declaration is to ensure that joint applicants have a commitment to their relationship on a permanent basis. This change would preserve that objective while making it inclusive for same-sex couples, thereby enabling them to jointly adopt children under the Division 2 private adoption provisions of the *Adoption Act.*

***The Vital Statistics Act* - regulations –** The forms would have to be amended to delete the references to "mother" "father" and "husband" and replace them with a gender neutral word like "parent", at least as an option. The following forms need attention:

Form 3 – Request to Register a Child in a Hyphenated or Combined Name;
Form 4 – Registration of Birth (including the instructions to parent or guardian);
Form 4A – Registration of Stillbirth;
Form 6 – Joint Request by Parents;
Form 9 – Request to Amend Registration;
Form 11 - Birth Certificate – paper form; and
Form 16 – Application Form.

This would enable a child to be registered with two parents of the same gender.

F. Adoption Recommendations

Generally:

1. That the right of common–law partners to apply to adopt jointly with a common-law partner, be extended to include same-sex common-law partners.
2. That the right of common-law partners to apply to adopt the biological child or extended family member of an applicant's common-law partner, be extended to include same-sex common-law partners.

***The Adoption Act*:**

3. That the definition of "extended family" in section 1 be amended to include adults who are cohabiting in a conjugal relationship of some permanence with a member of the same-sex.
4. That sections 36, 73(1), and 88 be amended to permit a joint application for adoption to be made by same-sex cohabiting partners that are in a conjugal relationship of some permanence.
5. That Form AA-14 in Adoption Regulation A2 – 19/99 be amended to permit a "declaration of commitment" to be made by same-sex cohabiting partners that are in a conjugal relationship of some permanence.

***The Vital Statistics Act*:**

6. That Forms 3, 4, 4A, 6, 9, 11, and 16 to the regulations of the *Vital Statistics Act* be amended to ensure that a birth certificate can register either two parents of the same gender if appropriate.

IV. Conflicts of Interest and Protection of the Public Interest

The Terms of Reference require that the following two questions be addressed in relation to the conflicts issue:

1. **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?**

2. **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?**

In response to these two questions, section A describes in detail the current provisions of Manitoba's legislation containing conflict of interest provisions. Section B provides information on the views of a variety of Manitobans on this issue as gathered through our process of submissions and consultations.

Finally, section C contains my analysis of whether amendments are recommended to include persons in common-law relationships and if so, utilizing what approach. I then analyze how this approach can best be reconciled with the privacy concerns of some same-sex common-law couples. A summary of my recommendations flowing from this analysis are set out in the recommendations section D.

A. The Law in Manitoba on Conflicts of Interest and Protection of the Public Interest

A number of Manitoba statutes contain conflict of interest provisions, including those affecting public officials. The Acts dealing with public officials generally have two types of provisions dealing with conflict. Firstly, the Act will require those to whom the Act applies to file a list of assets with a clerk or some other official before or shortly after they assume office. Secondly, there is generally a requirement to identify a conflict of interest when it arises during the course of the official's term of office. When such a conflict is identified, the legislation normally prohibits participation by that official in decision-making and requires them to absent themselves from the discussion and vote.

There are also Acts with conflict of interest provisions for persons employed or appointed by publicly funded organizations and agencies. Typically the legislation provides that the person is to withdraw from discussion and voting on an issue in respect of which they have a conflict. Sometimes the details of the nature of the conflict must be disclosed.

Finally there are Acts which deal with protection of the public interest by recognizing the special relationship of spouses. These Acts apply to a variety of fact situations from letting livestock run wild to executing a final will and testament.

All of these legislative provisions require disclosure of conflicts arising from a person's relationship with a spouse. Some extend this rule to common-law partners, although the definition of what constitutes a common-law partner varies, generally without a minimum qualifying period of living together. Some legislation arguably extends the rule to same-sex common-law partners – but only if the terms "family" and "spouse", which are undefined, are read broadly enough to include such persons. Although during an informal consultation with the Mayor of the City of Winnipeg we understood that the City had policy guidelines which extended conflicts disclosure to same-sex partners, subsequent investigation failed to secure copies of any such policies. Therefore, while some legislation requires disclosure of common-law partnerships, it appears that there are currently no provisions in Manitoba specifically requiring disclosure of conflicts arising out of same-sex common-law partnerships.

A summary of the specific provisions of the relevant legislation in Manitoba is set out below.

Acts Pertaining to Elected Public Officials

There are three Acts which pertain to elected public officials, namely, members of the legislature, city and municipal councillors, and school trustees. These Acts contain mirror provisions as to the identification and impact of conflicts of interest, and the disclosure of assets and interests.

Legislative Assembly and Executive Council Conflict of Interest Act [31]

This Act regulates conflicts for members of the Legislature, including ministers. Where a conflict arises for a member or minister, or any of their dependants, the member or minister is to disclose the "general nature" of the conflict, withdraw from any meeting dealing with the issue without voting or participating in the discussion, and refrain from attempting to influence the matter.[32] The clerk is to record the disclosure, the general nature of the conflict disclosed, and the withdrawal of the member from the meeting.[33]

In addition, every member and minister must file a statement of assets and interests with the Clerk of the Legislative Assembly within 15 days after the beginning of each session of the Legislature. The statement contains a detailed list of assets and interests of the member or minister and his dependants.[34] Dependant is defined to include the spouse of a member, including "a person who is not married to the member or minister but whom the member or minister represents as his spouse".[35]

Municipal Council Conflict of Interest Act [36]

This Act applies to all Mayors, Reeves and elected councillors in Manitoba including the City of Winnipeg. It provides that if a matter arises during a meeting where the councillor, or any of his dependants, has a pecuniary interest or liability, then the councillor must disclose the general nature of the pecuniary interest or liability, withdraw from the meeting without voting or participating in the discussion, and refrain from attempting to influence the matter.[37] Dependant is defined to include the spouse of a councillor, "including a person who is not married to the councillor but whom the councillor represents as his spouse".[38] The Clerk of the meeting must record the disclosure, the general nature of the pecuniary interest or liability disclosed, and the withdrawal of the councillor from the meeting.[39] In addition, every councillor must file with the clerk of the municipality a statement disclosing assets and interests for himself, and for his dependants, in November of each year.[40]

Public Schools Act [41]

This Act governs school divisions, and the powers, duties, and conduct of school boards, schools, and teachers in Manitoba. It provides that if a matter arises during a meeting where a trustee, or any of his dependants, has a pecuniary interest or liability, then the trustee must disclose the general nature of the pecuniary interest or liability, withdraw from the meeting without voting or participating in the discussion, and refrain from

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[31] *The Legislative Assembly and Executive Council Conflict of Interest Act,* R.S.M. 1987, c. L112.
[32] Ibid, sections 4(1), 7 and 8.
[33] Ibid, section 5.
[34] Ibid, sections 11 and 12.
[35] Ibid, section 1.
[36] *The Municipal Council Conflict of Interest Act,* R.S.M. 1987, c. M255.
[37] Ibid, section 5(1).
[38] Ibid, section 1.
[39] Ibid, section 6(1).
[40] Ibid, sections 9 and 10.
[41] *The Public Schools Act,* R.S.M. 1987, c. P250.

attempting to influence the matter.[42] Dependant is defined to include the spouse of a trustee, "including a person who is not married to the trustee but whom the trustee represents as his spouse".[43] The Clerk of the meeting must record the disclosure, the general nature of the pecuniary interest or liability disclosed, and the withdrawal of the trustee from the meeting.[44] In addition, every trustee must file with the secretary-treasurer of the school division or school district a statement disclosing assets and interests for himself, and for his dependants, prior to taking office and within 30 days of acquisition or disposal of an asset or interest.[45]

There is a further section in *The Public Schools Act* dealing with conflicts which is unique to that Act. A person entitled to vote for the members of a regional committee in a Francophone School Division includes "a spouse of an entitled person who is either legally married to the entitled person or, if not legally married, has cohabited with the entitled person for a period of at least 12 months immediately before the election".[46]

Acts Pertaining to Persons Employed by or Appointed by Publicly Funded Agencies

There are three Acts which pertain to Persons employed or appointed by publicly funded agencies which contain mirror provisions as to conflicts of interest, namely, for board members of the Communities Economic Development Fund, the Development Corporation, and the Manitoba Public Insurance Corporation.

Communities Economic Development Fund Act[47]

The purpose of this Act is to create a fund to encourage economic development in Northern Manitoba, in the Manitoba fishing industry, and for aboriginal people living outside of Winnipeg. The fund is managed by a Board of directors. A director cannot vote or be present at a meeting to discuss any business "in which he or she has a significant beneficial interest through ownership of capital stock by himself or herself or members of his or her family".[48] Family is not defined. Once the matter arises the member is supposed to "disclose any facts" that create the conflict and then withdraw.[49]

Development Corporation Act[50]

This Act creates a corporation which, amongst other things, provides financial assistance, including loans, to industrial enterprises and community development corporations. A director of the corporation cannot vote or be present at a meeting to discuss any business "in which he or she has a significant beneficial interest through ownership of capital

[42] Ibid, section 38(1).
[43] Ibid, section 36(1).
[44] Ibid, section 38(4).
[45] Ibid, section 39.3.
[46] Ibid, section 21,36(1).
[47] *The Communities Economic Development Fund Act*, R.S.M. 1987, c. C15.
[48] Ibid, section 15(5).
[49] Ibid, section 15(7).
[50] *The Development Corporation Act*, R.S.M. 1987, c. D60.

stock by himself or herself or members of his or her family".[51] Family is not defined. Once the matter arises the member is supposed to "disclose any facts" that create the conflict and then withdraw.[52]

Manitoba Public Insurance Corporation Act[53]

This Act establishes the "no fault" system of motor vehicle accident insurance in Manitoba. It establishes a Board of directors who must absent themselves from a meeting of the board and not vote upon any matter in which they have "a significant beneficial interest through ownership of capital stock by himself or members of his family"[54]. Family is not defined. Once the matter arises the member is supposed to "disclose any facts" that create the conflict and then withdraw.[55]

There are four other Acts pertaining to conflicts in publicly funded agencies which each have their own unique conflicts rules.

Agricultural Producers' Organization Funding Act[56]

The purpose of this Act is to facilitate the funding of organizations that represent producers of agricultural products in Manitoba. The Act establishes an agency which determines which organizations will get this funding. A member of the agency is prevented from participating in a decision about whether an organization will receive funding if the member or his dependant has within the past six months been a member of the executive or an employee of the organization under discussion. A dependant includes a person who is residing with the member and "who is not married to the member but whom the member represents as his or her spouse".[57] There is no responsibility to report the details of the conflict.

Credit Unions and Caisses Populaires Act[58]

This Act regulates the incorporation, powers, operating standards, membership and governance of credit unions. It provides that if a director or officer of a credit union is a party to a material contract with the credit union, or has a material interest in a contract or proposed contract between a person and the credit union, then they are deemed to have a conflict of interest. A conflict also arises when it is their spouse who has the material interest.[59] Spouse is not defined. When the director or officer is in a conflict of interest, they must disclose the nature and extent of the conflict in writing to the credit union, request to have it entered in the minutes of meeting of directors, and then not participate in any vote concerning it.[60]

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[51] Ibid, section 14(6).
[52] Ibid, section 14(8).
[53] *The Manitoba Public Insurance Corporation Act*, R.S.M. 1987, c. P215.
[54] Ibid, section 2(10).
[55] Ibid, section 2(12)).
[56] *The Agricultural Producers' Organization Funding Act*, S.M. 1989-90, c. 17 – Cap. A18.
[57] Ibid, section 10(1).
[58] *The Credit Unions and Caisses Populaires Act*, S.M. 1986-87, c. 5 – Cap. C301.
[59] Ibid, section 91(2).
[60] Ibid, section 91(6).

Family Farm Protection Act [61]

The purpose of this Act is to promote and preserve the Manitoba agricultural community and particularly the tradition of locally owned and managed family farms. It establishes The Manitoba Farm Mediation Board. Board members are disqualified from hearing or participating in decision-making by the board in any matter in which the member "is related by blood or marriage to any of the parties to the matter before the board".[62] Common-law couples are therefore not included. There is no requirement to report the details of the conflict.

Mental Health Act [63]

This Act deals with determining mental competence and assisting those who are determined incompetent. It establishes a review board to hear applications. A person's spouse may not sit as a member of the review board.[64] Also, a spouse must consent to the appointment of a committee.[65] Spouse is defined to include a person who "although not married to the patient, cohabited with the patient as his or her spouse for at least six months immediately before the patient's admission to the facility".[66]

Acts Which Protect the Public Interest

Animal Liability Act [67]

This Act deals with animal control and permits an action against the owner of livestock that has been permitted to run at large. The owner of the livestock can raise the defense that the livestock was at large due to an act or default of a person other than the owner himself, an employee of the owner, or "the spouse or child of the owner, who is not estranged from him or her".[68] A common-law partner is not included.

Civil Service Act [69]

This Act deals with the selection, classification and pay of government employees. In selecting personnel, where more than one candidate is qualified for the position, preference is to be given to a war veteran or the surviving spouse of a war veteran.[70] A common-law partner is not included.

Consumer Protection Act [71]

This Act governs the purchase and sale of goods. A common-law partner is not included in its provisions. A notice specifying that goods purchased on a time sale agreement are

[61] *The Family Farm Protection Act,* S.M. 1986-87, C. 6 – Cap. F15.
[62] Ibid, section 3(13).
[63] *The Mental Health Act,* S.M. 1998, c. 36- chap. M110.
[64] Ibid, section 49().
[65] Ibid, section 72(1)(c).
[66] Ibid, section 1.
[67] *The Animal Liability Act,* S.M. 1998, c. 8 – Cap A95.
[68] Ibid, section 2(3).
[69] *The Civil Service Act,* R.S.M. 1987, c. C110.
[70] Ibid, section 14(2)(d).
[71] *The Consumer Protection Act,* R.S.M. 1987, c. C200.

about to be repossessed, can be delivered personally to the buyer or to his spouse.[72] Individuals attempting to collect on a debt or repossess goods cannot:

- make harassing phone or personal calls to the debtor, his spouse or his family;
- except with leave of the court, remove any goods claimed unless the debtor, his spouse, his agent, or an adult having possession and use of the goods with the consent of the debtor is present at the time and is aware of the removal;
- give false information which may be detrimental to a debtor or his spouse; or
- make harassing phone or personal calls to determine the whereabouts of a debtor, his spouse or his family.[73]

Cooperatives Act [74]

This Act deals with the incorporation, powers, and governance of cooperatives in Manitoba. Board members are not permitted to participate in decisions in which they have a conflict, which is based upon whether they are an associate. Common-law partners are excluded from the definition of "associates".[75] While spouses are included in the definition, the term is not defined.

Corporations Act [76]

This Act defines a number of circumstances where a person cannot deal with an "affiliate" without being in a conflict. A person is affiliated with a corporation where the person is an officer, employee, significant shareholder, significant borrower, an officer or employee of a significant borrower, and so on of the corporation, or the spouse of any of these people.[77] Common-law partners are not included.

Department of Health Act [78]

This Act provides that when the government pays medical and other expenses for a person, they can seek recovery from the person's husband or wife.[79] They can also file a lien against the property of a person if these services were rendered to the person or to his or her spouse.[80] Common-law partners are not included.

Elderly and Infirm Person's Housing Act [81]

In this Act there are certain rights to housing given to elderly persons which are income tested. In determining income the Act looks at the total income of the person and their cohabiting spouse.[82] Common-law partners are not included.

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[72] Ibid, section 50(1).
[73] Ibid, section 98.
[74] *The Cooperatives Act*, S.M. 1998, c. 52 – Cap. C223.
[75] Ibid, section 2(5).
[76] *The Corporations Act*, R.S.M. 1987, C. C225.
[77] Ibid, section 342.1(5).
[78] *The Department of Health Act*, R.S.M. 1987, c. H20.
[79] Ibid, section 7(1).
[80] Ibid, section 7(3).
[81] *The Elderly and Inform Persons' Housing Act*, R.S.M. 1987, c. E20.
[82] Ibid, sections 1 and 2.

Elections Act [83]

In determining residence this Act deems a person to be living at the same place as their spouse unless they have taken up and continued at a home or some other place with the intention of living there for an indefinite period, separate and apart from their spouse.[84] Common-law partners are not included in these provisions.

Employment and Income Assistance Act [85]

There are certain means tested benefits under this Act where family income is often considered. Common-law partnerships are included but apply only to a man and a woman.[86]

Power of Attorneys Act [87]

This Act deals with the execution and effect of powers of attorney. If a donor cannot read or write, someone other that their spouse can sign for them[88]. In all cases, the spouse of the donor cannot witness his or her signature[89]. This is so that they do not exert undue influence on the donor. Spouse is defined to include "a person who is publicly represented by the donor or attorney as his or her spouse"[90].

Municipal Act [91]

This Act deals with the formation, dissolution, powers, administration, and governance of Municipalities. In the section on tax and debt collection, "a spouse or dependant family member" residing with the auctioneer, a member of council or the chief administrative officer cannot buy property offered for sale at a tax auction because they are considered to be in a conflict of interest[92]. Neither "spouse" nor "dependant family member" is defined.

Wills Act [93]

This legislation protects the public interest by ensuring that there is not undue influence upon a testator when they are deciding how to dispose of their estate.

This Act provides that if a person is a witness to a will that their spouse is benefiting under, then any provision in the will for that person's spouse is void.[94] The same thing applies when a person signs a will for someone else which contains a benefit for the person's own spouse. That provision is void as well.[95]

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[83] *The Elections Act*, R.S.M. 1987, c. E30.
[84] Ibid, section 35(1), rule 5.
[85] *The Employment and Income Assistance Act*, R.S.M. 1987, c. S160 – Cap. E98.
[86] Ibid, section 5(5).
[87] *The Powers of Attorney Act*, S.M. 1996, c. 62 – Cap. P97.
[88] Ibid, section 10(2).
[89] Ibid, section 11(2).
[90] Ibid, section 1.
[91] *The Municipal Act*, S.M. 1996, c. 58 – chap. M225.
[92] Ibid, section 373.
[93] *The Wills Act*, R.S.M. 1988, c. W150.
[94] Ibid, section 12. There is a saving provision if it can be proven that neither the witness nor his or her spouse exercised any improper or undue influence upon the testator.
[95] Ibid, section 13. There is the same saving provision as in section 12.

B. Submissions and Consultations

Persons who were consulted on this issue and who provided written submissions were surprisingly consistent in their approach. With the exception of one organization, who later qualified their position, everyone took the position that common-law partners, including same-sex common-law partners, should be bound by the same conflict of interest provisions as spouses.

This position remained true even though such disclosure could have the effect of breaching the privacy of gay and lesbian persons who wished to keep their sexual orientation confidential. The response to this concern by members of the gay and lesbian community was essentially that "this is the price we pay in order to have confidence in our public officials".

Despite this statement, it was clear that some gay and lesbian persons supported disclosure because:

- They believed that it is only necessary to disclose the fact that a conflict has arisen, and not the fact that it arises by virtue of a relationship with a same-sex partner, and that therefore it would be possible to keep one's sexual orientation confidential and still disclose a conflict;
- They believed that there is a convention in the media not to "out" gays or lesbians against their will; and
- They believed that the *Freedom of Information and Protection of Privacy Act*[96] would protect employees who had to make disclosure of a conflict arising from a same-sex partnership.

The one organization who initially took a contrary view was the Manitoba Association of Women and the Law. This organization conducted an equality audit of Manitoba statutes in June, 2001. They did no empirical research but, based on anecdotal information, concluded that requiring such disclosure could have a chilling effect on the participation of gays and lesbians in public life. They pointed out that there is a big difference between the climate in Winnipeg where there is a visible gay/lesbian community with somewhat more community support, and in rural Manitoba where discrimination can be intense. They spoke of same-sex partners who were even foregoing employment benefits because it would require public disclosure of their relationship.

Ultimately, the representatives of the Women and the Law Association advised that they were prepared to agree with a requirement of disclosure if steps were taken to try and ensure confidentially, where possible, such as limiting the extent of the disclosure and perhaps having a central person who would deal with conflicts instead of the local officials, who might not always be trusted to keep the information to themselves in a small town setting.

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[96] *The Freedom of Information and Protection of Privacy Act*, S.M. 1997, c. 50 - Cap. F175.

C. Analysis

The underlying policy behind conflict of interest legislation is to ensure that public officials, and persons serving the public, are able to make their decisions, and are seen to make their decisions, free from potential bias. It is necessarily a balance between the privacy rights of the person serving the public and their families, and the right of the public to scrutinize elected officials and other persons who make decisions on their behalf, particularly decisions which involve the expenditure of public money.

Persons with whom someone is emotionally close are most apt to be capable of unduly influencing their decision-making. This is particularly so when the person is someone with whom they share an economic partnership. Therefore, all such legislation has traditionally extended to spouses. However, when one considers the objectives of the legislation, there is no material difference between a spouse and a person with whom one is living in a conjugal relationship. As such, it seems clear that the category of persons which potentially gives rise to a conflict should be extended in all cases to include common-law partners.

With respect to a definition of common-law partner, it is clear that it must include same-sex partners since such persons are capable of the same type of emotional influence and economic interdependence as opposite-sex partners. This does raise the issue of confidentiality, which will be discussed below. But simply given the objectives of the legislation, there is no rational explanation for the exclusion of such persons, and all Manitobans that spoke on this issue apparently agree.

In designing a definition, it does not seem necessary, as with the acquisition of rights to support or property, that the living together relationship have subsisted for a specified period of time. If the issue is the actual or apparent ability of a person in an emotionally close relationship to influence decision-making, then that ability to influence is just as apt to be present at the beginning of the relationship as it is at the end. However, it may not be adequate that the parties are simply living under the same roof since they may be very independent from each other. The addition of the requirement that the living together relationship be a "conjugal" one creates a category of relationship that is apt to influence a person in their decision-making. "Conjugal" has a well-developed definition in law and includes the notions of economic and emotional interdependence.

These considerations are of equal importance in the various legislation that protects the public interest. Spouses are given special rights and responsibilities because their emotional and economic partnership is considered worthy of both special treatment and special responsibility.

Accordingly, the definition of common-law partner that is recommended for use in conflicts legislation and legislation concerning the protection of the public interest is:

> *"**common-law partner**" means a person who, not being married to the other person, cohabits with him or her in a conjugal relationship".*

This definition has the added benefit of being the same as that currently existing in Manitoba legislation, with the exception that it omits the requirement of a specific minimum time frame for cohabitation. Consistency with other legislation is an important objective as it increases general knowledge of the legislative provisions and therefore an increased likelihood of compliance.

This definition should be standardized and used throughout all legislation pertaining to conflicts and protection of the public interest. References to the person being 'dependent" or being "held out" as a spouse are old-fashioned and no doubt arise from an age when most public officials were men and their spouses, or common-law spouses, were women who were economically and emotionally dependent upon them. This is no longer true in Manitoba and such references should be abolished.

Apart from including common-law partners in the criteria for conflicts, it may be time for the legislation, which is really a hodge-podge of criteria, to be rationalized and made consistent wherever possible. The criteria for persons, in relation to whom a conflict could conceivably arise, ranges from "family" which is undefined, to "immediate family", to "persons related by blood or marriage", to "spouses and children" so long as they are dependent, and to spouses including those persons being "held out" as a spouse. There should be a standard definition of "family" established, as well as a standard definition of "immediate family" where it is desirable to restrict the criteria. For the purposes of this report I have simply recommended that one or other of these categories be used, as consistent as possible with the existing criteria in the particular legislation.

I turn now to the issue of confidentiality. In hearing the recommendations from the gays and lesbians we spoke to, we were conscious of the fact that we were speaking to persons who were already "out" in their own lives and had some level of comfort with public knowledge of their sexual orientation. We were also conscious of the fact that some of their support was based upon the, probably mistaken, assumption that the person disclosing the conflict could do so and still keep their sexual orientation confidential. For example, some believed that the media would always support a person who desired to have their sexual orientation remain confidential. This was directly challenged by a public official we spoke to whose personal experience was that the media were not prepared to do this in his case.

Further, most believed that the legislation did not require disclosure of anything about the conflict. In fact, this is another area where the criteria ranges widely, from a requirement that the person disclose the "nature and extent" of the conflict, to only the "general nature" of the conflict, to in many cases not requiring any particulars at all. Obviously, simply disclosing the fact that you have a conflict and then removing yourself from the discussion and decision-making is far more likely to retain confidentiality than announcing that the conflict arises from a person with whom you are sharing a same-sex relationship.

Certainly there is no practical advantage in requiring a person in a conflict to disclose the details of the conflict if the only purpose of the legislation is to get them out of the room

while the decision is being made. So long as they are prepared to absent themselves, providing an explanation of the circumstances giving rise to the conflict does not add anything of a practical nature. Indeed, it could be argued that a person may be *less* likely to disclose a conflict if they are required to disclose details where they have a concern about confidentiality. This might occur for heterosexuals as well when they would rather that the economic or business activities of their family members remain out of the public eye. If the most important objective of this legislation is to get people to remove themselves in the event of a conflict, any requirements for disclosing the details of a conflict might actually tend to hinder this.

The fact is, however, that in an effective democracy, fair decision-making must not only be done, it must be seen to be done. In this way it is similar to our legal system. It would not be sufficient for the public to be assured by a judge that a decision made behind closed doors was in fact fair and correct. The public would want the opportunity to be present to hear the evidence go in and the decision made. It is the same with conflicts. It would not be adequate for a public official to simply announce they had a conflict while refusing to divulge why. The public has elected the individual to do a job and if they are unable to discharge their duties, then the public is entitled to an explanation. Indeed, it trivializes the issue if it can be treated with this degree of cuteness.

Despite the "chilling effect" that this could conceivably have on homosexuals who wish to run for public office, or indeed on any person who is reluctant to have their business or family relationships subject to public scrutiny, our democratic right to scrutinize our elected officials outweighs these privacy rights. Unfortunately, it comes with the territory of public office. I recommend that the rights and responsibilities contained in the conflicts and public interest legislation be extended fully to common-law relationships, including same-sex relationships. I recommend that no changes be made to the disclosure requirements, except perhaps to standardize them, which is beyond the scope of this project.

There is one bright light in this area and that is that the "chilling effect" is apt to reduce over time. As gays and lesbians acquire more rights, some of which were contained in changes to legislation introduced in Bill 41 this past June, and some of which are being recommended in other portions of this report and may be proceeded with by government in the near future, the discrimination suffered by persons because of their sexual orientation is apt to decline.

D. Recommendations Regarding Conflicts of Interest and Protection of the Public Interest

Generally:

1. That the category of persons in relation to which conflicts of interest may arise be extended to include common-law partners, both same-sex and opposite-sex.

2. That the disclosure requirements in the event of conflict be the same for homosexual persons as for heterosexual persons.

3. That the categories of persons in relation to which conflicts of interest may arise be standardized as much as possible so as to increase public understanding of, and compliance with, conflicts of interest legislation.

4. That wherever rights or responsibilities are given to spouses in Acts pertaining to the protection of the public interest, that these rights and responsibilities be extended to include common-law partners, both same-sex and opposite-sex.

5. That a standard definition of **"common-law partner"** be utilized in all Manitoba legislation pertaining to conflicts of interest and protection of the public interest as follows:

   "*a person who, not being married to the other person, cohabits with him or her in a conjugal relationship*".

6. That a standard definition of **"family"** be utilized in all relevant conflicts of interest legislation as follows:

   "*the person's spouse, common-law partner, son, daughter, brother, sister, parent, or grandparent*".

7. That a standard definition of **"immediate family"** be utilized in all relevant conflicts of interest legislation as follows:

   "a person who resides with the member and who is:
   (a) the spouse of the member;
   (b) the common-law partner of the member; or
   (c) any child of the member."

***Communities Economic Development Fund Act*;**
Development Corporation Act;
Manitoba Public Insurance Corporation Act:

8. That the standard definition of "family" be added to the definition section of each Act.

9. That the standard definition of "common-law partner" be added to the definition section of each Act.

Legislative Assembly and Executive Council Conflict of Interest Act;
Municipal Council Conflict of Interest Act;
Public Schools Act:

10. That all references to "dependants", including the definition of "dependant" in each Act, be deleted and replaced with references to "immediate family".

11. That the standard definition of "immediate family" be added to the definition section of each Act.

12. That the standard definition of "common-law partner" be added to the definition section of each Act.

Animal Liability Act;
Civil Service Act;
Consumer Protection Act;
Cooperatives Act;
Corporations Act;
Department of Health Act;
Elderly and Infirm Person's Housing Act;
Elections Act;
Employment and Income Assistance Act;
Wills Act:

13. That the standard definition of "common-law partner" be added to the definition section of each Act.

Agricultural Producers' Organization Funding Act:

14. That the definition of "dependant" in section 10(1) be deleted.

15. That the standard definitions of "immediate family" and "common-law partner" be added to section 10(1).

16. That the reference to "dependants" of the member in section 10(2) be replaced with a reference to the "immediate family" of the member.

Credit Unions and Caisses Populaires Act:

17. That the definition of 'immediate family" in section 1(1) be amended to delete the word "immediate" and add the words "common-law partner" so as to be consistent with the standard definition of "family".

18. That the standard definition of "common-law partner" be added to section 1(1) of the Act.

19. That section 91(2) be amended to add the words "or common-law partner" so as to provide that a conflict also arises when a person's common-law partner has a material interest.

Family Farm Protection Act:

20. That section 3(13) be amended such that the circumstances in which there may be a conflict include common-law partners.

21. That the standard definition of "common-law partner" be added to the definition section of the Act.

***Mental Health Act*:**

22. That the Act be amended to include a person's common-law partner as being unable to sit as a member of the Review Board or consent to the appointment of a committee.

23. That the definitions of "spouse" and "nearest relative" in section 1 be amended to include a common-law partner.

24. That the standard definition of "common-law partner" be added to the definition section of the Act.

Municipal Act:

25. That the standard definitions of "common-law partner" and "family" be added to the definition section of the Act.

Power of Attorneys Act:

26. That the standard definition of "common-law partner" be added to the definition section of the Act.

27. That the definition of "spouse" be deleted from the definition section of the Act.

28. That the definition of "nearest relative" in the definition section of the Act be amended to include "common-law partners".

V. Property

The Terms of Reference require that the following question be addressed in relation to the property issue:

> **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 spouses an interest in and right to inherit/share their spouse's property.**

Section A describes in detail the current provisions of Manitoba's property legislation as it applies to spouses including legislation that gives an interest in a spouse's property during the term of the marriage, legislation that gives a right to share in a spouse's property upon separation or divorce, and legislation that gives a right to inherit a spouse's property upon death. Section B provides information about a variety of views of Manitobans on the issue of extending property rights to common-law partners, including same-sex common-law partners. Section C analyzes the provisions of our property legislation in relation to the *Charter*, and considers whether such legislation would be likely to survive a *Charter* challenge. Section D reviews the legislative approaches taken or proposed in other Canadian jurisdictions.

Finally, section E contains my analysis of which legislative approaches I believe would comply with the *Charter* and which would be recommended. A summary of my recommendations pertaining to property are set out in the recommendations in section F.

A. Property Legislation in Manitoba

Historically at common-law a husband and wife were considered as one person:

> "By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection and cover, she performs everything."[97]

As a result, the husband was the absolute owner of the wife's property.

This law was changed by the *Rights of Property of Married Women Act* assented to on May 14, 1875, wherein a married woman became entitled to own real and personal property separate from her husband, whether acquired prior to or during the marriage.

This then remained the state of the law for about 100 years: property owned by a spouse remained the separate property of that spouse and marriage [or divorce], did nothing to change that. Neither spouse had a right to make claims against the property of the other spouse upon separation or death [apart from dower rights] and, since most property was owned by men, many women were left economically compromised at separation or divorce.

Legislation passed within the past 25 years has greatly altered this law[98]. Significant rights have been given to spouses to secure an interest in, or right to inherit or share in, their spouse's property. A summary of this legislation follows. None of the provisions currently apply to same-sex common-law partners nor do they apply to opposite-sex common-law partners, except in a few instances where expressly noted.

Property Interests during and after the Relationship

Family Maintenance Act[99]

This Act applies when spouses and common-law partners separate and deals mostly with rights pertaining to child custody and support, spousal support, and protective relief. However, the Act also gives spouses certain property rights. Specifically, in the event of a separation, spouses have the right to seek exclusive occupancy of the family home and to have its sale postponed[100]. Common-law partners have no such rights in relation to the family home.

Farmlands Ownership Act[101]

This Act restricts the transfer of farmland. Spouses of farmers and retired farmers are not subject to these restrictions[102]. Common-law partners have no such exemption from these restrictions.

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[97] Blackstone's Commentaries on the Laws of England, 4th ed. (1771) bk.I, ch.15 at 442.
[98] There has also been some significant development during the last 20 years in the law of constructive and resulting trust which applies to both spouses and common-law partners.
[99] *The Family Maintenance Act,* R.S.M. 1987, c. F20.
[100] Ibid, section 13.
[101] *The Farmlands Ownership Act,* R.S.M. 1987, c. F35.
[102] Ibid, section 4.

Insurance Act [103]

This Act governs insurance contracts in Manitoba including licensing of insurers and all manner of insurance contracts including life, accident, fire, vehicle, and weather insurance. The provisions that give spouses certain property rights include:

- the right to take out life insurance and accident insurance on your spouse since you are considered to have an insurable interest in the life of each other;[104]
- the right to have your policy of life or accident insurance exempt from execution or seizure where you have designated your spouse as beneficiary; [105]
- the right to receive small payments from the insurer to assist with medical and other expenses before a full accounting of monies has been completed;[106] and
- the right to be the deemed owner of your spouse's car insurance if they should die while the insurance is in place. [107]

None of these rights are given to common-law partners.

Law of Property Act[108]

This Act covers a variety of property issues. Firstly, a spouse has the right to have property jointly held with the other spouse either partitioned or sold, without the other spouse's consent[109]. A spouse is also entitled to have his or her homestead interest valued and paid out to him or her in the event that the homestead is sold[110]. These rights are not extended to common-law partners.

Finally, a spouse is entitled to prevent their spouse from assigning their wages unless they consent[111]. This section also applies to "cohabiting spouses" which is defined as a man and a woman who, not being married to each other:

(a) have cohabited continuously for three years or more in a relationship in which one of them has been substantially dependent upon the other for support; or

(b) have cohabited for one year or more and have a dependant child born of their relationship[112].

Therefore, although opposite-sex common-law partners may have some rights under this section, same-sex common-law partners do not.

Marital Property Act[113]

This Act governs the sharing of assets accumulated by spouses during their marriage, or acquired in contemplation of their marriage, in the event of their separation or divorce, or the death of one of the spouses. Specifically, spouses have the right to apply to court for

[103] *The Insurance Act*, R.S.M. 1987, c.I40.
[104] Ibid, sections 156 and 216.
[105] Ibid, sections 173(2) and 228(2).
[106] Ibid, section 230(8).
[107] Ibid, section 239(3).
[108] *The Law of Property Act*, R.S.M. 1987, c. L90.
[109] Ibid, section 19.
[110] Ibid, section 24.
[111] Ibid, section 32.
[112] Ibid.
[113] *The Marital Property Act*, R.S.M. 1987, c. M45.

an accounting and equalization of their assets and debts[114]. An "accounting" requires that each spouse account for the value of their assets and debts as at the date of separation, or death, as applicable. After the net assets and debts have been determined for each spouse, the court "equalizes" the holdings by ordering one spouse to pay a money amount or transfer an asset or assets to the other spouse so that their holdings are equal. This transfer is called the "equalization payment". If there are insufficient assets to satisfy an equalization payment ordered by the court because the paying spouse has transferred assets to a third party for inadequate consideration, the other spouse has the right to sue the recipient of those assets[115].

Each spouse also has an equal right to the use and enjoyment of the family home [in the absence of a court order of exclusive occupancy] and of any other family assets [again in the absence of a court order otherwise][116].

Finally, each spouse has the right to apply to court to preserve assets which the other spouse may otherwise dissipate or abscond with[117].

Spouses have the right to contract out of the Act by written agreement, called a "spousal agreement"[118]. However, unless spouses specifically contract out of the Act, or a portion of the Act, the scheme of equal sharing applies.

None of these property rights are extended to common-law partners who therefore have no legislated right to an equal sharing of property upon separation or the death of their partner or to use or protect family assets during the course of the relationship.

Property Interests at Death

Intestate Succession Act[119]

This Act governs what happens to a person's estate when they die without a will. The surviving spouse receives the entire estate unless the deceased had children [which are not the children of the spouse] in which case the spouse receives the first $50,000.00 and shares the balance with the children[120]. A common-law partner is entitled to nothing.

Homesteads Act[121]

This Act gives a spouse the right to remain in occupancy of the family home, for the balance of their natural life, if their spouse dies, even if the home is in the deceased

[114] Ibid, section 13. It should be noted that there are some limited exceptions to the scheme of equal sharing, particularly in the case of commercial assets.
[115] Ibid, section 6.
[116] Ibid. Family assets are defined to include assets which are used for shelter and transportation, or for household, educational, recreational, social, or aesthetic purposes.
[117] Ibid, section 18.
[118] Ibid, section 5.
[119] *The Intestate Succession Act*, S.M. 1989-90, c. 43 – Cap. I85.
[120] Ibid, section 2.
[121] *The Homesteads Act*, S.M. 1992, c. 46 – Cap. H80.

spouse's name, and even if they have gifted the home to someone else in their will[122]. The Act also prevents the family home from being sold or mortgaged without the consent of the spouse[123]. Common-law partners have no such right to stay in the family home, or to prevent it from being mortgaged or sold.

Wills Act[124]

This Act provides that when a person marries, their will is considered to be revoked[125]. This effectively gives spouses a greater right to inherit their spouse's property since a prior will often leaves property to someone other than the current spouse, thereby reducing the entitlement of the current spouse. Once the will is revoked, and the spouse dies having made no further will, they are considered to have died intestate. In that case, pursuant to the provisions of the *Intestate Succession Act,* the spouse receives either all or most of the property in the estate. A common-law relationship does not so revoke a will and therefore a common-law partner does not receive priority treatment in the event of the death of their partner.

Further, when a person divorces, the provisions of their will which benefit their spouse are considered to be revoked unless a contrary intention appears in the will[126]. This is a benefit to a spouse who neglects to change a will after divorce when it is presumed that they would no longer wish to benefit their former spouse. This provision does not apply in the event of a termination of a common-law relationship.

Property Interests in Pensions

Pension Benefits Act[127]

Pension benefits earned by Manitoba employees are governed by either federal public service pension legislation[128], or by this Act. The spouses of pension members are entitled to an equal share of the member's pension benefits which accrued during the marriage[129]. This sharing is only available to common-law partners if the pension plan member has executed and filed a declaration stating that they have a common-law partner that they intend to share their pension with.

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[122] Ibid, section 21.
[123] Ibid, section 4.
[124] *The Wills Act,* R.S.M. 1988, c. W150.
[125] Ibid, section 17.
[126] Ibid, section 18.
[127] *The Pension Benefits Act,* R.S.M. 1987, c. P32.
[128] Such as *The Public Service Superannuation Act and Supplementary Retirement Benefit Act, The Canadian Forces Superannuation Act, The Members of Parliament Retiring Allowances Act, The Royal Canadian Mounted Police Superannuation Act, and The Pension Benefits Standards Act, 1985* for industries which are federally regulated such as interprovincial transportation/trucking, telecommunications, banking and mining.
[129] *The Pension Benefits Act,* R.S.M. 1987, c. P32, section 31.

A "common-law partner" is defined in the Act as:

> "a person who, not being married to the other person, cohabited with him or her in a conjugal relationship
> (a) for a period of at least three years, if either of them is married; or
> (b) for a period of at least one year, if neither of them is married"[130].

Therefore, both same-sex and opposite-sex common-law partners are included in pension sharing, but only if they have registered the relationship. Although there are no official statistics kept, information gathered anecdotally would suggest that such registration is extremely rare.

Teacher's Pensions Act[131]

This Act applies to all teachers in public schools. The spouses of such teachers are entitled to an equal share of the teacher's pension benefits which accrued during the marriage[132]. Benefits for common-law partners are available on the same conditions as under the *Pension Benefits Act,* namely, if there has been registration of the relationship[133].

Civil Service Superannuation Act[134]

This Act applies to provincial government employees. The spouses of such employees are entitled to an equal share of the employee's pension benefits which accrued during the marriage. Benefits for common-law partners are available on the same conditions as under the *Pension Benefits Act* namely, if there has been registration of the relationship[135].

Legislative Assembly Act[136]

This Act applies to all elected members of the Legislature, including ministers, as well as certain senior public officials. Their spouses are entitled to an equal share of the official's pension benefits which accrued during the marriage. Benefits for common-law partners are available on the same conditions as under the *Pension Benefits Act* namely, if there has been registration of the relationship[137].

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[130] Ibid, sections 1 and 31. Note that this definition was changed with the passage of Bill 41 which will come into force on January 1, 2002.
[131] *The Teachers' Pensions Act,* R.S.M. 1987, c. T20.
[132] Ibid, section 32.
[133] Ibid, sections 1 and 2.
[134] *The Civil Service Superannuation Act,* R.S.M. 1988, c. C120.
[135] Ibid, sections 1 and 44.
[136] *The Legislative Assembly Act*, R.S.M. 1987, c. L110.
[137] Ibid, sections 69 and 90.

B. Submissions and Consultations

There was a great variety of viewpoints on the issue of whether property rights currently available to married persons should be extended to common-law partners and if so, whether that would be best accomplished through a registration system or a system where property rights are acquired through status in the same way as rights to support are.

Many people noted that there is a commonly held belief that common-law partnerships "turn into" a marriage after a certain amount of time has passed and the common-law partners thereby acquire all of the rights of married spouses. Some people think that this time frame is 5 years, or more commonly 3 years, or even 1 year. There have been many disappointed common-law partners who have broken up or had their partner die only to find that they had no entitlement whatsoever to property. It was noted that this expectation of entitlement was not one that existed amongst same-sex common-law partners and that if the law were to change it would be desirable to do some public education in this area.

Those that spoke against extending property rights often wished to preserve these rights for spouses because marriage is "sacred" and involves a commitment that is not present in a common-law situation. Experts in this area who advocated for the unique and special treatment of marriage nevertheless admitted that court decisions were not supportive of this approach and that the special status in law of marriage was being steadily eroded. They argued that that as far as opposite-sex common-law partners were concerned, if they greatly desired property rights, then they should simply marry. Generally, those who were against the expansion of property rights to common-law partners did not support a registration system because it moves a common-law couple closer to a marriage-like relationship, again eroding the uniqueness of marriage.

Some people who spoke in favour of extending property rights to common-law partners identified the concern that an approach should be used that would "give the greatest number of people protection". This approach was most often advocated by persons and organizations with a feminist perspective who had a desire to protect the economically weaker partner. As such, a registration system was seen as less than desirable because there was a concern that many people would not think to register until they found themselves in a situation where they dearly wished they had.

Those that wished to provide protection for the economically weaker partner, nevertheless supported the notion that it should be possible to "contract out" of the legislation as spouses are currently able to do. This would ensure that partners who didn't put their mind to the issue, or who couldn't agree, would have the sharing scheme as the "default" arrangement, while still permitting those that wished to have a different arrangement for their relationship to enter into such an arrangement contractually.

Some persons resisted the extension of property rights to common-law partners for reasons of freedom of choice and personal autonomy. However, they noted that the ability to contract out would at least partially address this issue while still providing an

element of protection for everyone. Certainly it was noted that there are social benefits in that persons who are entitled to property sharing at separation from, or the death of, their partner are less likely to be a drain on the public purse.

Many of the expert lawyers that we consulted with, expressed the view that the extension of property rights would "happen eventually anyway" because of the *Charter*. It was also noted that the present law does provide some property rights to common-law partners at common law pursuant to the laws of constructive and resulting trusts, unjust enrichment, and quantum meruit. It was noted that these laws are complicated and uneven in their application and that common-law partners have to face great uncertainty and the possibility of expensive litigation which is not required of spouses when they separate.

Within the gay and lesbian community, it was felt that the easiest solution to the extension of property rights would be to permit marriage by gays and thereby create an automatic application of all property legislation to those who chose to marry. Some members represented that the gay and lesbian community was *not* in favour of a registered partnership regime because such a civil union would have a lesser status than marriage and they were holding out to win the right to marry.[138] Some members of the community had confidentiality concerns with a registration system because it would require partners to come "out" publicly in order to acquire these rights.

It was noted that in the gay and lesbian community, many people were decidedly unenthusiastic about the extension of property rights. For one thing, same-sex common-law partners often did not share financial resources. For another, it was noted that people are generally more enthusiastic about things that carry rights rather than responsibilities, and the extension of the property sharing scheme had an equal share of both. The economically weaker partner would acquire some rights, but at the "expense" of the economically stronger partner.

While we heard from some common-law partners who had suffered economically because of the failure of the law to afford them any protection, generally the public seems either misinformed about their rights, or unconcerned until they find themselves in the position of actually needing such protection.

[138] We were advised that there are some four cases currently before the courts wherein gays and lesbians are challenging the federal *Marriage Act* which restricts the right to marry to a man and a woman.

C. The Impact of the Charter of Rights

In determining whether existing property legislation would survive a *Charter* challenge, there is a two stage inquiry. Firstly, it must be determined whether the impugned legislation breaches the equality rights set out in section 15(1) of the *Charter.*

Section 15(1) of the *Charter* provides:

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

The person who challenges the legislation has the onus of proving the breach of s. 15(1). If this breach is proven, then the onus switches to the government to prove, pursuant to section 1 of the *Charter,* that the impugned legislation should be saved.

Section 1 of the *Charter* 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.*

I will examine firstly whether the provisions of various property legislation which excludes common-law partners from the right and responsibility to provide for their partner during the relationship and upon separation or death, offend section 15(1) of the *Charter* and, if I conclude that they do so offend section 15(1), then I will examine whether they can nonetheless be saved by the provisions of section 1 of the *Charter.*

The essential requirements of a s. 15(1) analysis are satisfied by two inquiries:

1. whether there is a distinction which results in the denial of equal benefit of the law; and
2. whether the denial constitutes discrimination on the basis of an enumerated or analogous ground.

As discussed in my *Charter* analysis on adoption law, supra, although s. 15(1) does not specifically include sexual orientation as a ground of discrimination, it is well-settled law that sexual orientation is included under s. 15(1) of the *Charter* as an "analogous" ground. Further, I am of the view that our property legislation, which creates differential treatment based on marital statues, would also offend section 15(1) equality rights.

In the case of *Miron v. Trudel*[139] the majority of the Supreme Court concluded that although s.15(1) does not specifically include marital status as a ground of discrimination, it is an analogous ground. In that case Mr. Miron was injured while a passenger in an uninsured motor vehicle driven by an uninsured driver. After the accident he was no longer able to work or contribute to his family's financial support.

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

His claim for accident benefits for loss and damages under his common-law partners' insurance policy was denied because he did not fit within the definition of spouse in the *Insurance Act* which, at the time, included only persons married to each other. The Supreme Court determined that the definition of spouse violated section 15(1) because it discriminated on the basis of marital status which was not saved by section 1. As concluded by Justice McLachlin (as she then was), writing for the majority:

> *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.*[140]

I would conclude with respect to the first inquiry, that Manitoba's current property legislation does draw a distinction which results in the denial of equal benefit of the law under the *Charter.* It does this by specifically according rights to individual members of married partnerships, which by omission it fails to accord to individual members of unmarried partnerships.

The next step is to determine whether the legislation can be saved by section 1 of the *Charter* by determining whether the impugned distinction is "demonstrably justified in a free and democratic society". This involves two inquiries. Firstly, is the goal of the legislation of "pressing and substantial" importance? And if it is, then is the connection between the goal and the discriminatory distinction rational and proportionate to the benefit achieved?

In *Walsh v. Bona* the Crown argued that the goal of the property sharing legislation was to strengthen the role of the family in society and to promote marriage and that the provisions excluding unmarried couples promoted that goal. But the court found that including common-law relationships in the provisions of the Act would have no financial impact on government and no negative impact on married persons.

It is difficult to articulate a policy basis for distinguishing between married couples and common-law couples. Although in *Pettkus v. Becker*[141] the Supreme Court was not considering property legislation, but rather common law rights to property, the Court articulated its policy approach to this area of law. After awarding a common-law partner one half of her partner's lands and business on the basis of a constructive trust, Dickson, J. writing for the majority concluded:

> *I see no basis for any distinction, in dividing property and assets, between marital relationships and those more informal relationships which subsist for a lengthy period.*

In the case of *Peter v. Beblow*[142] the Supreme Court again had an opportunity to articulate it's policy approach to common-law relationships and property rights. In that case the parties had lived together for some 12 years, with the woman doing the work within the

[140] Ibid, paragraph 156.
[141] *Pettkus v. Becker* [1980] 2 S.C.R. 834.
[142] *Peter v. Beblow* [1993] 1 S.C.R. 980.

home and the man being the owner of the property. Cory, J., writing for the majority, noted:

> *Business relationships concerned with commercial affairs may, as a result of the conduct of one of the corporations involved, result in a court's granting a constructive trust remedy….. Yet how much closer and trusting must be a long term common law relationship. In marriages or marriage-like relationships commercial matters and a great deal more will be involved…. Just as much as parties to a formal marriage, the partners in a long term common law relationship will base their actions on mutual love and trust. They too are entitled, in appropriate circumstances, to the relief provided by the remedy of constructive trust.*[143]

As can be seen from the above excerpts, the jurisprudence from the Supreme Court has been consistently evolving towards greater recognition of unmarried unions. I am of the opinion that the government would be unable to discharge its onus to prove that the exclusion of cohabiting couples from the marital property regime is justified under section 1.

If the government wishes to be more certain on this point prior to proceeding with new property legislation, the *Walsh v. Bona* case is anticipated to be heard during the Spring, 2002 session. Although a ruling could be made from the bench, it is likely in a case as important as this one, that it will be reserved and recent experience suggests that it could take approximately 1 year before a decision is rendered. Notwithstanding the wait, however, the case will be very instructive for Manitoba since the Nova Scotia legislation is similar in its scope to our *Marital Property Act*.

It is true that even if the Supreme Court were to uphold the Appeal Court and declare the Nova Scotia legislation as it then was unconstitutional, our legislation would continue to be binding until declared otherwise. However, it can be anticipated that it would not be long before a litigant sought to have it declared unconstitutional. Indeed, this issue is currently before the Manitoba Court in the case of *Spiwak v. Palaschuk*[144] wherein a common-law partner is challenging the provisions of the *Marital Property Act* which exclude her from the right to apply for an accounting and equalization of assets. Counsel advises that the matter is in case management and expects that it will proceed forward in the New Year with court dates. If the government seeks to defend its legislation and is unsuccessful, costs could be significant.

[143] Ibid, at paragraph 74.
[144] *Spiwak, Shirley v. Palaschuk, Gregory*, Court of Queen's Bench, Winnipeg Centre, Suit No. CI01-01-22345.

D. Legislative Approaches in Other Jurisdictions

There are only 2 jurisdictions in Canada which have extended property rights to common-law partners through legislative initiatives: Nova Scotia and Saskatchewan. In addition, since the terms of reference were established, a third province, namely Quebec, has moved to extend property rights to same-sex common-law partners through a system of registration. As a result, the Quebec approach is included in the following discussion, in addition to a review of the Saskatchewan and Nova Scotia approaches.

Nova Scotia

On November 30, 2000, *The Law Reform (2000) Act* received Royal Assent in the Province of Nova Scotia. That Act, entitled "*An Act to Comply with Certain Court Decisions and to Modernize and Reform Laws in the Province*" extended certain legal rights to common-law same-sex as well as opposite-sex partners. With respect to property, common-law partners were given the same rights and obligations as spouses under several Acts concerning the division of property upon separation and death[145], but only in the event that the partners have chosen to execute a "domestic-partner declaration" in a prescribed form. Those persons who would otherwise meet the definition of a common-law partner, but who have not executed the necessary declaration, are not subject to the rights and responsibilities under the law.

The Vital Statistics Act[146] was also amended in this omnibus legislation to permit for registration of domestic partnerships. Registration is accomplished in a similar way to the registration of births, deaths, marriages, and changes of name in the Province. The partners complete a Declaration in a prescribed form in front of witnesses which, together with a prescribed fee, is then submitted to the Registrar of Vital Statistics for registration[147]. Registration of the domestic partnership means that the partners have the same rights and responsibilities as spouses under a variety of Acts, both as between themselves and with respect to any other persons. If the partners sign but do not register the partnership declaration, then it is only effective as between themselves[148].

A domestic partnership may be registered by any two, otherwise unmarried, adults who are cohabiting or intend to cohabit in a conjugal relationship.[149] This domestic partnership declaration is binding until terminated. The Registrar will register a termination of the domestic partnership:

(a) when the partners together sign and file a Statement of Termination;
(b) when one partner swears and files an affidavit that the partners have been separated for more than one year and one or both of the partners intends that the relationship will not continue;

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[145] The list of Acts so amended included the *Matrimonial Property Act*, the *Pension Benefits Act*, the *Members' Retiring Allowances Act*, and the *Probate Act*.
[146] The *Vital Statistics Act*, Chapter 494, RSNS, 1989.
[147] Ibid, section 54.
[148] Ibid, section 54(3).
[149] Ibid, section 53.

(c) when a marriage certificate is filed showing that one of the domestic partners has married another person; or

(d) when one of the partners files a written separation agreement signed by both partners[150].

The legislation became effective on June 4, 2001. As of December 21, 2001 after over six months of operation, there had been only 94 domestic partnerships registered, compared to the approximately 5500 marriages registered in any given year in that province. There appears to have been an initial flurry of registrations which has since died down. The following represents the registrations, month by month, during 2001:

June	27
July	25
August	20
September	11
October	3
November	6
December	2
Total	94

Furthermore, it appears that opposite-sex partners are particularly making very little use of the registration system. Of the 94 registrations, only 11 [or about 12%], were opposite-sex couples, with the vast majority being same-sex couples who are not otherwise entitled to marry.[151]

Saskatchewan

On May 30, 2001, Saskatchewan introduced two bills, namely, *An Act to amend certain Statutes respecting Domestic Relations (No.1)* and *(No. 2),* which Acts are now in force having amended some 15 pieces of legislation. This included the amendment of various property legislation including the *Matrimonial Property Act, The Homesteads Act, The Intestate Succession Act, The Wills Act,* and various pension legislation including *The Municipal Employees' Pension Act, The Pension Benefits Act, The Public Employees Pension Plan Act,* and *The Saskatchewan Pension Plan Act.*

In all Acts, "spouse" is redefined to include a person with whom an individual has cohabited continuously for a period of not less than 24 months. There is no requirement that the couple be comprised of a man and a woman and hence same-sex partners are included in the definition. Saskatchewan is the only jurisdiction in Canada which has opted not to retain a separate category in it's legislation for spouses.

The Saskatchewan government chose 24 months as both the qualifying period for acquiring the status of common-law partnership, and the period after which certain rights expire for common-law partners. For example, homestead rights extended to common-law partners are deemed to be terminated once the common-law partners have not cohabited for 24 months. The right to apply for a division of marital property after separation expires after 24 months of separation. Certain presumptions as to benefits

[150] Ibid, section 55.
[151] This information was received from Bev Billard, the Senior Coordinator of the program in Nova Scotia.

under intestate succession do not apply if the common-law partners have not cohabited for the past 24 months. A will is not revoked by a common-law partnership if the partners have been separated for more than 24 months.

Common-law partners in Saskatchewan do not need to register their relationship or take any other active step in order to acquire the legal status of spouse. The mere passage of time gives them the same rights and responsibilities as spouses.

Despite this omnibus legislation, a large number of statutes which use the term "spouse" were left un-amended. The government was of the view that, as a result of the *Charter*, the courts will interpret the word "spouse" to include both same-sex and opposite-sex unmarried partners, and as such it was unnecessary to amend the legislation[152].

Quebec

On December 12, 2001, Quebec introduced a draft Bill entitled "An Act instituting same-sex civil unions and amending the Civil Code and other legislative provisions"[153]. The Bill is expected to be considered by the National Assembly in January or February, 2002.

This legislative scheme would give same-sex common-law partners who choose to register their relationship the vast majority of the rights and responsibilities in law of spouses. This includes the same matrimonial property regime which applies to spouses upon separation or divorce, the same rights to the family home and to pension sharing as for a married couple, and the same laws regarding legal succession in the event of death[154].

The registration process is not available to opposite-sex common-law partners who are expected to marry if they should wish to acquire these rights and responsibilities. Since same-sex partners cannot marry in Quebec, [or anywhere else in Canada], the government has provided a civil union alternative.

One essential difference from marriage is that a same-sex civil union can be dissolved more easily. If there are no children of the relationship, the parties can simply agree to terminate the union and go before a notary to confirm their agreement[155]. With marriage, the parties must seek an order of a Court.

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[152] This information was provided by Susan C. Amrud, Q.C., the Director of the Legislative Services Branch of Saskatchewan Justice.

[153] *An Act instituting same-sex civil unions and amending the Civil Code and other legislative provisions*, tabled by Mr Paul Begin, Minister of Justice in the Quebec National Assembly, second session, thirty-sixth legislature.

[154] Ibid, section 21 at articles 521.5, 521.6, and 521.7.

[155] Ibid, section 21 at articles 521.11 and 521.14.

E. Analysis

Although there is not overwhelmingly strong or even unanimous support amongst Manitobans to the extension of property rights to same-sex and opposite-sex common-law partners, I recommend that Manitoba nevertheless proceed to amend its legislation to extend such rights. It is true that married persons have historically received benefits in our society which were not available to unmarried persons. However, it is difficult to reconcile this approach with the recent court cases holding that it is contrary to the *Charter* to discriminate against common-law partnerships, whether they be same or opposite-sex. Certainly if the government wished to have a clearer indication of whether our property legislation is likely to survive a *Charter* challenge, it can wait until the case of *Walsh v. Bona* is decided in the Supreme Court of Canada. It seems very likely, however, that such rights will eventually be extended to common-law partners and that Manitoba in taking legislative action now, will avoid contested litigation later.

Apart from legal considerations, there is also the very real social problem wherein many Manitobans already mistakenly believe that they have these rights and take no steps to protect themselves. Further, there is the potential drain on the public purse resulting from a person's lack of any entitlement to their partner's property upon their separation from or the death of their partner. Finally, there is the basic question of equity and fairness when two couples, alike in all respects except perhaps for the bond of marriage, can be treated so differently in law to the great economic disadvantage of one of the partners.

To ensure that persons who choose not to marry are not burdened with the same laws that would be imposed if they had married, the same "opting out" provisions that are available to spouses should be available to common-law partners. Specifically, common-law partners should have the right to contract out of any new legislative provisions through properly executed cohabitation agreements.

Once the decision has been made to extend these rights, the question becomes which legislative model is best used to accomplish such extension. There are two models in use in Canada: that employed by Nova Scotia where rights are acquired upon registration of the relationship, and that employed in Saskatchewan where rights are acquired once a certain status is achieved.

I conclude that a registration system is the less desirable choice for a variety of reasons. A registration system requires a proactive approach to acquire these rights which means that unless the step of registration is taken, the person remains unprotected. European countries that have registration have a very low "take up rate". That is, few people actually register. Certainly that seems to be the experience in Nova Scotia if the early results are any indication. This has been the experience in Manitoba for the sharing of pension benefits for common-law partners where the registration of the relationship is required before sharing can occur. All evidence seems to indicate that few Manitobans have taken advantage of this opportunity.

There are a number of reasons why couples might not proceed to register their relationship:

- they are unaware of the requirement to register;
- they decide to register, but procrastinate;
- they think that they will never need the protection of a property sharing scheme ["we will never separate", "he will take care of me in his will"], and therefore don't bother to register;
- one partner wishes to register but the other partner refuses to do it. This is especially difficult if the partner wishing to register is the one who is economically weaker and therefore most likely to benefit from registration; or
- one or both partners is married to someone else and terminating that relationship so as to permit registration of a new relationship would be difficult or impossible.

It can be argued that a registration system should be created, as well as a system whereby rights are conferred by status. This would be the worst of both worlds in my opinion and would confuse the public even further about what their legal rights and responsibilities are if they are living common-law.

It should be noted that the registration approach to property rights taken by Nova Scotia was in direct consequence of the *Walsh v. Bona* case where the provincial legislation omitting common-law partners from the property sharing regime was found to be unconstitutional. The Nova Scotia legislation represents their legislative response to cure this problem. It was not a part of the government's legislative agenda to create a scheme whereby common-law partners were given the protection of a property sharing regime. Certainly the legislation has not had this result since so very few common-law partners are affected.

In considering the registration approach taken by Quebec, it is important to remember that common-law partners presently have no rights to succession, spousal support, or property sharing in that province except to the extent that the couple has created these rights by contract. This is different from the other provinces in Canada where common-law partners have some rights equivalent to spouses, and these rights are gradually increasing. Further, in Quebec a great many more common-law partners enter into cohabitation contracts to govern their relations. Finally, it is important to remember that Quebec has a civil law tradition when comparing the legislative approach taken. The Quebec approach of only extending property rights to same-sex common-law partners through a system of registration of the relationship is not recommended.

I would therefore recommend the Saskatchewan approach where a couple acquires the rights and responsibilities of a common-law partnership through acquisition of that status pursuant to certain criteria. This will ensure that the greatest number of people who need the protection of such a legislative scheme will receive it. It will create a consistency of treatment between the issues of support rights and property rights since support rights in Manitoba are acquired upon the acquisition of a certain status.

If the Saskatchewan approach is used, then Manitoba needs to decide which couples will acquire the status of a common-law partnership. In determining this question, regard should be had to existing legislation. Certainly there should be a requirement that the relationship be a conjugal one. The question is, for how long ought it to have subsisted for the rights to be acquired?

The answer in existing legislation is different in Manitoba depending upon which legislation one falls under. For the purposes of acquiring pension rights the test is having cohabited for 3 years if either party is married to another party, and 1 year if not. For the purposes of acquiring support rights, the test is having cohabited for 3 years, or 1 year if there is a child of the relationship. For rights and responsibilities under federal law, the test is simply 1 year, without any reference to whether there are pre-existing marriages or after born children.

With just the issue of property in mind, I would have recommended a straight 24 months of cohabitation be the criteria. This length of time is more in step with most other provincial legislation where 3 years is unusually long. It would have the advantage of consistency, and be easily understood by the members of the public affected by it. It is short enough to capture the serious relationships, and long enough to avoid bringing the full weight of the law to bear upon relationships that are fleeting.

However, given the recent legislative amendments which went through in June, 2001, I am reluctant to recommend yet another type of definition for common-law partner, which can only confuse the public further and create an illogical inconsistency between property rights and support rights. It seems to me that gaining a status of common-law for support purposes ought to be the same as for property purposes.

Therefore, upon reflection I would recommend that the same criteria for the acquisition of property rights be used which is used for the acquisition of support rights, namely, 3 years of cohabitation, or 1 year if there is a child. I recommend that this apply to all property legislation including pension legislation. This has the potential to create another inconsistency in that a person might have acquired the status of a common-law partner for the purpose of pension division upon separation, but not for the purpose of pension rights upon the death of a partner, or vice versa, since the criteria would be different for each. I therefore recommend that the new criteria for common-law relationships apply in the pension legislation for all purposes even though it might result in some people "losing" rights that they had otherwise acquired. It is not an entirely satisfactory result, but I believe that it is more important to have consistency in the pension legislation and within Manitoba legislation generally as it impacts on persons living common-law.

The end result of these recommendations would be two different sets of criteria for achieving common-law status in Manitoba – that applied by the federal government for legislation within its jurisdiction, and that applied by the provincial government for legislation within its jurisdiction. This is the best that can be achieved.

Therefore, I recommend that the definition of common-law for all property legislation including pensions, be as follows:

> *A "common-law partner" means a person who, not being married to the other person, cohabited with him or her in a conjugal relationship*
> *(a) for a period of not less than 3 years, or*
> *(b) for a period of at least one year and they are together the parents of a child..*

Once the decision has been made to extend property rights based upon the acquisition of the status of common-law partner, there are several special issues that arise in relation to specific legislation.

One challenge was the time-limit for applying for a property division. For spouses, a right to apply terminates 60 days after divorce which catches most people since divorce is a natural time to sort out legal rights and responsibilities. There is no such demarcation point for common-law partners. Clearly there must be some point in time when people can go on with their lives, free from any claims from former common-law partners. An arbitrary time period after the ceasing of cohabitation is the only solution. I have recommended that this time frame be 1 year, but it could be longer. In Saskatchewan it is 24 months.

Another problem that arises is the fact that it would be possible to have more than one person assert homestead rights in relation to a particular property. This is because a person can be married and have a common-law partner at the same time, both of whom may have resided in the same property. While this would not necessarily be a problem for the homestead rights which require a consent to the sale or mortgaging of the home, it might create a problem at death. Under a scheme extending homestead rights to common-law spouses, there could be 2 (or more) persons making a claim for a life estate in the property. I have recommended that the first person to acquire a life estate in the homestead have priority. While this might not work equity in every case, it would have the benefit of simplicity and might encourage spouses to "clean up" their affairs by terminating a marriage through divorce, or at least by securing a homesteads release before they more on to subsequent long term relationships.

Finally, consideration needed to be given to whether these changes should be given retroactive effect. It is recommended that they not apply to common-law partners who were already living separate and apart at the time that the changes are enacted, or whose spouse has already died at that time.

F. Recommendations Regarding Property Legislation

The recommendations in this section have been arranged with general recommendations first, followed by recommendations for changes to legislation that gives property rights during marriage or after separation, then at death, and finally in relation to pensions.

Generally:

1. That property rights and responsibilities be extended to all common-law partners, including same and opposite-sex partners.

2. That these rights and responsibilities not apply to common-law partnerships where the partners are already living separate and apart, or where one of the partners has already died, at the time that the new legislation is enacted.

3. That common-law partners be permitted to execute a written contract exempting themselves from the application of some or all of these legal rights and responsibilities.

4. That a standard definition of "common-law partner" be utilized in all other property legislation and that it be the same as the definition in Manitoba legislation which gives same and opposite-sex common-law partners the right to support upon separation or death, namely:

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

   a. for a period of not less than 3 years, or

   b. for a period of at least one year and they are together the parents of a child.

5. That the definition of "common-law partner" in pension legislation be changed to the standard definition for property legislation, for all purposes in the legislation including pension rights upon the death of a common-law partner.

***Family Maintenance Act*:**

6. That the name "family residence" be changed to "family home" to be consistent with the description of the family home in *The Marital Property Act.*

7. That section 31(1) be amended by adding "or common-law partner" everywhere that "spouse" appears so that common-law partners have the same rights as spouses to seek exclusive occupancy of the family home.

8. That section 13(2) be amended by adding "or common-law partners" everywhere that "spouse" appears so that common-law partners have the same rights as spouses to seek the postponement of sale of the family home.

9. That section 14(1) be deleted as it is no longer necessary.

Farmlands Ownership Act:

10. That the standard definition of "common-law partner" for property purposes be added to the definition section of the Act so that the Act applies equally to same-sex and opposite-sex common-law partners.

11. That sections 1(4), 3(14), and 3(15) be amended to add the words "or common-law partner" after the word "spouse" each time it appears so that common-law partners have the same rights to transfer farmland as spouses.

Homesteads Act:

12. That a definition of "common-law partner" be added to the definition section of the Act, which is the same definition as with other property acts, but with the exception that it also specify that a person loses their status as a "common-law partner" after 1 year of separation.

13. That the definitions of "election", "homestead", "owner", and "release" be amended by adding "or common-law partner" everywhere that "spouse" appears.

14. That section 21 dealing with the life estate in the homestead be amended to provide that the person who first acquired homestead rights in a property is the person who is entitled to the life estate if more than one person has homestead rights in the same property.

15. That sections 3, 4, 5(1), 7, 8(1), 8(2), 8(3), 8(5), 9(4), 9(6), 10(1), 10(3), 11(1), 11(3), 11(4), 12, 13, 14(1), 16(1), 16(4), 16(5), 17, 18, 19(1), 20(3), 21(1), 21(2), 22(1), 22(2), 23(1), 23(2), 23(3), 23(5), 24, and 25(1) be amended by adding "or common-law partner" everywhere that "spouse" appears so that homestead rights apply to common-law partners in the same way that they apply to spouses.

16. That section 20(2) be amended to add "or common-law partner" everywhere that spouse appears so that common-law partners have the same rights to have a homestead notice vacated as spouses, with the exception of termination due to divorce. In the case of common-law partners it is recommended that their rights terminate after they have ceased cohabitation for at least one year.

Insurance Act:

17. That the standard property definition of "common-law partner" for property purposes be added to the definition section of the Act so that the Act applies equally to same-sex and opposite-sex common-law partners.

18. That sections 156, 173(2), 216, 228(2), 230(8), 239(3), 248(4), 263(1), 264(1), and 265(1) be amended to add the words "or common-law partner" after the word "spouse" each time it appears so that common-law partners have the same rights as spouses in relation to insurance.

Intestate Succession Act:

19. That the standard definition of "common-law partner" for property purposes be added to the definition section of the Act so that the Act applies equally to same-sex and opposite-sex common-law partners.

20. That sections 2(1), 2(2), 2(3), 2(4), 3, 4(1), 4(3), 4(4), and 10 be amended by adding "or common-law partner" everywhere that "spouse" appears so that the property sharing scheme in the absence of a will is made applicable to common-law partners in the same way that it applies to spouses.

Law of Property Act:

21. That the standard property definition of "common-law partner" for property purposes be added to the definitions section of the Act so that the Act applies equally to same-sex and opposite-sex common-law partners.

22. That section 19(2) be amended to add the words "or common-law partner" after the word "spouse" each time it appears so that a common-law partner has the same right as a spouse to seek partition or sale of jointly held property without the necessity of a Homesteads Release if the court should so order.

23. That section 24 be amended to add the words "or common-law partner" after the word "spouse" each time it appears so that a common-law partner has the same right as a spouse to have their Homestead rights valued and paid out of sale proceeds in the event that homestead property is sold.

24. That section 32(3) be amended to add the words "or common-law partner" after the word "spouse" each time it appears so that a common-law partner has the same right as a spouse to have their spouse's assignment of wages rendered invalid unless they have consented to the assignment in writing.

***Legislative Assembly Act*:**

25. That the definition of "common-law partner" in the definition section of the Act be amended so that it is the same as the standard definition for property purposes.

26. That section 90(1) be amended to add "or common-law partner" to all the provisions pertaining to spouses so that common-law partners have the same right to division of pensions as spouses under this Act.

27. That section 90(3) be amended to delete the requirement for common-law partners to sign a declaration opting into pension division before there can be such a division.

28. That section 90(6) be amended to delete the reference to the filing of the declaration with the pension administrator as it is unnecessary.

29. That section 90(1) be amended to delete subsection (c) giving special treatment to common-law agreements since the previous subsection causes agreements of common-law partners to be treated the same as agreements of spouses.

30. That section 90(23) be amended to provide a new effective date for the pension division for common-law partners so that these rights and responsibilities are not retroactive.

***Marital Property Act*:**

31. That the name of *The Marital Property Act* be changed to "*The Family Property Act*".

32. That sections 2(1), 3, 4(3), 4(4), 6(1), 6(7), 6(8), 6(9), 6(10), 7(1), 7(2), 7(3), 7(4), 8(1), 10, 11(1), 13, 14(2), 14(3), 15(1), 16, 17, 18(3), 18(4), 20(1), 20(2), 20(3), 21(1), 21(2), 22, and 23 be amended by adding "or common-law partner" everywhere that "spouse" appears so that the property sharing scheme after separation is made applicable to common-law partners in the same way that it applies to spouses.

33. That the standard property definition of "common-law partner" for property purposes be added to the definition section of the Act so that the Act applies equally to same-sex and opposite-sex common-law partners.

34. That a definition of "common-law relationship" be added to the definition section.

35. That the definitions of "asset" and "family asset" in the definitions section of the Act be amended by adding "or common-law partner" everywhere that "spouse" appears so that the Act is clearly applicable to property owned by common-law partners as well as by spouses.

36. That the definition of "marital home" in the definitions section of the Act be amended by changing the name of the home to "family home" and by adding "or common-law partner" everywhere that "spouse" appears so that the family home is clearly that which may be occupied by common-law partners as well as by spouses.

37. That the definition of "spousal agreement" in the definitions section of the Act be amended by changing the name to "spousal or cohabitation agreement", and by adding "or common-law partner" everywhere that "spouse" appears, so that these agreements are clearly available to common-law partners as well as to spouses.

38. That the title to Part 1, Division 1 of the Act be amended to include common-law partners.

39. That section 2(4) be amended by adding "or common-law partner" everywhere that "spouse" appears except to provide a different date for the commencement of the Act in respect of common-law partners so that the Act does not affect common-law partners who are already living separate and apart at the time that the property rights and responsibilities for common-law partners are enacted.

40. That section 4(1) and 4(2) be amended to ensure that assets acquired outside of the marriage or common-law relationship are treated the same way.

41. That sections 5(1), 5(2), and 5(3) be amended by adding "or cohabitation" everywhere that "spouse" appears so that cohabitation agreements made by

common-law partners have the same effect as spousal agreements made by spouses.

42. That sections 6(2) and 6(3) be amended by adding "or common-law partner" after "spouse" everywhere that it appears, and by substituting "family home" for "marital home" everywhere that it appears so that common-law partners have the same rights as spouses to the use of family assets, including the family home.

43. That section 19(1) be amended to provide a limitation period of one year after separation within which common-law partners must apply to exercise their rights under the Act.

44. That the title to Part IV of the Act be amended to include common-law partners.

45. That sections 26, 27(1), 27(2), 28(1), 28(2), 29(1), 29(2), 30, 31, 32(1), 32(2), 33, 34, 35(1), 35(2), 35(3), 35(4), 36, 37, 39, 41(1), 41(2), 41(3), 41(4), 41(5), 42, and 43 be amended by adding "or common-law partner" everywhere that "spouse" appears so that the property sharing scheme after death is made applicable to common-law partners in the same way that it applies to spouses.

46. That section 25 be amended so that the Act does not affect common-law partners who have already died at the time that the property rights and responsibilities for common-law partners at death are enacted.

47. That section 27(3) be amended by adding "or common-law partner" everywhere that "spouse" appears and by adding "or cohabitation" everywhere that "spousal" agreement appears so that the ability to contract out of the property sharing scheme at death by written agreement is equally available to common-law partners as it is to spouses.

***Pension Benefits Act*:**

48. That the definition of "common-law partner" in the definition section of the Act be amended so that it is the same as the standard definition for property purposes.

49. That section 31(2) be amended to add "or common-law partner" to all the provisions pertaining to spouses so that common-law partners have the same right to division of pensions as spouses.

50. That section 31(5) be amended to delete the requirement for common-law partners to sign a declaration opting into pension division before there can be such a division.

51. That section 31(8) be amended to delete the reference to the filing of the declaration with the pension administrator.

52. That section 31(2) be amended to delete subsection (c) giving special treatment to common-law agreements since the previous subsection causes agreements of common-law partners to be treated the same as agreements of spouses.

53. That section 31(3) be amended to provide a new effective date for the pension division for common-law partners so that these rights and responsibilities are not retroactive.

54. That the regulations be amended as necessary to make the provisions for pension division for common-law partners the same as those for spouses.

Wills Act:

55. That the standard definition of "common-law partner" for property purposes be added to the definition section of the Act so that the Act applies equally to same-sex and opposite-sex common-law partners.

56. That sections 12(1), 12(3), 13(1), and 18(3) be amended by adding "or common-law partner" everywhere that "spouse" appears so that the property sharing scheme after death is made applicable to common-law partners in the same way that it applies to spouses.

57. That section 16 be amended to add the words "or common-law relationship" after the word "marriage" so that a will is deemed revoked not only when a person marries, but also when they have a common-law relationship.

58. That section 17 be amended to add the words "or common-law relationship" after the word "marriage" to permit common-law partners to execute a valid will in contemplation of their relationship in the same way that spouses can execute a valid will in contemplation of their marriage.

59. That "common-law relationship" be defined in the definitions section of the Act to make it clear that it is only if the parties have been living together for 3 years, or 1 year if they have a child together, that the relationship qualifies as a "common-law relationship".

60. That section 18(2) be amended to provide that if common-law partners had been living separate and apart for at least one year before the testator dies, then the provisions in the will are rendered invalid. This is to attempt to provide an equivalent clause as that which exists for spouses whose will provisions are rendered invalid where they had divorced or had their marriage declared a nullity.

61. That section 59 be amended to reflect the new name of *The Marital Property Act,* namely, "The Family Law Act".

VI. Conclusion

After examining the three areas of study mandated by the terms of reference, as well as the legislative change initiated by Bill 41 in June, 2001, I have concluded that there ought to continue to be two categories of adult relationships expressed in all Manitoba legislation: "spouses" and "common-law partners". "Spouse" should continue to have its traditional meaning, namely, a man and a woman who are married. "Common-law partner" should continue to include both opposite-sex and same-sex partners. This is to ensure maximum inclusiveness for all Manitobans, while preserving a distinct category for married persons which has existed for hundreds of years in our common law and which recognizes the uniqueness and value of this institution to society. It is also in accordance with the common-sense meaning of these terms as they are generally understood by the public. All of the recommendations in this report are informed by that basic approach.

A further underlying objective is to seek to have Manitoba legislation comply with the *Canadian Charter of Rights and Freedoms.* With respect to adoption this means that gays and lesbians must necessarily be extended the right to adopt jointly with their partners, and to adopt the children of their partners, in addition to the adoption rights which they currently enjoy. Any distinction in treatment from other common-law couples would not survive a *Charter* challenge. With respect to property rights, this means that the rights currently enjoyed only by married couples must likely be extended to persons in conjugal relationships of some permanence, similar to marriage, or risk the legislation being struck down as unconstitutional. Certainly this is the direction that our courts are moving in their interpretation of the *Charter* as including both marital status and sexual orientation as prohibited grounds of discrimination. Finally, with respect to conflicts legislation, it seems impossible that in a climate of extending equal rights to same-sex and opposite-sex common-law couples, we would not also require such couples to assume equal responsibilities. While a *Charter* challenge for a failure to include such persons in conflicts legislation is perhaps less likely as a practical matter, it is nevertheless true that such failure is almost certainly a breach of the *Charter.* This underlying concern with *Charter* compliance also informs all of the recommendations in this report.

I have also attempted to introduce some consistency in Manitoba legislation. Nowhere is this more needed than in the area of conflicts where the category of which kind of relationship gives rise to a conflict varies almost with each piece of legislation. With my recommendations, there would be only two categories of relationships: "family" and "immediate family". This objective of achieving consistency is another reason two categories of adult relationships ["spouses" and "common-law partners"] are recommended throughout. It is also why I have recommended that definitions such as "common-law partner", "family", "immediate family", and "family home", be consistent across various legislation. Finally, I have recommended that Manitoba attempt to implement a consistent criteria for achieving the status of a common-law partnership so that the peculiar and confusing situation of being considered common-law in some situations, but not others, will cease.

The last characteristic of my general approach is to recommend only as much change as is necessary to fix the problem. In the area of adoption this means that I do not recommend extending the right to adopt to "any two persons" when simply extending the right to same-sex common-law partners will fully address the issue. With property this means that I do not recommend the creation of a new registration system when the existing law, which characterizes relationships as "common-law" after living together in a conjugal relationship for a stated period, suffices. Finally, with conflicts of interest, I resist the urge to rationalize and standardize the provisions as to conflicts in various legislation and simply streamline some definitions while including common-law partners in the application.

The end result is a total of 95 recommendations affecting some 35 pieces of legislation, which gives common-law partners all of the rights and responsibilities of spouses in Manitoba legislation pertaining to adoption, conflict of interest and protection of the public interest, and property. There are some 33 statutes which will actually require legislative amendment. In Volume II those portions of each statute that require amendment are set out in table form with the existing sections of the Act opposite the recommended amendments.

Adoption is the most simple to achieve. There are only 6 recommendations affecting just 2 statutes: *The Adoption Act* and *The Vital Statistics Act.* With conflict of interest there are some 22 statutes identified as needing amendment and there are 28 recommendations setting out the specifics of those amendments. Finally, with property legislation there are 12 statutes which provide property rights either during marriage, after separation and divorce, or at death, including *The Wills Act* which also needs amendment as to the conflicts issue. There are some 61 recommendations for amendments to these statutes containing property rights and interests.

Manitoba should feel proud of the government having taken the time in this developing area of law to study the relevant legislation and to carefully consider an agenda for legislative change. There is more legislation that would be impacted in this move towards fuller equality for all Manitobans. I recommend that it be given the same study and care when amendments are being considered.

Schedule 1

Terms of Reference

An Opinion Respecting Persons in Common-Law Relationships

To: The Honourable A. C. Hamilton
Jennifer A. Cooper, Q.C.

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 dispatch 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 statues 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.

Gord Mackintosh
Minister of Justice
Attorney General
June 19, 2001

Schedule 2
Notice Inviting Submissions
List of Manitoba Newspapers
Where the Notice was Placed

1. Altona R.R. Valley Echo
2. Baldur Gazette
3. Beausejour Review
4. Beausejour Clipper Weekly
5. Birtle Eye Witness
6. Boissevain Recorder
7. Brandon Sun
8. Carberry News-Express
9. Carman Valley Leader
10. Cartwright Southern MB Review
11. Dauphin Herald
12. Deloraine Times & Star
13. Emerson Southeast Journal
14. Flin Flon Nth Visions Gazette
15. Flin Flon Reminder
16. Gladstone Enterprise
17. Glenboro Gazette
18. Grandview Exponent
19. Hamiota Echo
20. Interlake Spectator
21. Killarney Guide
22. La Liberte (French)
23. Lac du Bonnet Leader
24. Leaf Rapids Northern Star
25. Manitou Western Canadian
26. Melita New Era
27. Minnedosa Tribune
28. Morden Times
29. Morris Scratching River Post
30. Neepawa Banner
31. Neepawa Press
32. Pilot Mound Sentinel Courier
33. Portage Daily Graphic
34. Portage Herald Leader Press
35. Reston Recorder
36. Roblin Review
37. Rossburn Review
38. Russell Banner
39. Selkirk Journal
40. Shilo Stag
41. Shoal Lake Star
42. Snow Lake News
43. Souris Plaindealer
44. Steinbach Carillon
45. Stonewall Argus/Teulon Times
46. Swan River Star & Times
47. The Lance (French)
48. The Pas Opasquia Times
49. Thompson Citizen
50. Thompson Nickel Belt News
51. Treherne Times
52. Virden Empire Advance
53. Winkler Times
54. Winnipeg River Echo
55. Winnipeg Free Press
56. Winnipeg Sun

Schedule 3

Written Submissions

Submissions From Individuals

1. M. Adam, Winnipeg.
2. Crawford & Jody Bartel, Beausejour.
3. Robert L. Bedard, Selkirk.
4. Karen Busby, Professor, Faculty of Law, University of Manitoba.
5. Kerry Cazzorla, Winnipeg.
6. Mary Dyck, Altona.
7. Jocelyn Giesbrecht, Altona.
8. Harold Jantz, Winnipeg.
9. Darlene Kernot, Winnipeg.
10. Victoria E. Lehman, Attorney, Winnipeg.
11. Karen P. LeMay, Lorette.
12. Elliot Leven, Attorney, Winnipeg.
13. Sally Naumko, Winnipeg.
14. Tim and Betty Neufeld, Lowe Farm.
15. W. Penner, Morden.
16. Krista Piche, Winnipeg.
17. Tony Riley, Strathclair.
18. Sylvia Smith, Selkirk.
19. Noreen Stevens & Jill Town, Winnipeg.
20. Patricia Strong, Ste. Anne.
21. Margaret Temple, Winnipeg.
22. Bernie Thiessen, Winkler.
23. Confidential submission.
24. Confidential petition.
25. Confidential petition.

Submissions From Organizations

26. Adoption Options (Manitoba) Inc.
27. EGALE Canada.
28. Focus on the Family (Canada).
29. Manitoba Association of Women and the Law.
30. Manitoba Bar Association, Gay & Lesbian Issues Section.
31. Manitoba Human Rights Commission.
32. Office of the Children's Advocate.
33. Public Interest Law Centre.
34. Rainbow Resource Centre.
35. REAL Women of Canada.
36. Winnipeg Child and Family Services, Adoption Program.
37. Winnipeg Land Titles Office.

Schedule 4

Consultations

1. Janet Baldwin, Chairperson, Manitoba Human Rights Commission.
2. Kristine Barr, School Trustee, Winnipeg School Division No. 1.
3. Debra Beauchamp, Policy Analyst, Manitoba Human Rights Commission.
4. Aaron Berg, General Counsel, Manitoba Justice (counsel to Manitoba Human Rights Commission).
5. Bob Boulet, Adoption Supervisor, Winnipeg Child & Family Services.
6. Karen Busby, Professor, Faculty of Law, University of Manitoba.
7. Marianne Crittenden, Winnipeg.
8. Barry Effler, Deputy Registrar, Winnipeg Land Titles Office.
9. John Fisher, Executive Director, EGALE (Canada).
10. Rob Hilliard, President, Manitoba Federation of Labour.
11. Sarah Inness, Co-chair, Gay & Lesbian Issues Section, Manitoba Bar Association.
12. Garry Johnson, Adoption Supervisor, Winnipeg Child and Family Services.
13. Lori Johnson, School Trustee, Winnipeg School Division No. 1.
14. Gwendolyn Landolt, National Vice-President, REAL Women.
15. Manitoba Association of Women and the Law.
16. Michael Law, Sexual Orientation and Gender Identity Conference, Canadian Bar Association.
17. Elliot Leven, Rainbow Resource Centre.
18. Harry Mesman, Manitoba Federation of Labour.
19. Janet Mirwaldt, Children's Advocate, Office of the Children's Advocate.
20. Herbert Rempel, Board Member, Adoption Options (Manitoba) Inc.
21. Derek Roguski, Director of Research, Focus on the Family (Canada).
22. Jim Rondeau, Member of the Manitoba Legislative Assembly for Assiniboia.
23. Dennis Schellenberg, Acting Director, Manitoba Family Services.
24. Chris Vogel, Winnipeg.
25. Valerie Wadephul, Winnipeg.
26. Byron Williams, Attorney, Public Interest Law Centre.