

Recognizing and Supporting
Close Personal Relationships
Between Adults

Discussion Paper



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Preface

The Law Commission of Canada has identified “personal relationships” as a priority for research and study. This choice is meant to underscore the importance of relationships to human beings. In its Strategic Agenda the Law Commission observed that “Canadian law rests on a number of assumptions about how people organize their private lives, and how they relate to their parents, partners, children, and those with whom they make a home. These assumptions are frequently out of touch with the facts.”

This Discussion Paper is concerned with close personal relationships between adults. The Law Commission notes that adults have a wide variety of reasons for forming close personal relationships and that these relationships themselves are quite diverse. It explores the assumptions and goals that lie behind legislative programmes today and considers the rationales for Parliamentary involvement in regulating close personal relationships between adults.

Parliament’s current approaches to recognizing and supporting close adult personal relationships do not always line up with society’s expectations. In this Discussion Paper the Law Commission identifies some of the key issues that Parliament will have to address in reforming this field of law. What legal concepts can it use to respond to contemporary needs in a way that does not unfairly discriminate among different types of close personal relationships?

The initial draft of this Discussion Paper was prepared for the Law Commission of Canada by Vice-President Nathalie Des Rosiers. Research Officer Susan Alter gathered much of the background material and bibliography. We would also like to acknowledge the assistance of others who contributed to the Adult Personal Relationships project. Professors Martha Bailey, Brenda Cossman, Kathleen Lahey, Bruce Ryder, and Claire Young each prepared a background paper for the Commission. We also appreciate the comments and suggestions of those who served on the Study Panel for this project.

The Law Commission hopes this Discussion Paper leads to a thorough canvassing of issues that will both inform further research and assist it in preparing a final report. We invite your feedback about the law as it now



exists, and about ways in which it could, or should, be modified to respond to the diversity of close adult personal relationships in society today. We would be most pleased to receive your comments and reflections:

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Executive Summary

Society is founded on relationships. These relationships take many forms. Some are merely occasional and not particularly intimate. Others are affectionate and ongoing. The concern of this Discussion Paper is with close personal relationships between adults. It begins with a look at the various kinds of close adult personal relationships one finds in Canada today. It goes on to examine the reasons governments have decided to recognize and support some of these relationships, and how they have done so. The Discussion Paper then reviews the difficulties Parliament has experienced in keeping the field of law in tune with society's needs and expectations. It concludes by outlining different approaches to reforming how the law recognizes and supports close personal relationships between adults.

Friends, Families and Loved Ones

A broad diversity of close adult personal relationships is a sign of a vibrant society. Permitting people to form relationships that matter to them and in which they can find happiness and comfort is the mark of pluralism and freedom. Today, most close adult personal relationships arise between two people living in the same household. In many cases these adults are married, but not always. Sometimes the relationship is between two unmarried adults of the opposite sex. Sometimes the relationship is between two adults of the same sex. Occasionally, a close personal relationship can arise between friends, or brothers and sisters, or parents and their adult children, or others who share a home.

Adults form relationships for a variety of reasons. They often find security, mutual support, affection and fulfilment in a close personal relationship with another adult. Normally, the tasks and responsibilities of daily life are more easily managed when shared. Of course, these relationships can sometimes also be a source of sorrow, pain, exploitation, and even violence. Nonetheless, physical, psychological, emotional and economic support are key elements of the intimacy and interdependence that one finds in a healthy close relationship between adults.



The Legal Recognition of Close Adult Personal Relationships

Canadian law makes great efforts to protect the interests of individual citizens. What is less apparent are the numerous ways in which it recognizes, supports and protects relationships. Generally, the law acknowledges the value of close personal relationships between adults, and in many cases directly attempts to support them. In addition, Parliament sometimes uses these relationships as a way of organizing other policies and delivering social programmes. Governments see that some of the responsibilities they ultimately might have to take on can be better assumed by adults who care for and look after each other.

To date, Parliament has not clearly stated its rationales for supporting close adult personal relationships. Most often it has simply taken the most visible of these adult personal relationships — that between wife and husband — as the vehicle by which to promote specific policies and programmes. What is more, because marriage can be such a convenient proxy, many other policies that do not really have to do with supporting relationships as such have been fashioned by reference to it.

As society has changed over the years, however, Parliament has felt obliged to extend the reach of many of its programmes beyond married couples. It began by treating some common law relationships in the same manner as the marriage relationship. Later, under the direction of the courts, it determined that unmarried same-sex couples and unmarried opposite-sex couples should have identical rights and obligations. Yet, because Parliament has not had to comprehensively examine the underlying objectives for its different programmes, many statutes today appear to be both under-inclusive and over-inclusive.

Legal and Policy Challenges

Current approaches to recognizing and supporting close adult personal relationships are increasingly coming into question. In any recasting of legislation, Parliament will face difficult challenges. To begin, in order to overcome problems of under- or over-inclusiveness, it will have to think clearly about its intended policy in each and every case. Not every situation involving a close adult personal relationship should be treated identically. Parliament then has to decide whether it is preferable to fix the scope of its programmes by reference to the purposes it is pursuing, rather than by reference to concepts — like marriage — standing proxy for these purposes.



Another challenge is to ensure that previous patterns of discrimination and inequality are not repeated. Sometimes, statutes unwittingly reproduce distinctions that, while conceptually neutral, work unfairness in their actual operation. Achieving equality in statutes governing close adult personal relationships requires Parliament to develop its criteria of inclusion and exclusion with both their form and their practical impact clearly in view.

A last challenge is to find the right balance between the goals of coherence and equality and considerations of efficiency and privacy. Sometimes, given the purpose of a statute, the cost of specifying and monitoring eligibility criteria is too great. On other occasions, applying the criteria as announced would require officials to inquire into the intimate details of people's lives. For Parliament, the key is to discover legal concepts that effectively advance the policies it desires, that are relatively easy to administer, and that show due respect for people's privacy.

Reconsidering Close Adult Personal Relationships

What principles should govern a reconsideration of the law dealing with close personal relationships between adults, and how might these principles be put into practice? Initially, Parliament has to examine its existing statutes in order to determine whether its use of concepts like marriage and spouse actually has anything to do with the marriage relationship. Where it does not, these statutes should be rewritten so as to express their goals using concepts that specifically relate to the real objective Parliament is trying to achieve.

After that, Parliament has to decide how best to frame legislation that directly deals with close adult personal relationships so that, in each case, it achieves an effective coherence between its desired policy and the language it uses to achieve that policy. This involves distinguishing between the legal consequences that have until now been made to depend on granting status to a particular relationship, and the status relationship itself.

In rewriting statutes that set out the consequences meant to flow from a close adult personal relationship, Parliament should follow a three-step process. First, the objectives that underlie various policies and programmes have to be clarified. Second, Parliament needs to develop new legal concepts that actually speak to the types of relationships envisioned by these policies. Third, these new concepts have to be assessed in the light of the factual context within which they are meant to operate.



Clarifying legislative policies and inventing new concepts that directly link legislative policy to the observable facts of close adult personal relationships can go a long way to ensuring the coherence, justice and efficiency of the law. But many Canadians believe that more than the substance of the law has to be addressed. For them, as long as Parliament continues to recognize marriage as a privileged status relationship, all couples who wish to marry should be permitted to do so.

Parliament has several options should it decide to reconsider the status it wants to attribute to different close adult personal relationships. It could redefine civil marriage to include relationships that are excluded at present. It could supplement or replace the concept of marriage with a system of civil registration of relationships. It could establish a range of different registered statuses so that people would be able to choose whatever status they thought was best suited to their particular relationship.

Finding the best way to recognize and support close personal relationships between adults confronts Parliament with complex and difficult questions. These questions raise for discussion not only our conception of the role of the State, but also fundamental beliefs about how adults organize their relationships with each other. Whether or not Parliament decides to address issues of status, it cannot avoid rethinking the concepts it is now using to target the beneficiaries of its programmes. Only after doing so can it be confident that these programmes actually reach all the close adult personal relationships it means to recognize and support.



I Introduction

In the memories and photo albums of our childhood are reflected the stories of our friends, families and loved ones. These memories and photo albums are a rich storehouse of information about those who mattered most to us at the time. In the cast of characters they present, they reveal a broad diversity of personal relationships. How complex, we can now see, was the web of relationships among those dear to us.

Today's children are now building their own memories of friends, families and loved ones. Imagine them talking about the people who are closest to them. One child speaks of his parents' twenty-fifth wedding anniversary, his father who has to travel to another city every week because his job demands it, his disabled older brother who lives in a group home with other adults, and his mother's father who lives in a retirement home. Another describes her father and stepmother who have just adopted a little boy, her mother who lives with a new boyfriend, her father's mother who lives with an aunt who has never married, and her cousin who has just moved in with them to finish school. A third child talks about his mother who now lives with her female partner, the retiree in his community who they take in as a long-term boarder, and a group of relatives who live together in a housing co-operative. Still another recounts the recent arrival of an uncle from across the ocean who moves in with her and her parents, the widowed neighbour down the street who comes for dinner every Thursday, and a grandfather who has a live-in housekeeper.

Children usually describe people living in all of these different kinds of situations as being part of their family — and this happens even when there is no formal legal relationship between them. Our children see that there are all kinds of relationships among adults who either live together or in close proximity and who have developed bonds of affection for each other. Relationships where peoples' lives are emotionally and economically interdependent are at the foundation of social life today in Canada. Yet their very diversity continues to create, as it has always created, special challenges for the law.

This Discussion Paper is concerned with close personal relationships between adults. This is not to say that other close personal relationships — for example, intergenerational relationships that involve the rearing of



children — are unimportant. But the focus here is on interdependent relationships between adults who now share, or who have previously shared, a household.

Chapter One begins with a look at the different kinds of close adult personal relationships that we find in Canadian society today. It then sets out some of the reasons that adults have for forming close personal relationships and some of the needs that these relationships fulfil.

A second chapter is meant to explore the assumptions and goals that lie behind current legislative policies. It considers the rationales for Parliamentary involvement in regulating close personal relationships between adults, and reviews some of the programmes adopted in consequence.

Chapter Three outlines a number of difficulties caused by the way Parliament has, up to now, conceived of its role in recognizing and supporting close adult personal relationships. It addresses the challenges confronting governments that want to keep the law in tune with society's expectations, given the policies and objectives they are trying to pursue.

Finally, this Discussion Paper identifies the key issues that Parliament will have to address if it seeks to reform the law regulating close personal relationships between adults. What legal concepts can be used to respond to contemporary needs in a way that does not unfairly discriminate among different types of close personal relationships?



II Adult Personal Relationships Today

Human beings are social beings who continually establish relationships with others. Among adults these relationships take many forms. Some are affectionate and ongoing. Some are merely occasional and not particularly intimate. A person can have a commercial or economic relationship with an automobile mechanic or a grocer. A person can have a social relationship with bowling partners, or the members of a book club. A person can have a community relationship with neighbours down the street. A person can have a deeply-felt attachment to a cousin or a co-worker. A person can share a house or apartment with a partner, a friend or a family member.

There are, of course, many different kinds of arrangements under which adults live together, or cohabit, in the same household: being married; having a common law relationship, whether heterosexual or same-sex; rooming with an adult child, a brother or sister, or a friend; sharing a housing cooperative with several others; living in a group home or senior's residence; and so on. Personal relationships that involve cohabitation are often identified as a source of comfort, security, fulfilment, and joy. But they may also be a source of sorrow, pain, exploitation and even violence. Again, they may allow for a positive development of the self, or they may hinder that development. Whether for better or for worse, they structure one's sense of belonging to a community and even help to define one's personal identity.

Because close personal relationships in which adults care deeply about each other are important to people, one might think that governments should play a role in recognizing or nurturing them. In fact, Canadian governments have increasingly taken on this role. Many social policies today are aimed at supporting close adult personal relationships; and, of course, many legal obligations are imposed on those who live, or have lived, together.

But official recognition and support can, in some cases, have negative side-effects — both for society and for those in a relationship. For example, the law may draw unfair distinctions between kinds of relationships. It may also attach significant benefits or burdens to persons sharing certain kinds of relationships. These, in turn, may lead people to remain in relationships that have become abusive or exploitative. Or they may lead people to avoid entering into a particular type of relationship when they might otherwise wish to do so.



For these reasons, some have argued that current legislative approaches should be reconsidered. They believe that governments should not adopt policies meant to recognize and support relationships generally — especially close personal relationships between adults. They suggest that Parliament’s focus should be on protecting individuals. The claim is that, as far as possible, adults in close personal relationships should have exactly the same rights and obligations as adults not involved in a relationship.

Thinking about the potential effects of governmental action on decisions Canadians make about establishing or maintaining a close personal relationship with another adult raises basic issues of legal policy. How much of a role should governments play in influencing the formation of these relationships? Should they expressly set out to develop programmes that sustain relationships between adults? Or should they try to orient their policies towards individuals, promoting and regulating close adult personal relationships only when an approach centred on individuals proves to be inadequate?

A. The Diversity of Adult Personal Relationships

These are, obviously, not easy questions. Many people would respond: “It all depends on the kind of relationship you’re talking about.” That is, the difficulty of answering these questions can be traced to the great variety of close personal relationships that Canadian adults establish for themselves. In a very real sense, no two relationships are the same. Even if one tries to set out more general categories of adult personal relationships — for example, close friendships between adults who live together, marriage, family relationships of mutual support, marriage-like relationships — within these categories not all relationships exhibit the same characteristics.

This diversity can quickly be seen just by considering a few of the questions that might be asked about close personal relationships between adults:

- how much integration and interdependence is there?
- how much mutuality characterizes the relationship?
- how intimate is the relationship?
- how enduring is the relationship?
- how important to the relationship is the support of other dependents?



- how important is the sharing of a household?
- how do the persons in the relationship themselves understand their relationship?

Consider, under each of these features, the range of differences there can be among relationships.

1. Integration and Interdependence: Some personal relationships involve a very high degree of integration and interdependence. This integration and interdependence is popularly understood as having several dimensions: a physical aspect, an intellectual aspect, an economic aspect, and an emotional aspect, to name just a few.

One person may be physically dependent on the other: that person may need assistance in meeting his or her most intimate needs, and may not be capable of offering reciprocal assistance. Even in the absence of strict dependence, the physical capacities of persons in the relationship may not be the same. One may take on greater responsibility for the physical labour needed to make the household work.

In some relationships one person may not have the intellectual ability to live on his or her own, or may have had to drop out of school before learning to read and write. The other contributes by organizing household finances, and looking after needs that require marketplace savvy or related abilities.

The division of labour and the tasks associated with maintaining a relationship also presupposes a certain degree of economic interdependence. Frequently, one person may work at home, running the household, while the other works outside the home, earning an income to finance this arrangement. By contrast, in some relationships, both may work outside the home and share in the housework. Again, in some situations bank accounts are joint; in others they aren't.

People involved in relationships may also have different emotional needs. One may be a strong personality, the other not. One may deal with conflict by avoiding it while the other may be confrontational. Both within the relationship and in dealings with outsiders, people may build interdependence by dividing responsibilities to meet their different emotional needs and capacities.

There are now a multitude of familial relationships for which we have not yet evolved the language to describe appropriately. This may have serious policy consequences. For instance, we tend to include under the term 'family' spousal relationships, child-parent relationships, sibling relationships, and more extended family relationships. One assumption used to be that spousal and parental relationships involved the same adults, yet this is no longer the case for an increasing proportion of people. They are neither married, nor do they live with the biological parent of their children, and they may be married to someone else. If these relationships are simply identified as 'family', without recognizing the fundamentally different relationships involved, it will lead to muddled thinking and inappropriate policies.

M. Eichler, *Family Shifts – Families, Policies, and Gender Equality* (Toronto: Oxford University Press, 1997) at 2-3.



2. Mutuality: Some relationships allow for people to grow and flourish as individuals, while others are a source of frustration and anxiety. Some relationships are harmonious and have a deep-rooted mutuality. Others are abusive, manipulative and violent. Some can frequently alternate between affection and exploitation.

3. Intimacy: Some relationships have a high degree of intimacy — the sharing of confidences, of hopes and fears, of private time together. Intimacy can be emotional, spiritual, physical. Some relationships involve sexual intimacy. In others, for example as between siblings living together, there can be great emotional and spiritual intimacy within the relationship, but sexual intimacy takes place with others outside the relationship.

4. Duration: Some relationships endure until one person dies. Others last for a very short time. Once they last for any period, of course, relationships evolve — they are dynamic. The changes occur in numerous ways. Relationships may deteriorate over time, or they may improve. Economic and social changes may transform them. One person may become unemployed, and the other may become the breadwinner. Often the physical, intellectual and emotional well-being of one person may decline significantly.

5. Support of Other Dependents: Some relationships are characterized and shaped by the presence of other dependents — especially children. These may be children of whom persons in the relationship are the birth or adoptive parents, or children that one or both of the persons bring into the relationship. In some relationships there are no children, but there may be other dependents: a parent, or a disabled relative, or a close friend. And in many relationships there are neither dependents nor children, although there might once have been.

6. The Sharing of a Household: Most close relationships between adults involve some kind of physical cohabitation. Whether the relationship is between friends or between spouses, people generally live under the same roof. But not always. In some relationships people take extended separate vacations. In others, one may live primarily at a country home while the other lives primarily in the city. In some, one person may have to work in a distant place for extended periods. And in others, while people share most of the physical space of a house, they may have separate bedrooms or even separate entrances.



7. Self-Identification: A common feature of close personal relationships between adults is that the relationship is acknowledged. In many cases, the relationship is also recognized by the law, and flows from a public commitment like a marriage ceremony. In others, the public commitment comes from holding oneself out to neighbours and the community as being a couple. In still others, such as relationships between brothers and sisters, or close friends, people publicly identify themselves as housemates. Some relationships, however, involve only a private commitment, be it just an understanding or be it through a contract dealing with economic and other matters. Some relationships are established and evolve without any formal commitment whatever being made. And some relationships may be acknowledged privately, but denied publicly.

* * *

These reflections suggest that there is no easy test for determining what is a close adult personal relationship. These relationships are both numerous, and can vary greatly. They can have different focuses and different time lines. Some may be characterized by a high degree of mutuality and great intimacy. Others may not. Some may last a life-time. Some are more transitory, and be dependent on a community of interests, on residence in one location, or on participation in one activity. Some are publicly acknowledged — even legally recognized — but others are not.

This diversity of close personal relationships between adults, and the different experiences of people involved in the same kind of relationship, are positive signs of social pluralism and an indication of the freedom that generally characterizes Canadian society. The ability to choose and adapt one's relationships with other adults to one's circumstances is a source of great comfort for many people. Choice in building relationships and the respect of governments for these choices are among the core features of a liberal democracy.

Nevertheless, the variety of these relationships, and the way they evolve over time, pose significant challenges to Parliament. These challenges don't just concern decisions about what policies and programmes to put into place to recognize and support close adult personal relationships. They also concern decisions about which relationships to support and what legal criteria to use as a way of identifying the selected relationships.



B. The Nature and Meaning of Close Adult Personal Relationships

To make appropriate choices about legal policy, Parliament needs to have a thorough appreciation of the facts. But this is only the beginning of the legislative task. Coherent policy development also requires Parliament to ask what it is about close adult personal relationships that it should value. Simply put, before Parliament can develop criteria for identifying which relationships to recognize and support it needs to understand the nature of these relationships and their meaning for the adults who establish them.

Historically, in addressing relationships between adults, Parliament has not directly focused on either of these issues. For at least a century the legal regulation of most relationships has been left to the ordinary law of contracts. Canadian law permits adults to create relationships with each other through contracts. It then protects the relationship by enforcing the contract should one person wish to break it, and by shielding the relationship from improper interference by others.

But Parliament has also acknowledged that at least some relationships between adults, typically close personal relationships, are not best understood simply as contracts. These relationships also involve a status. The kinship relationship — for example, as between parents and their children, or as between brothers and sisters — is a good example of a status relationship. So is marriage. The policy question for Parliament today is whether there are other relationships that should be given a recognized status as well. That is, Parliament has to decide if there are such socially beneficial outcomes of close adult personal relationships generally that it should promote these outcomes by expressly attributing some distinctive legal status to them.

A proper answer would require conducting a number of detailed inquiries about the meaning and consequences of different kinds of relationships. For example, Parliament might want to know if the lives of adults who share a close relationship with another adult are better or worse than the lives of people who live alone, or in a series of casual relationships. Suppose the data were to show that adults who share a close personal relationship have healthier, happier, more productive lives. Would this be a good enough reason for governments to support these relationships? Again, Parliament might want to know if there is a correlation between those who claim a recognized status and individual well-being, or if the factual characteristics

Two brothers, a brother and sister, cousins, a parent with his or her adult child, friends or co-tenants can cohabit. Mutual benefit can also exist between members of the same family, between friends, or between members of the same community. Thus, the marital relationship is one instance of mutual benefit among so many others. From a psychological standpoint, we must therefore find other, more precise and more selective criteria for defining marital life. [translation]

Madam Justice Carole Julien, quoting psychiatrist and expert witness Dr. Nowakowsky, in: *Brunette c. Québec (Ministre de la Solidarité sociale)*, [1999] J.Q. no 5693 at para. 31 (C.S. (Chambre civile)) online: QL (A.Q.).



of the relationship — its nature, length, mutuality, for example — are the key factors for promoting well-being. Suppose the data were to show that official recognition and acknowledgement adds a further dimension of well-being for adults who share a close personal relationship. Would this be a sufficient reason for governments to explicitly recognize these relationships?

Of course, in conducting all these inquiries it is important to know the basis upon which notions like health, happiness, productivity and well-being are being measured. The beginnings of an answer can be found by thinking about the kinds of needs that adults may have as individuals — whether or not they are in any kind of relationship at all. Then Parliament can reflect upon its own role, and the role of close adult personal relationships, in meeting these needs. Health care professionals note that people have a wide variety of needs, and that every person conceives his or her needs slightly differently.

While there is no consensus either on how these needs can be grouped together or on whether they can even be ranked, the following list has often been used by psychologists and social workers. Human needs are said to comprise:

- physiological needs (for example, water, food, sleep);
- security and safety needs (for example, shelter, physical security, economic security);
- emotional needs (for example, love, a sense of belonging, intimate relationships);
- respect needs (for example, self-respect, acknowledgement by and esteem of others); and
- spiritual needs.

As noted, an initial consideration for Parliament is whether it should take on responsibility for meeting some or all of these needs. Canadian governments usually feel the obligation, at least as a last resort, to provide for water, food, shelter, physical security, and so on. They have not, by contrast, usually been preoccupied with nurturing love, self-respect, and public virtue for individual citizens, even though, as a general matter they seek to promote tolerance, equality and good citizenship. Much public debate about the role of government today centres on how big a role, if any, it should assume in looking after these different human needs.



Family means different things to different people, and the failure to adopt the traditional family form of marriage may stem from a multiplicity of reasons — all of them equally valid and all of them equally worthy of concern, respect, consideration, and protection under the law.

Justice L'Heureux Dubé in: *Miron v. Trudel*, [1995] 2 S.C.R. 418 at para. 102, online: QL (SCJ).

Regardless of how this debate is resolved, there is another issue that Parliament has to consider. If governments do accept responsibility for meeting at least some of these needs, in what ways should they do so? Today, governments sometimes address these needs directly, as for example, by hiring police officers, firefighters, providing municipal water and sewers, and so on. In other cases, they do so by giving tax deductions and grants to private-sector organizations like churches, charities, community groups, and social service agencies.

In reflecting on how to best meet whatever responsibilities it assumes, Parliament sooner or later has to consider the role of close personal relationships between adults. While some needs might be most efficiently met by government, or by social and religious organizations, many others — such as, for example, the need for love and self-respect — are best fulfilled in sustained face-to-face human interactions. These close personal relationships between adults offer a context in which the human spirit can flourish.

This is not the end of the matter. Even if Parliament were certain that close adult personal relationships are often the most efficient, or the only, means of responding to certain physical, economic and emotional needs of individuals, it would have at least one other issue to address. Not all close personal relationships between adults are identical. How does Parliament know which of these relationships to use as a way of pursuing its policy objectives? This is not a new or unusual question. For example, whenever non-governmental organizations are used to advance policies or deliver programmes, Parliament always has to decide which organizations it will actually recognize as churches or charities. So too, for decades it has been deciding, at least implicitly, exactly which close adult personal relationships to recognize and support.

Usually Parliament has adopted a formal test for recognizing relationships. It has simply concluded that people who enter into a certain kind of arrangement — such as marriage — will benefit from identified policies and programmes. But Parliament might also choose to look more carefully at the substance of a relationship. After all, if it is an important human need to build and nurture healthy close personal relationships with other adults, Parliament might decide that it should only recognize and support relationships that are neither dysfunctional nor harmful.



Among health care professionals there is, once again, no unanimity either about the central characteristics of healthy relationships or the typical features of pathological relationships. There is, however, general agreement on the kinds of questions that need to be considered in evaluating the nature and character of adult personal relationships.

A first concern addresses power within the relationship: How equal is it? Is any imbalance negotiated or imposed? Another relates to the degree of commitment that parties have to the relationship: Is it the same for both? Is the relationship affective or utilitarian? Health care professionals also assess the degree of mutual respect in a relationship: Do the parties respect each other as individuals? Is one party victimizing the other? A fourth factor relates to the acknowledgement of the relationship in the context of other relationships that parties may have: Is each party able to form and maintain other relationships? Are they comfortable acknowledging and describing their relationship to others? Finally, there is the question of volatility and safety: Is the relationship unstable and risky for parties? Is there a shared safe environment in which it can flourish?

Underlying this diagnostic inventory is an assumption that healthy adult relationships are characterized by reasonable equality, mutuality of commitment, respect, recognition and safety. People will understand their roles, and be comfortable and accepting of these roles, even as they evolve over time. This suggests that what characterizes a close adult personal relationship (as distinct from any other relationship between adults), are the fact of interdependence — whether physical, emotional, economic or spiritual — and the commitment to intimacy — once again whether physical, emotional or spiritual.



III Society, Law, and the Recognition of Adult Personal Relationships

All human relationships emerge and develop through a complex interweaving of social, cultural, religious and economic forces. These forces shape how the law comes to recognize and regulate these relationships. The law enacted by Parliament then plays back into and moulds socio-cultural understandings and attitudes. Nowhere is this more apparent than with close personal relationships between adults.

Social and legal approaches to these relationships have for a long time been very much tied to the idea of family — even though there has not always been a lot of agreement on exactly what a family might be. The way many people in Canada imagine the family today — the self-sufficient nuclear family of wife, husband and a small number of children — is a quite recent cultural development. Only a few years ago it was common for families to have seven or eight children. Only a few years ago it was common for unmarried adult children to live with their parents, and for ageing parents to live with one of their married children. Only a few years ago it was common for a strong network of brothers, sisters, aunts, uncles and cousins to sustain family life. Only a few years ago it was common for close friends, hired hands on farms, and live-in nannies to be welcomed as family members.

Yet today, the television image of the nuclear family powerfully affects the way we see and characterize all close adult personal relationships. More than this, the attitude that social, cultural, religious and economic groups and organizations take to different relationships has a profound impact on how adults choose to build their relationships, and on how happy and satisfied they are about the relationships they have chosen.

Here are some examples. A community's acceptance of a common law couple as full participants in neighbourhood activities can be a positive factor in sustaining that relationship. Whether an adult child is characterized as a dependent for insurance purposes will effect eligibility for benefits if his housemate-parent has an accident. A restricted housing cooperative that only permits childless married couples may play an important role in supporting a close personal relationship if it allows two adult siblings to move in. An employer that recognizes the extended family



of one of its employees, may offer bereavement leave when a best friend's parent dies. A religious congregation that permits same-sex marriages can give great emotional support to such couples.

These socio-cultural, economic and religious understandings and practices can exert a powerful influence on the law. At the same time, the role of the law in shaping and reinforcing these understandings and practices should not be underestimated. The assumptions of, and judgements reflected by, the law are a significant steering mechanism in contemporary society.

A. The Organization of Legal Policy

Because legal rules and principles exist in close interaction with social attitudes and behaviours, Parliament often does not consciously reflect on their rationale in individual cases. This is especially true of rules and principles first announced decades ago. For this reason, it is opportune to look closely at how the law recognizes and regulates close personal relationships between adults today.

A good, although not comprehensive, sense of the variety of Parliamentary policy judgments that are at stake can be gained just by looking at existing legislation. A preliminary survey undertaken by the Law Commission of Canada reveals that terms dealing with close personal relationships between adults appear thousands of times in federal statutes, regulations and policy manuals. Apart from the *Income Tax Act*, there are over 1800 statutory sections where these terms appear singly or in groups. A recently adopted federal statute entitled the *Modernization of Benefits and Obligations Act* identifies over 60 laws where terms like husband, wife, marriage, spouse, divorce, maintenance, and so on are used to organize legal policy.

The following five examples illustrate some of the different ways in which close personal relationships between adults are now identified and governed by federal legislation.

The *Canada Evidence Act* provides that “no husband is compellable to disclose any communication made to him by his wife during their marriage, and no wife is compellable to disclose any communication made to her by her husband during their marriage.”

The *Immigration Regulations* adopted under the *Immigration Act* provide that “a person who is a Canadian citizen or permanent resident (...) is authorized to sponsor the application for landing of any member of the family class”. Family class is defined so as to include a spouse, fiancé(e),



father or mother, dependent daughter or son. In this section, spouse means a person of the opposite sex who is joined in marriage. However, at other times, spouse is defined more narrowly as a person of opposite sex who is cohabiting with the sponsor in a conjugal relationship, having cohabited continuously for at least one year.

The *Income Tax Act* provides a tax credit to a person who supports a spouse. Spouse is defined as a person of the opposite sex who is married or is a common-law partner. For the 1999 tax year, the maximum federal credit is \$915, and that amount is reduced once the spouse's income exceeds \$538. The spousal tax credit, as it is called, aims at recognizing the obligation of one spouse who supports the other who is not engaged in the labour force.

In the *Old Age Security Act*, an allowance is paid monthly to the spouse or common-law partner of a pensioner who already receives a guaranteed income supplement under the Act.

The *Business Development Bank of Canada Act* provides for loans to persons who wish to develop businesses and prevents a director of the Bank from receiving a loan from it. Some people linked to the director of the Bank may apply for a loan, but their application must be specifically approved by the Board of the Bank. The people affected are: the spouse, common-law partner, child, brother, sister or parent of a director; the spouse or common-law partner of a child, brother, sister or parent of a director; and the parent, the sister or the brother of the spouse or of the common-law partner of a director.

Two observations may be made about these five statutory provisions. First, and most obviously, in every case, the law identifies a close personal relationship by using concepts that are associated with the idea of family, and more particularly with the idea of marriage. Second, the policy objective behind the use of words relating to family and marriage is different in each case.

Marriage and family-related concepts

Legal policy in all these statutes relies on the two main relationships that have traditionally been associated with membership in a family: marriage and kinship. Marriage has long been a highly regulated legal institution. The law has typically imposed relatively strict limitations on who is entitled to get married. Moreover, until recent decades, remarriage was difficult because the conditions under which couples could have their marriage declared void, or could obtain a divorce were not extensive.



Many of the discussions of marriage and cohabitation assume that the rights associated with marriage are a given, and that the only issue is whether cohabitants' rights should rise to a similar level. However, when considering possible reforms, we should not assume that change will *necessarily* result in an *increase* in the rights and obligations of cohabitants. It is possible that a *reduction* in the rights and obligations for *both* married spouses and/or cohabitants might be more appropriate.

W. Holland, "Intimate Relationships in the New Millennium: The Assimilation of Marriage and Cohabitation?" (2000) 17 Can.J.Fam.L. / 17 Rev.Can.D.Fam. 114 at 116.

As for kinship, the law has also been quite rigorous. This can best be seen in how it dealt with children. In the past, distinctions were drawn between categories of children depending on the relationship of their parents: children born of parents who were married at their birth; children born of parents who married after their birth; children born to an unmarried woman; and adopted children. Many important consequences were made to depend on these distinctions.

Today, many of the historical restrictions on marriage and divorce no longer apply, and the law has abandoned practically all discriminatory distinctions relating to children. In addition, unmarried couples who to all intents and purposes look and act as if they were married, are often treated in a manner similar to those who are in fact married. Similarly, even children who have no formal legal or blood relationship to an adult (for example, the children of a person's common law spouse) can often claim support from a *de facto* parent.

Still, there remain many close personal relationships between adults that neither an extended concept of spouse, nor an extended concept of kinship will reach. Despite these contemporary extensions, that is, some relatively traditional notion of family continues to underlie the way in which these statutory provisions are drafted.

The diversity of policy objectives

The policy objectives that Parliament is pursuing through these different statutes are not identical. In some cases, the objective would appear to be to support the stability of close adult relationships. For example, the privilege of not having to testify against one's spouse in the *Evidence Act* was meant to preserve harmony in the family and to ensure candour and intimacy in marital relations. And yet, many would consider that this objective is too narrowly drawn. If the goal is to respect the sense of divided loyalties that may arise when one is obliged to testify against one's loved ones, we can readily imagine that the dilemma of a parent having to testify against his or her child is equally as great.

The *Immigration Regulations* under the *Immigration Act* may appear to reflect a concern for the well-being of families as a whole. Separating families may cause great distress to members. It may harm the mental and physical health of people living in Canada as well as their loved ones abroad. And yet, here again the reference might be seen as under-inclusive, in that it would not permit sponsorship of an adult friend with whom the sponsor has the closest relationship.



The use of family concepts in the *Business Development Bank Act*, by contrast, is not particularly linked to the protection of families. The rationale for these provisions is that the Bank might be led astray by business decisions made by a director who chooses to favour his loved ones instead of objectively assessing the risk that they present as borrowers. In such a context, it matters little whether the borrower is a married spouse or a close friend or a same-sex partner, the divided loyalty on the part of the director is equally problematic. Again the description used would seem under-inclusive.

Some statutes attempt to target not only particular individuals but others linked to them. Some rules of the *Income Tax Act* relating to certain pension benefits, for example, were conceived at a time where the expectation was that there would be one salary per household. Often the assumption was that children had been born to the union and that the care of such children would be provided by their mother without compensation, and without her having the opportunity to accumulate funds to insure a comfortable old age. However, not all relationships that would qualify, for example, for the provision allowing a surviving spouse to benefit from certain of the deceased spouse's RRSP entitlements fit that model. Some spousal relationships might never have involved children. In others, both partners may have always had paid employment. Here, the use of the word spouse seems over-inclusive.

Finally, in some statutes, the aim is to provide an adequate income for retired couples whose pension entitlements or other revenues are insufficient. The assumption in the *Old Age Security Act* is that the only relationships of mutual support between people who have ceased working involve spouses and common-law partners. In this case, reliance on the terms spouse and common law partner is under-inclusive.

Of course, it is not just in relation to governmental policies and programmes that these statutory references are important. Parliament also encourages other institutions such as churches, benevolent associations, and charities to nurture adult relationships. Again, large numbers of employment benefit programmes and private entitlement schemes mirror the official regime. This happens, for example, with respect to the designation of beneficiaries of private insurance, pension, health and disability benefits. It also occurs in connection with other benefits such as access to company housing, health clubs, golf clubs, conference travel, and so on. Even such everyday ideas as offering "spousal tickets" for transportation, entertainment and other services can track official policy.



Many of these non-governmental entitlements, benefits and services are explicitly desired by Parliament, while others are just informal, customary practices. Nonetheless, they all show the ways in which the model of close personal relationships between adults that Parliament adopts can influence decisions of employers, private service providers, and other organizations.

B. Governmental Interests in Adult Personal Relationships

The five examples just discussed reveal the diversity of legal policies and programmes that currently are organized by reference to a close adult personal relationship. But they do not directly suggest what Parliament's attitude towards these relationships should be. Nor do they tell us whether there should be a governmental interest in fostering these types of relationships. The present issue, then, is to determine the key interests that Parliament seems to be pursuing in statutes that address close adult personal relationships. These interests can be grouped under some broad headings — namely physical security, integrity and solidarity, psychological and emotional security, and economic security.

Physical security

A number of statutes are meant to promote the physical security of adults in a relationship. Typically, however, they are written so as to protect individuals. There is nothing about a relationship that is singled out for special attention. For example, domestic assault is a criminal offence that is defined no differently than other types of assaults.

In the past, less protection was sometimes afforded to adults in certain kinds of close adult personal relationships. For example, the idea that a wife and husband became united by marriage meant, among other things, that a husband was deemed legally incapable of raping his wife. A few years ago, however, the *Criminal Code* was amended to do away with this rule.

Today, some statutes acknowledge the increased physical vulnerability of adults in at least some close personal relationships. The *Witness Protection Program Act* and the legal principle popularly known as the “battered wife defence” can provide a measure of security to those who are, or have been in, a close personal relationship with an abusive adult.



Integrity and solidarity

Many statutes are designed to enhance the integrity and solidarity of a relationship. Unlike provisions meant to ensure the physical security of adults who may be involved in a close personal relationship, these statutes usually focus on the relationship as such. For example, the concept of spousal privilege in the law of evidence that was noted earlier is often justified on the basis that it would preserve harmony and ensure candour and intimacy in marital relations. A similar type of concern is seen to underlie the special treatment that spouses enjoy when they are charged together in connection with a conspiracy or when one is accused of being an accessory to a crime committed by the other.

Often solidarity is enhanced by policies having an economic impact. For example, the idea that certain assets acquired during a marriage are “family property” in which both partners have an interest, and the policy of creating family-centred social benefits are meant to promote economic interdependence. Again, allowing dependents to claim for economic losses caused by the fault of third persons is another type of legal response meant to enhance solidarity.

In recent years the law has sometimes been amended in a way that undermines solidarity in a relationship because of a desire to afford better protection to individuals in it. For example, for many years the law presumed that a husband who took his wife’s property against her wishes was not committing theft. It also took the position that one spouse could not be sued for damages by the other. But these principles have now been abolished. Sometimes the law undermines solidarity indirectly. The rules strictly limiting the conditions under which spouses can claim a business expense deduction for wages paid to each other is a good example.

Psychological and emotional security

Protecting the psychological and emotional security of adults is another goal that Parliament often pursues. Rules intended to prevent exploitation and victimization of persons in close relationships are common. But the law is less certain about the role it should take in actually promoting recognition of healthy relationships. The idea of family reunification in the *Immigration Act* is, however, one policy clearly designed with this goal in mind.

Commitment is the cement that holds relationships together. If spouses were not committed, they probably would not put up with some of the difficulties faced in their marriage.

L. Larson, J. Goltz & B. Munro, *Families in Canada — Social Context, Continuities and Changes* (Toronto: Prentice Hall, 2000) at 184.

Economic security

The economic security of adults in a close personal relationship also appears to be a key Parliamentary concern. During the currency of a relationship this goal can be reflected through legislative or private and employment-related benefits made available to a couple. Favourable tax treatment to encourage couples to pool resources is another way in which economic security is enhanced.

But it is often at the point that a relationship ends that the goal of promoting economic security becomes most obvious. The concepts of alimony and other private wealth transfers between former partners such as the division of pension, insurance and other employment benefits are significant reflections of this concern. Allowing a dependent to claim from a person's estate when adequate provision has not been made by will is another policy through which the law encourages mutuality during a relationship by providing for the economic security of partners when the relationship ends.

* * *

One might summarize this discussion by noting that Parliament already acknowledges a number of interests it should be addressing in close personal relationships between adults. There is a big difference, however, between the sociological reality of close adult personal relationships in Canada today and the relationships that actually fall within the legal definitions that Parliament uses to express policies and deliver programmes aimed at recognizing and supporting them.

This divergence raises the question whether Parliament should be troubled by the lack of connection between its legislation and social fact. Today, most Canadians would answer "yes" to this question. For them, official law is society's most important institution for creating social order. They believe that there has to be a general congruence between the law and social practice. Otherwise, social living will be unstable, uncertain, unpredictable and open to exploitation by those who have the resources to use the law against other people.

Of course, it is one thing to say that law and social practice should be largely congruent. It is another to achieve it. So a second question for Parliament is whether its basic approach should be to adjust the law to fit the facts, or to reinforce the law in an attempt to more closely control social practices. In general, Canadians appear to believe that the values set out in the constitution (freedom of speech, freedom of religion, procedural



fairness, equality before the law) should always trump social practices. The role of courts is to ensure that social practices conform to central constitutional values.

At the same time that Canadians want Parliament to uphold constitutional principles, they also want it to take notice of a changing society and to be responsive to changing values. Indeed, most of the time when Parliament is called upon to amend or reform the law, it is because people feel that legal rules are out of date and need to be modernized. In general, the public attitude in these cases is that the role of the law should be to facilitate the achievement of people's purposes, not to frustrate or repress them.



IV Legal and Policy Challenges

Whenever Parliament decides to advance some social policy or establish a programme it has to make a number of choices about how to frame legislation to accomplish its purposes. After all, statutes do not simply make themselves.

At the outset, Parliament has to ask what it actually wants to accomplish. Consider the following example. Parliament might be thinking about establishing a programme to support older adults who have retired from paid employment. Much debate would normally take place about whether the government should even be involved in providing benefits to the elderly, or whether this should be done by the private sector. Similarly, much debate might occur about whether a universal regime should be enacted, or whether benefits should only supplement the income of those who might be in economic need. The initial policy question always comes down to one of determining what the true goal of the programme is to be.

After this, Parliament has to decide what legal techniques to use to put this policy into place. It could, for example, send a monthly cheque to eligible recipients. Or it might just give older adults an income tax deduction, or provide them with coupons to receive discounts on goods and services. The procedural question for Parliament is whether there are better or worse policy instruments — grants and subsidies, tax deductions or tax credits, contracts — and better or worse ways of using these policy instruments to accomplish its goals.

Finally, once Parliament has fixed upon a policy, and selected its preferred legal instrument, it must still draft a statute to connect policy and legal instrument. Sometimes, it discovers that it has formulated its policy using ideas and concepts that aren't adequate to the task. Suppose it wanted to use a monthly payment as the policy instrument. It might have initially thought that all it had to do was pick an age, say 65, at which people would be legislatively deemed to be "retired", and therefore eligible. But some people now retire at 60; others continue to work well into their 70s. Faced with these social facts Parliament might decide to redefine its policy objective. Alternatively, it might simply accept that, in practice, the programme will be both under- and over-inclusive. Or finally, it could rethink the legal concept that it initially had in mind to define eligibility, so as to get a better fit between its desired policy and the actual impact of the instrument it selects.



All attempts to legislate require Parliament to ask what its policy should be, what legal instrument it should use, and how it should frame its definitions. This chapter highlights some of the special challenges it confronts when designing statutes to meet the needs of a diverse and changing society. A first step, however, is to take note of the main reasons why these challenges arise.

To begin, facts and our perceptions of facts change. Whatever may have been or have appeared to have been the case fifty or one hundred years ago, it is now clear that there are many Canadian households in which two or more unmarried adults live in a close personal relationship of mutual support. There are certainly numerous common law unions; and other household relationships such as those between siblings, friends, adult children and their parents, same-sex partners, and so on, are at least more visible than previously.

In addition, the overall framework of the law changes. So some assumptions underlying longstanding legal rules and programmes no longer seem justified given the changing attitudes and values of Canadians. Beginning in the 1960s, governments began enacting human rights legislation meant to prevent or correct what Canadians perceived as unfair private discrimination. With the coming into force of section 15 of the *Canadian Charter of Rights and Freedoms*, the idea that no government programme should discriminate unfairly became a constitutional principle.

Finally, the goals of public policy and legislation change. Over the past few decades, governments have taken on many more responsibilities than previously. Through the tax system, through social welfare programmes, and through their increasingly active role in the economy, governments are much more involved in supporting all kinds of close adult personal relationships. It is increasingly difficult to use the concepts of programmes aimed at family relationships as a way of describing the relationships to be targeted by these newer programmes.

These factors present governments with three main challenges. Most importantly, in many situations Parliament has to overcome a lack of coherence between the policy objective being pursued and the legal concept used to frame that policy. Then, it has to reconsider its use of distinctions that look neutral on their face, but that create inequality and result in injustice. Lastly, it has to find the right balance between the goals of coherence and equality and considerations of efficiency and privacy.



A. Coherence

Whether any legislative regime is or is not coherent in the sense the term is used here depends on judgements about the policy that Parliament is trying to pursue. Suppose, for example, that Parliament clearly stated that its policy objective was to support marriage. In such a context, legislation that specifically targets only married couples would be coherent.

But as the statutory provisions set out in the previous section indicate, apart from laws like the *Marriage (Prohibited Degrees) Act* that regulate entry into marriage, and statutes like the *Divorce Act* that control the conditions for exiting from a marriage, Parliament rarely frames its policy objective as being simply to support marriage. Rather, its goal is usually to achieve some other substantive outcome that is usually closely connected to, but not exactly congruent with, the marriage relationship. Parliament is just using marriage as a proxy for indicating the kinds of close personal relationships between adults to which it intends a particular policy to apply.

This generalized use of concepts like marriage and spouse as a proxy directly raises problems of congruence: in some cases, the concepts are too narrow; in some, they are too broad; and in some, they are both too narrow and too broad at the same time. Even when statutes are written so as to deal more generally with “conjugal” relationships — that is, when they are drafted to include both marriage and common law relationships — they can still fail to line up with what appears to be the underlying rationale for the policy or programme Parliament is pursuing.

Here is an example. When governments wish to encourage and support the formation of stable parenting relationships to promote the nurturing of children, they typically use the concepts of marriage or common-law relationship as a way of identifying the unit to receive the benefit or service being offered. However, many married and common-law couples have no children. In other situations children have grown and left home. Some people marry or establish a common law relationship after the woman has passed child-bearing age. On the other hand, there are many other close adult personal relationships in which children are cared for and nurtured. Grandparents often have responsibility for their grandchildren; as do step-parents; as do same-sex couples, where one partner has given birth, or fathered a child.

Here is another. Governments often acknowledge the economic interdependence between adults who live or have lived together, especially where the personal financial resources they have acquired during the cohabitation are unequal. Once again it is not clear that using the general

Policies have to evolve as circumstances change. At present, there seems to be a general agreement that policies and reality are out of sync, but there is no agreement as to how to get them into sync again. Public opinion is divided as to what are appropriate responses. Some argue that we should support families wherever there are familial relations, regardless of the biological, marital, or type of sexual relationship involved. Others argue that this is precisely where the problems started and that we must protect the nuclear family against the demands of alternative types of families to be treated on an equal footing.

M. Eichler, *Family Shifts — Families, Policies, and Gender Equality* (Toronto: Oxford University Press, 1997) at 3.



categories of marriage and conjugal relationship are helpful ways to identify who should be subject to a regulatory regime that provides for an orderly determination of the rights and obligations of people who once lived together but decide to separate. Some married and conjugal couples are economically independent — having relatively equal resources and keeping their affairs separate. By contrast, there is often significant economic interdependence in non-conjugal close adult relationships: an elderly parent who lives with a son or daughter and often “lends” pension money to pay the rent or buy food; a sister who lives with her disabled brother; or a grandmother who moves in with her recently divorced daughter to help care for her children.

Take a third example. Governments have an interest in preventing exploitation and abuse in personal relationships. Exploitation of a vulnerable family member does not occur exclusively within marriages or even within heterosexual common-law relationships. Cases of exploitation can also be found in close personal relationships involving parents and their adult children, brothers and sisters, friends who live together, and same-sex partners.

In each of the above cases, the use of categories like marriage, spouse and common-law couple to identify the beneficiaries of different Parliamentary policies and programmes is both too narrow and too broad. But these are only three examples. One of Parliament’s most pressing challenges today is to identify and more precisely specify its policy objectives. For only after these objectives have been clarified is it possible to ask whether they are being met by legislative language that takes as the central case the married heterosexual couple. To achieve coherence between a policy objective and the legal concept used to achieve that objective, each and every section of each and every statute that now use concepts like marriage or spouse needs to be carefully examined and assessed.

DISCUSSION POINT:

The policy objectives that are currently being pursued in statutes meant to recognize and support close personal relationships between adults include the following:

- **to protect intimacy and confidence between couples**
- **to encourage the provision of care for dependent individuals**



- to prevent the exploitation of an economically weak spouse
- to recognize economic interdependence
- to encourage the redistribution of wealth within the family
- to recognize and encourage cohabitation
- to promote the stability of unions
- to create a climate of certainty in terms of the rights and obligations that result from personal relationships
- to protect children.

Are there other objectives that governments should pursue in developing policies and programmes meant to recognize and support close personal relationships between adults?

B. Equality

A lack of coherence in legislation is a common complaint today. But there is another reason why a fresh look at the concepts by which Parliament frames its policies and programmes is warranted. An over-inclusive or under-inclusive legislative regime can also create or reflect real inequality. In many such cases, statutory programmes and policies unintentionally perpetuate discriminatory attitudes toward adults who live together in certain close personal relationships.

Whether any particular legislative regime creates inequality depends on judgements about the rationale for the distinctions that are being drawn. Not all distinctions involve unjust discrimination. But some do, especially where they originate in long-standing socio-cultural precepts. As patterns of social living change, for the first time the real assumptions on which many legal concepts rest come to light.

A good illustration of the parallel evolution of social values and legal concepts can be seen in connection with the concept of marriage. Even though the formal distinction between married and common law couples remains today, many of the consequences of that distinction have been eliminated. Until the past few decades, couples who to all intents and purposes looked and acted as if they were married but who were not, had very different legal rights and responsibilities towards each other than those

Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society.

Justice Iacobucci in: *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at para. 53, online: QL (SCJ).

couples who were married. Now, common law partners can have significant rights against and obligations towards each other. In addition, many social welfare, pension and other benefits may be claimed equally by both common law and married couples.

These legislative changes have gone a long way to overcoming unfair distinctions drawn between different types of close adult personal relationships. What is more, many of the distinctions that the law still draws — between married couples and heterosexual common law couples, and between heterosexual common law couples and same-sex couples — are being challenged in courts. There, they have sometimes been found to involve discrimination that contravenes the right to equality guaranteed by section 15 of the *Canadian Charter of Rights and Freedoms*. Implicitly, the courts have directed Parliament to look carefully at all statutory provisions in which words like spouse, marriage, couple, and so on, are used to define rights, obligations and entitlements. Parliament is constitutionally compelled to confront and respond to inequality in its treatment of close adult personal relationships.

Nonetheless, rewriting statutes so that they are not discriminatory is not as easy as might first appear. There are two reasons for this. Sometimes no amount of amendment to an existing legislative concept can overcome its discriminatory effect. And sometimes, a concept that formally is not discriminatory can produce inequality in practice.

It has been suggested that problems of inequality in establishing the rights and obligations of persons involved in close adult personal relationships can be overcome simply by enlarging the categories of people who can get married. The idea is that doing so would catch most adults involved in such relationships. But this is not necessarily the case.

To begin, many relationships are still formed outside the traditional institution of marriage, even by those who are entitled to marry. The reasons so many couples choose not to marry are complex. Some couples reject any role for the state in organizing their relationships; they simply do not want the government to impose any obligations on them as a consequence of their cohabitation. Again, some couples are opposed to the institution of marriage because they see it as a sexist institution and wish to signal their rejection of it. Others do not marry because they are not psychologically ready to commit themselves in the long term. Finally, many people do not get married because they cannot do so. One or both of the intending partners may still be married to someone else. Or they may be a same-sex couple. Or their relationship, although emotionally intimate, may not be a conjugal relationship.



Even were the concept of marriage to be redefined so that, for example, same-sex couples were permitted to marry, this would only partially address the problem of people living in close adult personal relationships who are currently unable to get married. In addition, it would not address the needs of adults living together in a non-conjugal close personal relationship. Nor, finally, would it address the situation of those couples where at least one partner is unwilling to get married. For these reasons, achieving equality in the treatment of adults living together in close personal relationships is not just a matter of redefining who is entitled to marry. To really overcome discriminatory assumptions and to ensure equality in its policies and programmes, Parliament has to focus on the practical consequences of its statutes.

Here is one example. In the past, close personal relationships between men and women have been marked by an unequal distribution of power. For example, some of the social pressures surrounding marriage have at times kept some women in relationships that were physically, sexually and psychologically abusive. The generally unequal access of women to the workforce, their primary responsibility for raising children, and traditional definitions of sex roles have often meant that they were economically dependent upon the men with whom they shared a close personal relationship. A woman living in a common law relationship who wanted to marry her partner sometimes had little choice but to stay in the relationship, particularly where children were involved, even when the man said he would never marry her. In modernizing policies and programmes, this heritage of inequality cannot be ignored.

Discrimination and inequality arise not just in the way the law treats different kinds of close adult personal relationships. They can exist within relationships themselves. And they can result from the unequal effects of policies and programmes that are, on their face, fair and non-discriminatory. Finding ways to achieve equality in all its dimensions is a particular challenge in redesigning policies and programmes to recognize and support close personal relationships between adults.

C. Efficiency and Privacy

Statutes that do not fully cover the situations for which they are intended lack coherence. In many cases, flaws in their conception will mean that they also perpetuate or promote inequality. These statutes typically have a third defect as well. They are inefficient. For example, a social assistance



Aiming state support at conjugal couples whether married or unmarried, opposite-sex or same-sex, may be an indirect way of supporting families who have developed economic interdependency or raised children together. Whether the state can or should direct its support more precisely is a social policy question to be considered. It may be that marriage, registration, and cohabitation are the only “markers” that the state can reasonably be expected to identify, and that it would simply be too difficult to direct benefits on the basis of whether a family fulfills functions that the state has a legitimate interest in supporting.

M. Bailey, *Marriage and Marriage-like Relationships* (Ottawa: Law Commission of Canada, 1999) at 132, online: Law Commission of Canada Home Page <<http://www.lcc.gc.ca/en/papers/rapport/bailey.html>>.

programme will fail to reduce poverty if the concept used to define eligibility is so narrow that it excludes an important segment of its intended beneficiaries. Here, the efficiency of a programme can be measured by its effectiveness in practice.

But policy efficiency is only one kind of efficiency. Cost efficiency is another. Governments usually do not want to spend a lot of money on administration. In theory, a statute could set out detailed conditions of eligibility that would ensure a perfect coherence between policy and outcome. These would likely involve the need to obtain precise factual information about the character of a close adult personal relationship. In theory, governments could also hire a large number of public servants to identify and locate all possible beneficiaries, and a large number of judges to hear all the disputes about eligibility that a detailed factual criterion of eligibility would generate. But if the administrative costs of a specifically targeted policy or programme are disproportional to the policy effectiveness that is achieved, Parliament is unlikely to adopt a policy or programme established in such terms.

Respect for privacy is another consideration for Parliament. Once a policy or programme is made to depend on substantive facts about a close adult personal relationship, it is necessary to inquire into the details of that relationship. In other words, it may be possible to purchase absolute coherence between policy and outcome only at the cost of great intrusiveness into people’s lives. Given the importance of privacy in the Canadian legal system, one can understand Parliament’s reluctance to enact statutes that oblige people to prove publicly that their relationship is conjugal, or that it involves sexual intimacy.

In part both to minimize costs of administration and to avoid intruding excessively into people’s private lives, Parliament has often settled for definitions establishing eligibility that are only approximate, but that are relatively cheap and easy to apply. Hence, the traditional reliance on the concepts of marriage and spouse. In principle, a person is either married or is not. There is a registration system by which this can be quickly verified. No inspectors need be hired to ascertain the specific facts about a close adult personal relationship.

There are other efficiencies that result from using a traditional concept like marriage to identify beneficiaries of a policy or programme. It is a concept that involves an element of reliability: it is a status relationship that can only be ended by death or a divorce granted by a court. It is a concept that can be verified independently of any claims made by those in the



relationship: whether a couple is married in no way depends on them agreeing that they are wife and husband. It is a concept that, in theory, rests on a voluntary commitment by both parties: therefore, if they choose to marry or to remain married, they can be presumed to desire the policy consequences that Parliament attaches to the status. Finally, it is a concept generally recognized in foreign legal systems: an internationally acknowledged legal concept makes it easier to determine the rights of children born outside Canada, the ownership of property in another country, and the right to immigrate to Canada or to visit a foreign land.

These are among the advantages of using criteria like marriage and spouse as a way of targeting policies and programmes. But even today the law does not always take a marriage certificate at face value, and a factual inquiry will be necessary. For example, courts will not recognize what are called “sham” marriages — especially where a person gets married simply in order to be able to immigrate to Canada. Similarly, the entitlement of surviving spouses to draw on the pension of their deceased partner is sometimes set aside when the difference in their ages is too great.

Some statutes have now been written so as to extend eligibility to include couples who, even if not actually married to each other, have been cohabiting for a certain period of time. This, obviously, requires factual determinations that are harder to establish and that can be contested. A couple may disagree about the date when their cohabitation commenced, with one partner trying to minimize its length in order to avoid having to pay support to the other. There is also a possibility that a couple may collude in claiming that they have lived together for longer than they actually have in order to assert an entitlement to some governmental benefit.

In part for these reasons, other factual criteria are occasionally used as well. Sometimes it is simply necessary to prove that a child has been born to a couple; on occasion, the law just requires a couple to publicly identify themselves as “husband and wife”. Yet even these criteria also involve fact-finding processes that may be inefficient or intrusive. For example, they make a rather probing inquiry into the paternity of a child necessary where the question has nothing to do with the child, but concerns the applicability of a policy or programme directed to close adult personal relationships.

Concerns about efficiency and privacy impose constraints on the use of fact-based criteria for targeting legislative policies and programmes. Finding the right balance among policy efficiency, administrative efficiency and respect for the privacy of adults in close personal relationships remains an important challenge for Parliament in considering how best to formulate policy.



DISCUSSION POINTS:

One approach to identifying relationships that are intended to support close personal relationships between adults is to use a formal criterion such as marriage. Another approach is to announce a criterion that depends on the particular facts of a relationship — its nature and duration, for example. A third approach is to let adults in such relationships themselves identify whether they wish their relationship to benefit from policies and programmes. A purely formal criterion may not actually reach all intended beneficiaries. A factual criterion may involve costly investigations that probe into the personal lives of adults in a close personal relationship. A criterion that lets adults self-identify may lead to abuses of the programme in question.

How should governments strike the balance between ease of administering criteria and the need to ensure that policies are effective in reaching their intended targets?

Need the balance always be struck in the same place or might it be different depending on the nature of the policy, programme or obligation in issue?



V Reconsidering Close Adult Personal Relationships

The use of family-related concepts to identify the beneficiaries of policies and programmes intended to support close personal relationships between adults rests on various assumptions about how adults live their lives together, judgements about which of these relationships should be recognized, and understandings about the most efficient ways to write legislation aimed at these relationships. Many of these assumptions, judgements and understandings are no longer in much accord with social practices. This is why the law relating to close adult personal relationships is ripe for reconsideration. Parliament must, however, be both modest and pragmatic in redrafting legislation. These relationships are in constant evolution. They have changed a lot over the past thirty years, are still changing, and will undoubtedly continue to do so in the decades to come.

How then ought Parliament to respond?

One may start with the idea that Parliament should examine all current statutes with a view to discerning the specific goals it is trying to achieve. Today, not all laws that use concepts like marriage and spouse actually have anything to do with close personal relationships between adults. A first task, therefore, is to identify these situations and to rewrite statutes so that policy goals are not expressed using terms unrelated to these goals. After that, Parliament can focus its attention on statutes that do directly address close adult personal relationships.

In working through how to reform these statutes Parliament has to keep in mind the distinction between the substance and the form of law — between the legal consequences that have until now been made dependent on establishing a particular status relationship, and the relationship itself. Parliament's substantive tasks are to decide what effects and impacts it desires, and to ensure that these desired outcomes are in fact achieved. Only then will it be in a good position to decide which close personal relationships between adults should be given a formal status.

A. Lining up Policy and Practice

As noted earlier, many Canadian laws now use the concepts of marriage and spouse as a way of targeting policies and programmes to support close personal relationships between adults. Whatever may have been the case in



We argue that all non-marital, economically interdependent relationships are equally deserving of legal structures to address their particular needs. A couple like the fictional brother and sister, Matthew and Marilla Cuthbert, in *Anne of Green Gables* would be excluded from benefits under Bill C-23, even though they're a man and a woman who live together, have adopted a child, and are therefore the beloved parents of Anne. They would be excluded from benefits under Bill C-23, even though to outsiders they may look like a happy family who many people in the community might even think were married. There are many domestic relationships that are deserving of protection, and I've mentioned some. Others may include an elderly parent and an adult child who cares for that parent.

Dr. Janet Epp Buckingham, General Legal Counsel, Evangelical Fellowship of Canada in: House of Commons, Standing Committee on Justice and Human Rights, *Evidence* (2 March 2000) at 2, online: Justice Committee Home Page <<http://www.parl.gc.ca/InfoComDoc/36/JUST/Meetings/Evidence/justev29-e.htm>> (date accessed: May 3, 2000).

the past — and it is far from clear that these traditional socio-cultural concepts were ever a good point of reference — it is obvious that they are not longer adequate to achieve Parliament's purposes.

These inadequacies have generated, over the past fifty years, a predictable Parliamentary response. Rather than directly announcing its policy and redefining the scope of statutes to address the goal being pursued, Parliament usually just broadened the ambit of legislation by extending existing concepts by analogy. For example, during World War II it enacted statutes providing that most common law partners of soldiers killed on active duty would be able to claim a widow's pension under the same conditions as legally married widows. Over the next half-century this type of extension by analogy became a frequent practice.

In some cases analogical extensions can be an effective way of amending legislation. But often they are not. Sometimes the analogy does not work easily and the new concept becomes a pure fiction. Sometimes the extended concept clashes with the way the concept is used in other legal contexts. Sometimes the extended concept does not actually line up any better with the legislative purpose being pursued. Sometimes the concept is also used by other groups or organizations (such as religious organizations) who have strong feelings about the proper definition and scope of the concept. Nonetheless, because the various extensions of the concept of spouse to date have always been an *ad hoc* response to particular situations where Canadians have broadly supported the extension, they have never provoked a rethinking of the policy bases of the legislative provision to which they applied.

Today, however, such a rethinking can no longer be avoided. To properly evaluate the substantive questions now confronting it, Parliament ideally should follow a three-step process. First, the objectives that underlie its several policies and programmes have to be clarified. Second, it is necessary to see whether legal concepts that actually speak to the types of relationships envisioned by these policies can be developed. Third, the factual context within which any new concepts and definitions are to operate must be carefully assessed.

Clarifying objectives of policies and programmes

When Parliament seeks to clarify the objectives of its policies and programmes it will be concerned not only with identifying what are, today, the objectives that it is attempting to accomplish, but also with assessing whether it is, in fact, pursuing the right objectives. Given the evolution of



close adult personal relationships in Canadian society, Parliament might well conclude that its current objectives are miscast or not sufficiently comprehensive. In its *Report on Recognition of Spousal and Family Status*, the British Columbia Law Institute lists eight principles that it believes should guide legislation in this field:

- protection of relationships based on personal choice
- non-discrimination in access to social status
- voluntariness
- protection of the vulnerable
- protection of expectations
- equity in distribution of benefits
- equality among family relationships
- protection of privacy

Other law reform and public policy agencies have developed similar lists. In each case, however, the announced principles tend to identify objectives connected to the idea of family and spousal status. They do not, and are not meant to, directly apply to any close adult personal relationships that do not involve conjugal cohabitation. To fully address these other relationships additional principles might have to be considered. These could include, for example: protecting and enhancing autonomy; preventing physical and emotional abuse and exploitation; protecting the integrity of relationships from external pressures and threats; and minimizing destabilizing conflicts of interest between adults in a close relationship.

It is not enough, however, simply to list the principles that should inform legislative action. After all, these principles are likely to conflict in certain cases. Parliament will also have to decide which are most important given the objectives it wants to achieve with any particular policy or programme. For example, it could be that the protection of the vulnerable may mean that the principle of voluntariness must be set aside at least to some extent in setting up rules to govern the economic consequences that flow from the break-up of a relationship. It follows that much work still needs to be done in identifying, clarifying, ranking and perhaps enlarging the range of objectives that Parliament might wish to pursue in its legislation dealing with close personal relationships between adults.



DISCUSSION POINTS:

Many reports considering close personal relationships between adults have listed the following eight principles to guide Parliament's reflections:

- protection of relationships based on personal choice
- non-discrimination in access to social status
- voluntariness
- protection of the vulnerable
- protection of expectations
- equity in distribution of benefits
- equality among family relationships
- protection of privacy.

Are these principles sufficient?

How should governments attempt to resolve conflicts among these principles?

Developing legal concepts that address the types of relationships envisioned

Once Parliament is relatively confident that it has identified appropriate policies to govern close adult personal relationships, it must then find the language and concepts to put these policies into operation. This quest poses special challenges in cases where a key goal is to modify a definition that it considers both under- and over-inclusive.

As noted, one technique for doing so is to extend existing concepts by legislative analogy. In seeking to implement policies dealing with close adult personal relationships Parliament could, adopting this technique, redefine the terms marriage and spouse so that all close personal relationships between adults — whether they involve same-sex couples, siblings, adult children and parents, friends supporting each other, and so on — would fall within the new definition. Such a technique has the advantage of relieving Parliament of the obligation to rewrite every statutory section in which the words marriage or spouse appeared.

A second technique is to abandon existing concepts as the reference point for the policy to be pursued. Normally, when it chooses this route, Parliament focuses on the substance of the desired policy objective. In



seeking to implement public policies dealing with close adult personal relationships Parliament could, adopting this technique, rewrite legislation so that the criteria of inclusion and exclusion relate to purposes of, and observable facts about, the relationship — its length and character, for example. Of course, this technique requires Parliament to create a new concept, say the concept of a “relationship of interdependence”, and to specify the substantive features of any close personal relationship between adults that would make it fall within the new concept.

In the light of past experience with extending the concepts of marriage and spouse by analogy, Parliament may well be better advised to design a new concept that directly links the purposes it is pursuing to the observable facts of the close adult personal relationships that it seeks to target. Doing so would enable it to overcome the built-in obsolescence of all formal definitions — namely, that the forms of close personal relationships between adults change so quickly and vary so greatly. It would also require Parliament to be more attentive to the specific objectives it wishes to pursue, and to re-examine the appropriateness of those objectives. Finally, defining a new concept by reference to the substance of a policy being pursued gives Parliament the means to clearly distinguish between a status relationship and the practical consequences that it wishes to achieve — both for adults who can claim such a status and for those who cannot.

DISCUSSION POINTS:

Concepts like marriage and common-law spouse have traditionally been used to identify those who are targeted by specific policies. They do not directly indicate the reasons underlying any policy, but serve as a proxy for identifying the kinds of relationships meant to be targeted. If policies and programmes are extended beyond marriage and common-law relationships the criteria used to identify beneficiaries of these policies would have to be explicitly stated by reference to the policies being pursued.

Should programmes and policies currently framed as applicable only to marriage or a common law relationship be extended to other close adult personal relationships?

If governments choose concepts other than marriage and spouse as identifiers of those targeted by certain policies and programmes, what kinds of criteria could be used to identify such beneficiaries?



Understanding the context within which concepts and policies operate

Not all personal relationships between adults involve affection and interdependence. Where they do, one can presume that recognition and support are worthy Parliamentary objectives. Unfortunately, however, these relationships can occasionally have disastrous consequences for the individuals involved in them. A legislative policy that aims unreservedly to support close personal relationships between adults may indirectly reinforce undesirable aspects of some relationships. For example, strict rules relating to divorce may have contributed to the stability of marriages, but they also compelled large numbers of couples to continue to live in an unhealthy or even pathological environment.

It is therefore important, in examining legislative objectives and choosing the concepts to be used for achieving these objectives, to recognize the potential for exploitation and abuse that exists in all close personal relationships between adults. This suggests that Parliament ought not to rely entirely on parties to a relationship themselves to choose the type of arrangement they think most appropriate to their circumstances. Parliament has to ask if there should be a minimum set of reciprocal obligations that adults will be deemed to have assumed, regardless of whether either of them actually wish to do so. These obligations might include, for example, a minimum standard of conduct that excludes physical and emotional exploitation, and provides for economic support during and after the breakdown of a close personal relationship.

Parliament also needs to consider whether a distinction should be drawn between support for a close adult personal relationship as long as it is prospering and policies that apply to the relationship when it falls apart. For example, a policy that offers favourable tax treatment or a programme of health and pension benefits may support close adult personal relationships and enable them to develop. But when the relationship comes to an end, these policies and programmes may have created a situation where the economic and other consequences of the break-up are not evenly shared by former partners. The issue is how to ensure that policies meant to protect the physical, emotional and economic security of adults in close personal relationships are not frustrated or do not generate perverse consequences when the relationship collapses.

A third contextual feature relates to the difference between the burdens and benefits that attach to relationships. Today, for example, the law is sometimes more disposed to recognize a close adult personal relationship

Historically in our society, the unmarried partner has been regarded as less worthy than the married partner. The disadvantages inflicted on the unmarried have ranged from social ostracism through denial of status and benefits. In recent years, the disadvantage experienced by persons living in illegitimate relationships has greatly diminished. Those living together out of wedlock no longer are made to carry the scarlet letter. Nevertheless, the historical disadvantage associated with this group cannot be denied.

Justice McLachlin in: *Miron v. Trudel*, [1995] 2 S.C.R. 418 at para. 152, online: QL (SCJ).



when it comes to imposing burdens, such as the obligation to support a partner or former partner, than when it comes to offering benefits under various government programs. Might it be that Parliament should take the opposite tack? Here is an example. There might well be a good justification for granting family unit tax benefits to a brother and sister who live together in a close personal relationship, simply because this type of relationship often relieves the government of the obligation to provide health and social services. But when the relationship comes to an end, it might not be appropriate to impose a continuing support obligation on one of the siblings in the absence of clear evidence of the economic dependency of the other.

DISCUSSION POINTS:

Many relationships involve economic and emotional interdependence. Sometimes this type of relationship permits couples to claim benefits from governments. Sometimes it means that they assume obligations towards each other. Sometimes it involves the right to claim employment benefits under private health, dental, insurance and pension plans. Today the criteria for establishing entitlement to these various benefits and the criteria for imposing the obligation to provide support are not always identical.

Should governments establish different criteria for imposing obligations on parties to relationships than for granting access to benefits?

If so, should it be easier or harder to establish an entitlement than to be made subject to an obligation?

B. Status and Recognition

Clarifying legislative policies, avoiding concepts like marriage and spouse wherever the policy or programme in question does not relate to marriage, and developing new concepts that directly link the policy being pursued to the observable facts of the relationships that Parliament seeks to target can go a long way to ensuring the coherence, justice and efficiency of the law.

Such a pragmatic approach does not, however, address issues of symbolic status. This is why there is so much public debate today about the recognition that the law now gives to one particular close adult personal



Many couples entering marriage fail to realize that marriage is not simply a contract between two people living together, but is a status conferred on individuals by the state. Contrary to other contracts, marriage is not merely a private arrangement between two persons, but has a public character, and is subject to laws dictating and controlling the rights, obligations and incidents of marriage, independent of the wishes of those who marry. While marriage is based on a contract between two individuals, the state establishes conditions as to its creation, duration and consequences.

L. Larson, J. Goltz & B. Munro, *Families in Canada — Social Context, Continuities and Changes* (Toronto: Prentice Hall, 2000) at 171.

relationship — marriage. Many people claim that as long as Parliament continues to recognize marriage as a privileged status relationship, all couples who wish to marry should be permitted to do so.

To understand the implications of this claim, it is helpful to recall current limitations on who is entitled to be married. Today, intending spouses: must have legal capacity; must have reached the minimum age to consent to marriage; must in fact consent; must not be too closely related to each other; must not currently be married to someone else; and must be of the opposite sex.

These preconditions are, of course, not carved in stone. They have been modified over the years, as opinions and values change. Today some are being explicitly challenged. What is more, these preconditions are not naturally given. They were initially established in order to advance social policies such as reinforcing a particular religious view of close adult personal relationships. Today, it can be argued that this type of goal is no longer appropriate for a pluralistic, secular society.

Parliament has several options if it should decide to reconsider the symbolic status that it affords to different close adult personal relationships. First, it could redefine marriage to extend the concept to other personal relationships that are excluded at present. Second, it could supplement or replace the concept of marriage with a system of civil registration of relationships. Third, it could establish a range of different registered statuses so that people would be able to choose whatever status was best suited to their particular relationship.

Redefining the concept of marriage

While marriage is a deeply-rooted socio-religious idea, it is also a legal concept. Since at least the 1800s, Parliament has enabled people who could not, or who did not wish to marry in a religious ceremony to do so in a civil ceremony performed by a public official. In other words, there has long been a clear distinction between religious and secular forms of marriage. What is more, the preconditions for each type of marriage are not always the same. For example, the Roman Catholic Church does not permit divorce, and will not perform a religious ceremony if one of the intending spouses has been divorced under the *Divorce Act*. Nonetheless, Canadian law has no trouble recognizing both a civil divorce and any subsequent remarriage, whatever the religion of the parties involved.

Many argue that Parliament should not hesitate to define the term marriage to suit its own policy purposes. Presently, there is one situation where there is a call for a secular definition of marriage that departs significantly from



most religious definitions — the recognition of same-sex marriages. Much of the opposition to expanding the entitlement to marry in this manner comes from religious organizations, that feel Parliament should not have the right to redefine a concept that, they argue, was originally a religious one.

Others answer that while religious organizations may continue to use the word marriage and limit how it is defined, they should be allowed to do so only within their sphere, which is religious life. Parliament should be entitled to define marriage however it likes for ordinary legal purposes. Only in a theocracy, they observe, are secular concepts necessarily identical to religious concepts.

It is therefore possible to imagine Parliament establishing a civil, secular marriage in which same-sex or other relationships are recognized, that would stand side-by-side with religious marriage as defined by different sectarian authorities. Religions could continue to impose their rules regarding eligibility for marriage, and marry only couples who complied with those rules. This approach meets the status concerns of many people who wish to get married but who cannot now do so. It does not, however, address similar concerns expressed by other adults living in a close personal relationship — brothers and sisters, close friends, parents and their adult children — who also seek symbolic, official recognition of their relationship.

DISCUSSION POINTS:

Even though marriage often involves a religious ceremony, the state has always had the authority to define the conditions of eligibility of marriage as it sees fit and to permit civil (or non-religious) marriages. These conditions have usually been very similar to those adopted in most religions. Some countries are considering making it possible for same-sex couples to marry.

Should the criteria that governments adopt for determining who is entitled to marry in a civil, secular ceremony continue to parallel those found in religious traditions?

Should the law be amended to permit same-sex couples to marry in a civil ceremony?



It is impossible to consider reform options without questioning why our whole focus is on *sexual-romantic relationships* rather than on a wider range of relationships, which might include those based on friendship or on other similar ties (e.g. a family composed of two widowed siblings living together.) If such relationships are to be recognized what are the options?

W. Holland, "Intimate Relationships in the New Millennium: The Assimilation of Marriage and Cohabitation?" (2000) 17 *Can.J.Fam.L.* / 17 *Rev.Can.D.Fam.* 114 at 117-118.

Registered domestic partnerships

As an alternative to developing its own definition of marriage to deal with claims for equality of status, Parliament could decide simply to delete the words marriage and spouse from all its statutes and regulations. If it had previously made its various policies and programmes dealing with close personal relationships between adults dependent on a new concept that identified the factual properties of targeted relationships, no substantive consequences would flow from such a deletion. After dispensing with the legal concept of marriage, Parliament would then be in a position to establish a new formal status applicable to a broad range of close adult personal relationships.

It is important to note, however, that it would be difficult for Parliament not to replace the concept of marriage with some other status concept. This is because both provincial law in Canada, and many foreign legal systems now use the concept of marriage as the basis of various policies dealing with close personal relationships between adults. Unless some replacement concept were enacted, considerable problems of harmonization of provincial and federal law, and of recognition of Canadian law abroad would result.

If Parliament were to pursue such an approach, it might do so by establishing a registry in which close adult personal relationships meeting certain preconditions could be declared and publicized. In some legal systems, this alternative means for recognizing relationships is called a "registered domestic partnership". Domestic partnership registration would be voluntary, public, reliable and likely to be recognized in other countries. In a few foreign proposals, registered domestic partnership regimes are to co-exist with civil marriages, and are meant to be open both to those who are not entitled to marry, and to those who are entitled to marry, but may not wish to do so.

The co-existence of civil marriage and domestic partnership regimes may not, however, fully address the symbolic concerns of those who now seek to have same-sex marriages recognized. As long as same-sex couples are not entitled to marry, they argue, the registered domestic partnership regime would just be giving them a second-class status. For this reason, it may be that the registered domestic partnership regime is a viable option for Parliament only if at the same time it both abolishes the



concept of civil marriage, and requires couples married in a religious ceremony to register their status as domestic partners, just as they now must do to have the marriage recognized by the state.

This type of approach would also permit Parliament to describe the conditions under which adults who have a close personal relationship but who are not cohabiting in a conjugal relationship — for example, siblings, friends who mutually support each other, parents and their adult children — would be entitled to register their relationship. In this way, a domestic partnership regime could also facilitate the identification of all close adult personal relationships targeted by Parliamentary policies and programmes.

DISCUSSION POINTS:

Many countries are considering establishing a registry of domestic partnerships in which adults in a close personal relationship could publicly register their relationship. In some proposals, this registration system would be open both to couples who are entitled to marry and to couples — such as same-sex couples — who may not now get married. In some proposals the registry would also be open to other adults in close personal relationships.

Should Parliament establish a regime of registered domestic partnerships?

If so, should the regime exist alongside civil marriage, or should the registered domestic partnership be used to replace the legal concept of marriage?

If a system of registration is established should it be open only to those who are now entitled to marry, to those in conjugal relationships, or should it be available to anyone who is in a close personal relationship?

Diversity of registered statuses

Given the diversity of close personal relationships between adults in Canada today, it may be that were Parliament to establish a registered domestic partnerships regime to replace marriage, it should not hesitate to establish a diversity of registered legal statuses. The idea is that Canadian adults should have a choice in defining the nature of their close personal relationships. In these types of proposal, Parliament would develop one or more intermediate statuses between a full-blown registered domestic



partnership (the former civil marriage) and unregistered cohabitation. These intermediate statuses would imply a graduated series of mutual obligations during the relationship, would establish rules to govern the cancellation of the registration, and provide for a division of property accumulated during the relationship.

Any system that contemplates a diversity of statuses for adults who are involved in a close personal relationship can, however, create certain problems. Many people do not realize the implications of the legal choices they make. They may assume that the law protects them because they have been cohabiting for a period of time, only to be unpleasantly surprised when their partner dies or the relationship breaks down. Deciding whether to adopt a regime that permits a variety of statuses involves several considerations besides just providing choice. After all, choosing to marry, or to register a partnership, or to live together can have significant consequences relating to entitlement to government programmes, the imposition of long-term burdens and financial commitments, a difference in treatment in employment contracts, and so on.

For all these reasons, limiting the number of possible registered statuses (perhaps to just two) is probably the most effective approach for meeting the need for symbolic recognition in a way that does not create confusion, especially for those partners who may be more vulnerable. This does not mean that adults living in a close personal relationship could not, subject to any obligatory rules concerning physical security and the sharing of economic benefits and burdens, tailor their rights and obligations to their individual wishes by contract. But in view of considerations like international acknowledgement, and domestic manageability, it is more doubtful that Parliament should create a system of multiple registered statuses.

DISCUSSION POINTS:

Today Canadian law generally imposes rights and obligations on couples who are married or who are living in a common law relationship of some duration. Many of these obligations are strictly imposed and couples cannot contract out of them. Proposals to establish registered domestic partnership regimes also provide that couples who do not register their relationship will not be able to avoid the rights and obligations that have so far been imposed on common-law couples.



Should the law develop fact-based criteria to establish rights and obligations between all adults who live in a close personal relationship that would apply even if they could not or chose not to get married, or chose not to register their relationship?

Should the law provide that adults who are living in a close personal relationship cannot contract of their state-imposed obligation to mutually support each other?



VI Conclusion

Finding the best way to recognize and support close personal relationships between adults confronts Parliament with complex and difficult questions. These questions involve not only conceptions of the role of the state, but also fundamental beliefs about how adults should organize their relationships with each other.

This Discussion Paper has briefly presented the approach currently taken in Canada, and raised questions about the adequacy of that approach for a diverse, secular society. It outlined the beneficial effects of official recognition and support for close personal relationships, but also noted how the manner in which such recognition is framed can have negative consequences for adults who are most vulnerable, and for people whose relationship does not fall within a recognized category.

The various considerations reviewed in this Discussion Paper suggest just how difficult it is to find appropriate legislative language to express who should be the beneficiaries of the policies that Parliament seeks to implement. They also suggest four of the key challenges that must be faced in reforming the law dealing with close personal relationships between adults.

1. Parliament needs to clarify what policies it is currently pursuing, and what policies it believes it should be pursuing.
2. Parliament needs to evaluate how well the legal concepts it is now using line up in practice with the policies it is trying to pursue.
3. Parliament needs to assess whether it is still appropriate to use traditional status concepts as a proxy for a functional definition of the beneficiaries of its policies and programmes.
4. Parliament needs to decide whether it should modify existing status concepts or should develop new status concepts to acknowledge the diversity of close personal relationships between adults that do not now benefit from a recognized legal status.

Responding to these challenges requires Parliament to address a number of more detailed questions. Some of these questions have been posed as Discussion Points throughout this Paper. They are reproduced in the tear-out

All people should be able to freely choose their intimate partners and their legal relational status without penalty from the state or without financial inducement to abandon their choices.

...

The role of the law ought to be to support any and all relationships that further valuable social goals, and to remain neutral with respect to individuals' choice of a particular family form or status.

B. Cossman & B. Ryder, *Gay, Lesbian and Unmarried Heterosexual Couples and the Family Law Act: Accommodating a Diversity of Family Forms* (Toronto: Ontario Law Reform Commission, 1993) at 3, 5.

sheet that immediately follows this conclusion. The Law Commission invites you to send it any comments you may have about how Parliament should frame policies meant to recognize and support close personal relationships between adults. You can also post your comments on the Commission's Web page — <http://www.lcc.gc.ca>.



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Additional Research Undertaken for the Law Commission of Canada

For information about the Law Commission's continuing research on recognizing and supporting adults' close personal relationships, and for copies of research papers published after the release of this Discussion Paper, visit the Commission's web site: <<http://www.lcc.gc.ca>>.



Summary of Discussion Points

Personal relationships in which adults care deeply about each other are a fundamental feature of social life in Canada today. These relationships can fulfil many of people's most important needs by offering comfort, affection, security, fulfilment, and joy. They can also be an effective vehicle for the delivery of social policies and programmes.

Canadian law generally is organized on the assumption that most adults will marry, or will live in a common law relationship with another person. There are many other types of close relationship — between parents and their adult children, between siblings, between two friends — where adults who may be living together mutually support each other.

DISCUSSION POINT 1:

The policy objectives that are currently being pursued in statutes meant to recognize and support close personal relationships between adults include the following:

- to protect intimacy and confidence between couples
- to encourage the provision of care for dependent individuals
- to prevent the exploitation of an economically weak spouse
- to recognize economic interdependence
- to encourage the redistribution of wealth within the family
- to recognize and encourage cohabitation
- to promote the stability of unions
- to create a climate of certainty in terms of the rights and obligations that result from personal relationships
- to protect children.

Are there other objectives that governments should pursue in developing policies and programmes meant to recognize and support close personal relationships between adults?



DISCUSSION POINT 2:

One approach to identifying relationships that are intended to support close personal relationships between adults is to use a formal criterion such as marriage. Another approach is to announce a criterion that depends on the particular facts of a relationship — its nature and duration, for example. A third approach is to let adults in such relationships themselves identify whether they wish their relationship to benefit from policies and programmes. A purely formal criterion may not actually reach all intended beneficiaries. A factual criterion may involve costly investigations that probe into the personal lives of adults in a close personal relationship. A criterion that lets adults self-identify may lead to abuses of the programme in question.

How should governments strike the balance between ease of administering criteria and the need to ensure that policies are effective in reaching their intended targets?

Need the balance always be struck in the same place or might it be different depending on the nature of the policy, programme or obligation in issue?

DISCUSSION POINT 3:

Many reports considering close personal relationships between adults have listed the following eight principles to guide Parliament's reflections:

- protection of relationships based on personal choice
- non-discrimination in access to social status
- voluntariness
- protection of the vulnerable
- protection of expectations
- equity in distribution of benefits
- equality among family relationships
- protection of privacy.

Are these principles sufficient?

How should governments attempt to resolve conflicts among these principles?



DISCUSSION POINT 4:

Concepts like marriage and common-law spouse have traditionally been used to identify those who are targeted by specific policies. They do not directly indicate the reasons underlying any policy, but serve as a proxy for identifying the kinds of relationships meant to be targeted. If policies and programmes are extended beyond marriage and common-law relationships the criteria used to identify beneficiaries of these policies would have to be explicitly stated by reference to the policies being pursued.

Should programmes and policies currently framed as applicable only to marriage or a common law relationship be extended to other close adult personal relationships?

If governments choose concepts other than marriage and spouse as identifiers of those targeted by certain policies and programmes, what kinds of criteria could be used to identify such beneficiaries?

DISCUSSION POINT 5:

Many relationships involve economic and emotional interdependence. Sometimes this type of relationship permits couples to claim benefits from governments. Sometimes it means that they assume obligations towards each other. Sometimes it involves the right to claim employment benefits under private health, dental, insurance and pension plans. Today the criteria for establishing entitlement to these various benefits and the criteria for imposing the obligation to provide support are not always identical.

Should governments establish different criteria for imposing obligations on parties to relationships than for granting access to benefits?

If so, should it be easier or harder to establish an entitlement than to be made subject to an obligation?

DISCUSSION POINT 6:

Even though marriage often involves a religious ceremony, the state has always had the authority to define the conditions of eligibility of marriage as it sees fit and to permit civil (or non-religious) marriages.



These conditions have usually been very similar to those adopted in most religions. Some countries are considering making it possible for same-sex couples to marry.

Should the criteria that governments adopt for determining who is entitled to marry in a civil, secular ceremony continue to parallel those found in religious traditions?

Should the law be amended to permit same-sex couples to marry in a civil ceremony?

DISCUSSION POINT 7:

Many countries are considering establishing a registry of domestic partnerships in which adults in a close personal relationship could publicly register their relationship. In some proposals, this registration system would be open both to couples who are entitled to marry and to couples — such as same-sex couples — who may not now get married. In some proposals the registry would also be open to other adults in close personal relationships.

Should Parliament establish a regime of registered domestic partnerships?

If so, should the regime exist alongside civil marriage, or should the registered domestic partnership be used to replace the legal concept of marriage?

If a system of registration is established should it be open only to those who are now entitled to marry, to those in conjugal relationships, or should it be available to anyone who is in a close personal relationship?

DISCUSSION POINT 8:

Today Canadian law generally imposes rights and obligations on couples who are married or who are living in a common law relationship of some duration. Many of these obligations are strictly imposed and couples cannot contract out of them. Proposals to establish registered domestic partnership regimes also provide that couples who do not register their relationship will not be able to avoid the rights and obligations that have so far been imposed on common-law couples.



Should the law develop fact-based criteria to establish rights and obligations between all adults who live in a close personal relationship that would apply even if they could not or chose not to get married, or chose not to register their relationship?

Should the law provide that adults who are living in a close personal relationship cannot contract of their state-imposed obligation to mutually support each other?

