Taxing Times for Lesbians and Gay Men: Equality at What Cost?

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Claire F.L. Young* Taxing Times for Lesbians and Gay Men: Equality at What Cost?

The author examines the federal government's refusal to recognize lesbian and gay relationships for the purpose of income taxation. She analyses the use of the tax system as a spending programme and a tool by which to subsidize particular activities. After considering the impact of extending the definition of "spouse" in the Income Tax Act to include same-sex couples, she concludes that among the winners and losers, the losers would be those least able to afford the loss, that is couples in which both partners have low incomes.

Furthermore, in the author's view, the issue of the application of the tax system to lesbians and gay men is not an isolated issue. Thus consideration of the impact of changes to the tax system must be made in a broader context and as part of an overall strategy for equality.

When Marion Boyd, Attorney General for Ontario introduced Bill 167, "The Equality Rights Statute Law Amendment Act", she described it as "the jewel in my crown".1 The Bill proposed to redefine "marital status" and "spouse" in 56 pieces of Ontario legislation by removing any reference to "opposite sex", thereby giving lesbian and gay couples the same rights and obligations as heterosexual couples.2 Twenty days later the Bill was defeated by 68 votes to 59 in a free vote in the Ontario Legislature. For many lesbians and gay men the introduction of the Bill had been the culmination of years of effort in the struggle for equality and its defeat was particularly hard to take.

In this article I shall briefly review some of those struggles and the current state of the law. This forms the backdrop to an issue that I view as being of fundamental importance to lesbians and gay men in their fight

* Claire Young © 1994. Claire Young is a professor in the Faculty of Law at the University of British Columbia. An earlier version of this paper was presented at the Conference on Lesbian/Gay/Queer Studies at the Learned Societies, University of Calgary, June 9 1994. Many thanks to Susan Boyd, Gwen Brodsky, and Lisa Philipps for comments on an earlier draft and to Michaela Donnelly for research assistance. The financial assistance of the Social Sciences and Humanities Research Council provided by way of a strategic grant under the Women and Change Program is also gratefully acknowledged.
2. Section 2(2) of The Equality Rights Statute Law Amendment Act, 3rd Session of the 35th Parliament, defined "marital status" as "the status of being married, single, widowed, divorced or separated and includes the status of living with a person of either sex in a conjugal relationship outside marriage" and "spouse" as "the person to whom a person is married or a person of either sex with whom the person is living in a conjugal relationship outside marriage".
for equality and which has not received much attention;³ that is the tax system. I shall focus on two aspects. First, I shall analyse the use of the tax system as a spending programme and a tool by which to subsidise particular activities. In this context I shall examine the federal government’s refusal to recognise lesbian and gay relationships, thereby denying lesbians and gay men tax subsidies available to heterosexuals. My second focus is to consider the impact of extending the definition of “spouse” in the Income Tax Act⁴ to include same-sex couples. I shall show that the impact of such a change for lesbians and gay men will depend to a great extent on the level of income of both partners and the distribution of income between them. I conclude that it is those couples in which one partner is economically dependent on the other that would benefit most from being included as spouses under the Act. Finally, I discuss some of the issues that the lesbian and gay community has to consider as we struggle for equality generally, and more particularly those that emerge from my analysis of the tax system.

Before discussing the non-recognition of lesbian and gay relationships by the tax system, it is important to review some of the ongoing legal challenges by lesbians and gay men. It is quite easy to consider the issue of equality for lesbians and gay men as entitlement to a list of different “benefits” currently available to heterosexual individuals. While this approach has value because it allows us to identify the inequalities in treatment, it is not sufficient. Any analysis of the advantages and disadvantages of arguing for particular “benefits” must take place in the broader context of the ongoing challenge lesbians and gay men present within a homophobic, lesbophobic and patriarchal society. This requires us to recognise that an approach that seeks formal equality with heterosexuals may not, in fact, lead to substantive equality. For example, giving lesbians and gay men the same rights to employment benefits as heterosexuals does not mean that all lesbians and gay men will be able to claim those benefits. Some will be unable to identify themselves as lesbian or gay to their employer, fearing homophobic responses from the employer or their co-workers. The formal right to equal employment benefits does not necessarily translate into true equality in the workplace.

It is also important to recognise that lesbians and gay men are not a homogenous group. We differ by reason of our gender, race, colour, class,

⁴. R.S.C. 1985, c. 1 (5th Supp.) (hereinafter referred to as ‘the Act’).
and so on. Therefore any discussion of the impact of certain political strategies and legal challenges cannot assume that the consequences will be the same for all. Some may gain, but others will lose. This point is well illustrated when we consider the impact of treating lesbians and gay men in the same manner as heterosexuals for all purposes of the income tax system.

I. The Litigation

Litigation challenging discrimination against lesbians and gay men has employed several legal instruments, including section 15 of the Charter of Rights and Freedoms and statutory human rights legislation. Currently seven provinces and the Yukon territory include sexual orientation as a prohibited ground of discrimination in their Human Rights Acts. The issues being raised in the courts and before human rights tribunals are wide ranging. Some of the more recent cases involve the right to marry, the right to sponsor one’s partner for immigration into Canada, the right to a spouse’s allowance under the Old Age Security Act, the right to


“15(1) Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and in particular, without discrimination based on race, nationality or ethnic origin, colour, religion, sex, age, or mental or physical disability.”

6. As will be discussed later, the Canadian Human Rights Act, R.S.C. 1985 c.H-6 does not prohibit discrimination on the ground of sexual orientation.


8. In Layland v. Ontario (1993), 104 D.L.R. (4th) 214 (Ont. Ct. (Gen. Div.)) two gay men argued that to deny them a marriage licence was to discriminate against them on the basis of their sexual orientation contrary to section 15 of the Charter. The court held that there had been no discrimination. The case is currently being appealed.

9. The case of Morrissey and Coll v. Canada was filed in January 1992 but did not proceed to trial. Bridget Coll was appealing the refusal of the immigration authorities to recognise her and her lesbian partner as family and to admit her to Canada under the family class. The case was dropped when Coll was awarded permanent residence status as an independent applicant.

10. In Egan v. Canada (1993), 103 D.L.R. (4th) 336 (F.C.A.) (under appeal to the Supreme Court of Canada) two gay men argued unsuccessfully that to deny them a spouse’s allowance under the Old Age Security Act, R.S.C. 1985, c. O-9, as am., was in contravention of section 15 of the Charter.
conjugal visits with one's same-sex partner in prison\textsuperscript{11} and the right to spousal coverage under Medicare.\textsuperscript{12}

Many cases have arisen in the employment context.\textsuperscript{13} These can be divided into two categories; those which look to the environment of the workplace and which argue that there has been discrimination within the workplace and those that claim "spousal" or "family" based benefits. An example of the former is Haig v. Canada (Minister of Justice)\textsuperscript{14} where the Ontario Court of Appeal held that to deny two members of the Canadian armed forces promotion and advancement was in contravention of section 15 of the Charter. In so finding the court applied Schacter v. Canada\textsuperscript{15} and read the ground of sexual orientation into the Canadian Human Rights Act.\textsuperscript{16} The issue of "spousal" or "family" benefits has been addressed in several recent cases, both before the courts and human rights tribunals. In Mossop v. Treasury Board of Canada,\textsuperscript{17} the issue was entitlement to bereavement leave. Brian Mossop argued that to deny him bereavement leave to attend the funeral of his male partner's father was to discriminate against him on the basis of "family status" under the Canadian Human Rights Act. Speaking for the majority of the court Lamer C.J. held that there had been no such discrimination and said that "Mr. Mossop's sexual orientation is so closely connected with the grounds which led to the refusal of the benefit that this denial could not be condemned as discrimination on the basis of "family status" without indirectly introducing into the Canadian Human Rights Code the prohibition which Parliament specifically decided not to include in the Act, namely the prohibition of discrimination on the basis of sexual

\textsuperscript{11} In Veysey v. Correctional Service of Canada (1989), 44 C.R.R. 364 (F.C.T.D.); 47 C.R.R. 394 (F.C.A.) the Federal Court of Appeal upheld the ruling of the Trial Division that it was not a contravention of section 15 of the Charter to deny the applicant participation in the private family visiting program with his male partner.

\textsuperscript{12} In Andrews v. Ontario (Minister of Health) (1988), 49 D.L.R. (4th) 584 (Ont. H.C.J.) the claim was for medical benefits for a lesbian partner under the Ontario Health Insurance Plan. The court denied the claim.

\textsuperscript{13} For a discussion of some of these cases, see Debra M. McAllister, "Recent Sexual Orientation Cases" (1993) 2 N.J.C.L. 354 and "Sexual Orientation and Spousal Status: The Unresolved Question" (1993) 3 N.J.C.L. 288; Patricia Lefebour, "Same Sex Spousal Recognition in Ontario" (1993) J. L. & Social Pol'y 272.

\textsuperscript{14} (1992), 94 D.L.R. (4th) 1.


\textsuperscript{16} Supra note 6. In Douglas v. Canada, [1993] 1 F.C. 264 the challenge was to the armed forces policy of releasing persons who engaged in homosexual activity or, if the individual refused to be released, denying promotion and restricting the career training and postings available. The case was settled prior to trial and a declaration was made by the court that rights under section 15 of the Charter had been denied by the armed forces.

\textsuperscript{17} [1993] 1 S.C.R. 554.
orientation".18 In Leshner v. Ontario (No. 2)19 the benefit claimed was extension of insured employee benefits (including health benefits)20 and survivor pension benefits to the male partner of Leshner, an employee of the Ontario government. Leshner complained of discrimination in contravention of the Ontario Human Rights Code with respect to marital status and sexual orientation. The human rights tribunal upheld the claim.

These briefly described examples show that the claim for spousal benefits in the employment context can be brought under one or more of several grounds, including "sexual orientation", "marital status" or "family status". Depending on the fact situation the challenge may be under the Charter21, and/or the Canadian Human Rights Act22 or one of the provincial or territorial Human Rights Acts.23 If the action is initiated under human rights legislation the decision may be appealed to the courts or not.24 Generally speaking human rights tribunals have tended to be more sympathetic than the courts to these claims,25 although the successes of lesbians and gay men making these claims have been sporadic.

II. The Tax Connection

There is a direct link between the tax system and the efforts by lesbians and gay men to secure employment benefits that recognise our relationships. The link is that many of the monetary employment benefits sought are heavily subsidised by the tax system. Consequently, the cost of providing those benefits is borne both by the federal and provincial

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18. Ibid. at 580. Mossop was decided after Haig which read sexual orientation into the Canadian Human Rights Act but the comments by Lamer C.J. were in relation to the law as it existed when the human rights complaint was first adjudicated.
20. The issue of medical benefits for same sex partners has been the focus of several cases including, Vogel v. Manitoba (No. 2) (1992), 90 D.L.R. (4th) 84 (Man. Q.B.) and Nielsen v. Canada (Human Rights Commission), [1992] 2 F.C 561.
21. Supra note 5.
22. Supra note 6.
23. Supra note 7.
24. The government of Ontario did not appeal the Leshner decision. Howard Hampton, at that time Attorney General of Ontario, announced the decision not to appeal and said "It has always been government policy to extend all spousal benefits to the same sex partners of its employees", The [Toronto] Globe and Mail, September 2, 1992 A1. This response can be contrasted to that of the federal government in Mossop which appealed the decision of the human rights tribunal to the Federal Court of Appeal. The case was ultimately decided by the Supreme Court of Canada.
25. Both Mossop and Leshner were successful before human rights tribunals. Another success at the tribunal level was Clinton v. Ontario Blue Cross (1993), 18 C.H.R.R. D/375 (Ont.Bd. of Inquiry) (medical benefits) but this decision was overturned by the Ontario Court, General Division on May 3, 1994 (unreported).
governments through tax breaks\textsuperscript{26} as well as by employers and employees. The concept of the tax system as a tool to subsidise certain activities or individuals is not new. Tax expenditure analysis recognises that our tax system does more than raise revenues. It is also a spending programme. Any departure from the normative tax system by way of measures such as income exclusions, deductions, deferrals or credits are considered to be tax expenditures.\textsuperscript{27} In the context of employment benefits, the tax system is used to subsidise both pension and health benefits.

The provision of medical and dental benefits by an employer to an employee through a private health services plan\textsuperscript{28} is a deductible business expense to the employer.\textsuperscript{29} Unlike other employment benefits, a benefit derived by the employee from the employer’s contribution to the private health services plan is not taxable.\textsuperscript{30} This means that the medical and dental services provided to employees under these plans are effectively subsidised by tax expenditures. Many employment medical and dental

\textsuperscript{26} The following discussion focuses on the role of the federal government with respect to this issue. It should be noted, however, that provincial governments bear part of the costs because in all provinces, except Quebec, provincial income taxes are calculated as a percentage of federal tax payable. Quebec administers its own provincial tax system but also bears part of the cost of providing these subsidies because its rules parallel those of the federal government with respect to employment benefits.


\textsuperscript{28} “Private health services plan” is defined in section 248 of the \textit{Act} as a contract of insurance in respect of hospital expenses, medical expenses or a combination of those expenses or a medical care insurance plan or hospital care insurance plan or a combination of those plans. It does not include a provincial “medicare” plan. See Interpretation Bulletin IT-339 R2 for a full description of the medical services that are considered by Revenue Canada to qualify as services offered under a private health services plan.

\textsuperscript{29} The premium is deductible under sections 9 and 18(1)(a) of the \textit{Act}.

\textsuperscript{30} Section 6(1)(a) of the \textit{Act} provides that any benefit incurred by virtue of one’s employment is taxable but a benefit derived from an employer’s contribution to a health services plan is an exception to this rule. See also Interpretation Bulletin IT-470.
plans permit an employee to designate a spouse or children or both as persons also covered by the plan. While the Act does not specifically address this situation, Revenue Canada’s position is that the same tax rules apply to these plans. Therefore the employer is entitled to a deduction for the cost of the premiums and the value of the benefit to the employee of the coverage for the spouse or children or both is not required to be included in income.

Some employers permit their lesbian and gay employees to designate their partners as persons covered by these plans. Despite the fact that there is nothing in the Act or regulations that specifically addresses the issue of the tax consequences with respect to the designation of a “spouse” as a beneficiary under the plan, Revenue Canada has taken the position that they will administer the rules in a different manner when dealing with the partners of lesbians and gay men. It has indicated that if a private health services plan provides coverage to a same-sex partner, section 6(1)(a)(i) of the Act, which provides that any benefit derived from the plan is not taxable, does not apply and the employee must include the value of the medical or dental service provided to their partner in their income. In fact, Revenue Canada has also indicated that the entire medical or dental plan may be invalid resulting in no deduction to the employer. This position appears to be highly questionable from a technical legal perspective. Unlike the provisions of the Act that apply to registered pension plans, there is no statutory requirement that a private health services plan meet any conditions with respect to the designation of spouses in order to qualify for the preferential tax treatment.

Another important employment benefit is the pension plan to which both the employer and employee make contributions. Registered pension plans are subsidised extensively by the tax system. First, the contributions made by employers and employees are deductible. Secondly the income

31. These include, for example, the University of British Columbia, London Life Insurance Co., Northern Telecom Ltd., Ontario Hydro, the Hudson’s Bay Company, the City of Toronto, the Globe and Mail, Toronto’s Hospital for Sick Children, the Canadian Union of Public Employees and IBM Canada.

32. Conversation with Revenue Canada official, Vancouver District office, July 6, 1994. The official who provided this information did state, however, that Revenue Canada “are at present turning a blind eye” to the issue. In fact, prior to this conversation Revenue Canada had announced that they would permit one plan to cover both same-sex and opposite-sex couples, provided that the plan administrator accounts separately for the contributions, income and disbursements of the taxable and non-taxable parts of the plan. Both the premiums paid by the employer for coverage of the employee’s same-sex partner and the value of any benefit received by the partner must be included in the employee’s income. See, Newsletter, Towers Perrin Consulting Inc., Vol 3 No. 4, May 1994 at 3.

33. Section 147.2(1) and (4) of the Act.
earned by the funds invested in the registered pension plan is not taxable. In order to qualify for registration by the Minister under the Act and the tax benefits flowing therefrom, the pension plan must meet certain conditions. If, for example, the plan provides survivor benefits on the death of the plan member (either pre or post retirement), those benefits can only be provided to a spouse. If the plan provides such benefits to anyone other than a spouse, the Minister may refuse to register the plan or deregister an already registered plan. Because “spouse” is defined as meaning a person of the opposite sex, these rules effectively preclude the provision of survivor benefits to the partners of lesbians and gay men. Therefore, if an employer wishes to establish a pension plan with spousal survivor benefits for all its employees, a separate plan for its lesbian and gay employees must be established. That plan will not receive any subsidy from the tax system. The value of the lost tax subsidy is considerable. For the 1991 taxation year (latest figures available) the tax expenditure with respect to registered pension plans was $4.46 billion for the deduction for contributions and $8.95 billion for the non-taxation of the income in the registered pension plan, making it the largest single tax expenditure in that year. It is important to note in this context that contributing to one’s employment pension plan is not usually optional. It is a condition of employment. Thus if an employer does not establish a separate pension plan, lesbian and gay employees are required to contribute to a plan under which they do not receive the same benefits as their heterosexual co-workers.

The recent Leshner decision has highlighted the issue of the non-recognition of same-sex partners by the Act. Michael Leshner, an Ontario government employee, applied to his employer to have his benefit plan coverage amended from single coverage to family coverage in order to cover his male partner. The request was refused and Leshner filed a complaint with the Ontario Human Rights Commission arguing that this refusal was discrimination on the basis of marital status and sexual orientation under the Ontario Human Rights Code. The board of inquiry

34. Section 149(1)(o.1) of the Act.
35. Section 147.1(2) of the Act.
36. Regulations 8502(c), 8503(2) and 8506 made pursuant to the Act.
37. Section 252(4) of the Act.
38. Northern Telecom is one company that has taken this step and as of July 1, 1994 established a separate pension plan for its lesbian and gay employees.
40. The plan provided for extended medical benefits, dental benefits and pension benefits.
found that there was discrimination. The majority of the board also held that section 25(2) of the Code permits discrimination on the basis of being a single person with respect to employee benefit schemes and therefore that the Code had not been breached. It held, however, that the denial of the benefits was not sustainable under section 15 of the Charter. The board of inquiry ordered that the definition of marital status in the Code be “read down” by omitting the phrase “person of the opposite sex”.

The relevance of Leshner to this discussion of tax implications for lesbians and gay men is that the pension plan in that case provided for survivor benefits for an eligible surviving spouse of the opposite sex on the death of the plan member. The plan therefore qualified for registration under the Act and received all the tax benefits discussed earlier. Any change to the plan to provide these benefits to same-sex couples would have resulted in its deregistration. In its argument at the hearing, the Ontario Human Rights Commission was very careful to make it clear that it was not seeking a remedy that would result in deregistration of the pension plan. In their decision the board of inquiry said that “Since the stumbling block to fair and equal treatment of the complainant lies in the Income Tax Act, we deem a change in that Act to be the only fully equitable means of rectifying existing discrimination against gay and lesbian couples.” The remedy prescribed by the board included an order that, if the necessary changes to the Act were not made within three years of the ruling, the Ontario government “[must] create a funded or unfunded arrangement outside of the registered pension plan to provide for equivalent survivor benefits and eligibility to persons living in homosexual conjugal relationships with employees as provided to persons living in heterosexual conjugal relationships with employees outside marriage”.

The federal government’s position on the issue of the registration of pension plans is clear. At present it does not recognise same-sex couples as spouses for any purposes, including spousal survivor benefits, under the Act. That position is, however, the subject of an ongoing legal

42. In her minority concurring decision Board member Dawson found that assigning the status of single person to Leshner was discrimination on the basis of sexual orientation and therefore that the Government of Ontario had breached the Code in denying the employment benefits to Leshner on the same basis that they were provided to heterosexual employees.
43. The pension plan was provided through the Public Service Pension Plan, under the Public Service Superannuation Act, R.S.O., 1990, c. 419.
44. Supra note 19 at D/208.
45. Ibid. at D/224.
46. Confirmation of this position was introduced at the Leshner hearing. In 1990 the N.D.P. government was elected in Ontario. Effective January 1, 1991, that government extended family coverage for all insured and non-insured benefits to same sex couples. At that time it
challenge. Since 1989 the Canadian Union of Public Employees (CUPE) has permitted its employees to designate same-sex partners for the purposes of all employment benefits, except survivor pension benefits. In 1991 CUPE amended its employee pension plan to extend survivor pension benefits to same-sex partners. The union filed the amendment with Revenue Canada and was subsequently advised that the Minister of National Revenue would not accept the amendment on the basis that it did not comply with the definition of "spouse" in the Act.\textsuperscript{47} CUPE has launched an action\textsuperscript{48} asking for an order directing Revenue Canada to accept for registration pension plans that provide survivor benefits to same-sex partners and to accept amendments that will provide these benefits to existing plans.\textsuperscript{49} CUPE is arguing that the current definition of spouse in the Act, as it applies to pension plans, discriminates on the basis of sexual orientation in contravention of section 15 of the Charter.\textsuperscript{50} This case is noteworthy for several reasons. If CUPE is successful it will be only the second case in which a provision of the Act has been held to offend section 15 of the Charter.\textsuperscript{51} But even more importantly a ruling that the current definition of spouse discriminates on the basis of sexual orientation, albeit in the context of registered pension plans, would have ramifications for that definition as it applies elsewhere in the Act.

\begin{enumerate}
\item asked the federal government if it would accept for registration under the Act a pension plan that defined "spouse" to include same-sex relationships. The federal government refused. In its letter of refusal the federal government indicated that the issue was one of a constitutional or policy nature and not based on cost. See, supra note 19 at D/191.
\item Letter of April 29, 1992 to CUPE from Stella Kotlar, Director of the Registered Pension Plan Division, Revenue Canada.
\item Canadian Union of Public Employees et al v. Minister of National Revenue, scheduled to be heard in fall 1994 by the Ontario Court General Division.
\item Conversation with Heather Gibbs, counsel for CUPE, July 7 1994.
\item Sexual orientation is not a listed ground in section 15 of the Charter nor has it been held to be an analogous ground. In Haig v. Canada (Minister of Justice), supra note 14, the Ontario Court of Appeal held that the absence of sexual orientation from the list of prohibited grounds in the Canadian Human Rights Act was in contravention of section 15 of the Charter. In Mossop v. Treasury Board of Canada, supra note 17, at 579 and 581–582 Lamer C.J. hinted strongly that he felt there could have been a challenge on the basis of sexual orientation under section 15 of the Charter.
\item Thibaudeau v. Canada (Minister of National Revenue), [1994] 2 C.T.C. 4 (F.C.A.). The potential application of section 15 of the Charter to the Act is an ongoing issue which will have fundamental consequences for Canadian tax policy. The Act is used to direct social and economic behaviour. One consequence of this is that it has inherent biases. It favours certain activities over others and treats different groups of taxpayers differently. The issue with respect to the Charter is which of these biases constitute discriminatory treatment in contravention of section 15. For a more detailed analysis of the application of the Charter to the Act, see Faye Woodman, "The Charter and the Taxation of Women" (1990) 22 Ottawa L. Rev. 625 and Claire F.L. Young, "Child Care and the Charter: Privileging the Privileged" (1994) 1 Rev. Con. Studies 20.
\end{enumerate}
III. The Political Picture

Even though the long promised reform of the *Canadian Human Rights Act* to include "sexual orientation" as a prohibited ground of discrimination still has not happened, there are indications that the position of the federal government on the broad issue of equality for lesbians and gay men is shifting. The Minister of Justice, Allan Rock has described gay rights legislation as "a matter of fundamental justice" and indicated that the Liberal government will fulfill an election promise to introduce lesbian and gay rights amendments to the *Canadian Human Rights Act.*

There is also an indication that in the area of "family benefits" the government is considering changes. A recent suggestion by Allan Rock that family benefits could be extended to a wide range of relationships, including same-sex couples, older parents living with adult children and other "non-traditional" relationships opens up the possibility for changes to the law that might benefit lesbian and gay couples. There are other more subtle indications that the government may well be changing its position with respect to equality for lesbians and gay men generally and same-sex benefits in particular.

In *Lorenzen v. Treasury Board (Environment Canada)* an arbitrator ordered the federal government to grant a gay man the same family leave provisions as his heterosexual co-workers. After initially filing a Notice of Appeal with the Federal Court, the federal government announced that it would drop its appeal. While this action is not of itself especially determinative of the overall intention of the government in this area, it does appear to be part of an increasing reluctance to constantly fight these

52. Supra note 6.
53. The history of this particular amendment to the *Canadian Human Rights Act*, supra note 6, is a long and tortuous one. In 1979 the Canadian Human Rights Commission recommended the addition of this ground to the *Canadian Human Rights Act*. The House of Commons Standing Committee on Justice and Legal Affairs also made the same recommendation in 1985. In *Haig v. Canada (Minister of Justice)* (supra note 14) the Ontario Court of Appeal read sexual orientation into section 3 of the *Human Rights Act*, R.S.C. 1985, c. H-19. That decision was not appealed by the federal government. In December 1992 the Conservative government introduced Bill C-108 *(An Act to Amend the Canadian Human Rights Act and Other Acts in Consequence Thereof)* to add sexual orientation as a prohibited ground of discrimination to the *Canadian Human Rights Act*, (supra note 6). That Bill died on the order paper when an election was called and Parliament was prorogued on September 8, 1993.
issues in the courts.\textsuperscript{59} As Bill Pentney, general counsel with the Canadian Human Rights Commission put it: "I think the withdrawal of the appeal in this case is an indication that the government as an employer is moving in line with many other major employers, including provincial governments and major private-sector companies to extend benefits to same-sex couples".\textsuperscript{60}

The position that the private sector takes on this issue is relevant to any discussion of the likelihood of the federal government making changes in this area. If the private sector considers it advantageous to provide employment benefits to its lesbian and gay employees on the same basis as it provides them to its heterosexual employees, there will be considerably more pressure on the federal government to change its tax policy. Several large employers already provide full employment benefits to all employees, regardless of whether they are in heterosexual or homosexual relationships.\textsuperscript{61} Some do not provide pension benefits because without the tax subsidy the cost is too great. Others establish a separate pension plan for their lesbian and gay employees and absorb the extra cost of so doing.\textsuperscript{62} One reason that large employers appear to be willing to provide medical and dental benefits to their lesbian and gay employees is that the cost of extending the coverage to include the partners of these employees is relatively small.\textsuperscript{63}

\section*{IV. The Income Tax Act and the Definition of "Spouse"}

As the foregoing indicates the state of the law regarding the rights and responsibilities of lesbians and gay men is in a state of flux. The legal challenge by CUPE to the discriminatory impact of the \textit{Act} as it applies to employment benefits raises the possibility of the current definition of "spouse" being held to be in contravention of section 15 of the \textit{Charter}. Even if the government wins the CUPE case and the \textit{Act} is found not to discriminate against lesbians and gay men, the constant legal and political challenges to other policies that lesbians and gay men view as discrimi-
natory may prompt the government to reconsider its current position on the general issue of equality for lesbians and gay men. If so, the tax system would presumably be subject to close scrutiny. Indeed there is one particularly compelling reason for the government to consider redefining “spouse” in the Act to include the partners of lesbians and gay men. Such a change would likely result in a significant revenue gain for Revenue Canada. When the definition of spouse was amended in 1993 to include “common law” spouses the Department of Finance estimated that the change would result in increased tax revenues over a 5 year period of $9.85 billion. The bulk of the increased revenue was attributable to the rules that require the combining of spouses incomes for the purposes of the refundable GST tax credit and the refundable child tax benefit. This resulted in the overall reduction in the value of the tax credits owing to taxpayers.

In theory, because the individual is the unit of taxation in Canada it should make no difference whether or not a taxpayer is in a relationship and, if so, whether or not that relationship is recognised by the state. In fact, the Act recognises spousal relationships for many different purposes. In some cases this is an advantage for the spouses because the total tax liability of the couple is less than if the relationship was not recognised. In other cases there is the disadvantage of an increased tax burden. In this section I shall consider the impact of redefining spouse to include lesbians and gay men. Because there are over 400 references to spouse in 152 provisions of the Act I shall not canvass all the implications. Rather, I shall use three fact situations and apply a selection of the spousal provisions to those situations. I shall demonstrate that the results of such a change depend to a large extent on three factors; the amount of income of each of the partners, the nature of that income and the relative distribution of that income as between the partners.

64. Canada, Department of Finance, Budget Papers, Supplementary Information, February 25, 1992, at 138-139.
65. Ibid.
66. Generally the “advantages” and disadvantages of spousal status under the Act are determined by reference to the monetary value of any tax saving (advantage) or increased liability to tax (disadvantage). Although my primary focus in this article is on the monetary advantages and disadvantages there may be some non-monetary advantages from spousal status. Some lesbians and gay men would consider the symbolic significance of the legal recognition of lesbian and gay relationships to be an advantage.
Section 252(4) of the Act provides that a spouse of a taxpayer includes the person of the opposite sex who cohabits with the taxpayer in a conjugal relationship and:

a) has so cohabited with the taxpayer for 12 months, or

b) is the parent of a child of whom the taxpayer is also a parent. Removing the reference to "of the opposite sex" would be a simple way to ensure that the definition would apply to same-sex couples.

In order to discuss the consequences of such a change for lesbian and gay taxpayers in relationships, I shall use three fact situations involving lesbian couples who have lived together in a conjugal relationship for 12 months. In the first, both taxpayers are taxed at the top rate of tax; in the second both are taxed at a low rate; and in the third one taxpayer is taxed at the top rate and the other has no taxable income. My analysis will determine the effect of such a change by reference to the resulting increased or decreased tax liability. Because space does not permit a review of all the applicable statutory provisions I shall limit my analysis to the more commonly applied rules. My conclusion is that if the "advantage" of being included as spouse under the Act is determined by reference to tax dollars saved, then it will be the lesbian or gay couple in a relationship in which one partner is economically dependent on the other who will benefit the most from being included as spouses under the Act. Conversely it will be the low income couple in which each partner earns approximately the same amount of income that will suffer the greatest disadvantage.

68. This definition was added to the Act by S.C. 1993 c.24, applicable after 1992. Prior to its enactment "spouse" only included legally married persons or, in a few limited circumstances, "common law" spouses of the opposite sex.

69. While this would be a simple method by which to include same-sex couples in the definition, it has problems. A "conjugal" relationship has been defined by the courts in terms of the idealised marital or marital like relationship. The word therefore seems inappropriate in the context of describing the relationship of two persons who do not have the right to marry. For an excellent discussion of the problems with the conjugal requirement of cohabitation, see Brenda Cosman and Bruce Ryder, "Gay, Lesbian and Unmarried Heterosexual Couples and the Family Law Act: Accommodating a Diversity of Family Forms" (June, 1993) [unpublished research paper], available from the Ontario Law Reform Commission. Further, the inclusion of the parents of a child as spouses would, as the law now stands, not include lesbians and gay men because they cannot legally adopt a child together.

70. It should be noted that even though a rule may apply to more than one fact situation I shall discuss it only once. I shall also discuss the application of the Act to particular fact situations in a relatively non-detailed manner. My purpose is to ensure that my comments about this issue are not obscured by an overly technical explanation of the tax rules. Reference should be had to the Act for an analysis of fact situations that differ from the simple ones that I am using in this article and for a fuller explanation of the operation of the rules that I discuss.

71. Because there are so many possible variables that could alter the specific result in any particular case, my conclusions on this issue can only be of a general nature.
1. **Two high rate taxpayers**

The individuals in this couple are well off. They each earn significant incomes and pay tax at the top combined federal-provincial tax rate of 52.5%. They own considerable capital property, including their own home (owned by partner A), a summer cottage (owned by partner B) and a portfolio of investments held in both names. Because their incomes are of approximately the same amount and taxed at the top rate and because the capital property is evenly divided between them, there is no advantage to them to income split. Taxing them as spouses under the *Act* will, however, have both negative and positive consequences. Under section 40(2)(b) of the *Act* any appreciation in value (capital gain) with respect to a principal residence will not be taxed for the period that the property qualifies as a principal residence. The result is that the sale of one's house may usually be done on a tax-free basis. The rule provides, however, that only one home may be designated in a particular year as a principal residence by a taxpayer, the taxpayer's spouse or an unmarried child under 18. In this scenario the ability to dispose of both the house and the summer cottage on a tax-free basis, provided both qualify as principal residences, is lost once this couple become spouses under the *Act*.

There are, however, some benefits for this couple if they are considered to be spouses under the *Act*. When a taxpayer dies all capital property owned at the time of death is deemed to have been disposed of by the taxpayer. To the extent that the capital property has appreciated in value, there will be a taxable capital gain. One exception to this rule is that if the capital property (in this scenario the summer cottage and portfolio of investments) is transferred to a spouse, it is transferred at its adjusted cost base and thereby rolls over to the transferee without tax being exigible. This effectively defers the capital gain until the property is ultimately disposed of by the transferee, resulting in a considerable saving.

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73. Income splitting involves transferring property from a taxpayer who pays tax at a high rate to one who does not pay tax or who pays tax at a lesser rate, thereby subjecting the income earned by the transferred property, or the capital gain that accrues to that property, to a lower rate of tax.
74. Section 54(g) of the *Act*.
75. Section 70(5) of the *Act*.
76. Section 70(6) of the *Act*. See also section 73 of the *Act* which permits an *intervivos* spousal rollover.
77. The advantages of deferring tax include the benefit of having the deferred taxes available to earn income and, in times of inflation, the declining value of the dollar declines which permits the taxpayer to ultimately pay the taxes with “cheaper” dollars. A taxpayer may also pay tax at a lower marginal rate in future years.
2. *Two low rate taxpayers*

The individuals in this couple have modest incomes and each pay tax at a combined federal-provincial rate of 25%. They do not own their own home and have no savings or investments. Therefore the advantage of the tax free transfer of capital property is of no value to this couple. For them any change to the definition of spouse that would bring them within its ambit would operate to their detriment. The reason is that their entitlement to both the child tax benefit and the goods and services (GST) tax credit will be reduced. The child tax benefit is a refundable tax credit calculated by reference to both spouses' incomes. This pooling of income means that the total amount of the tax credit this couple receives as spouses will be less than the amount they each received as individuals. The GST tax credit is also based on pooled income. This refundable credit is an income tax credit intended to offset some of the costs of the GST for those with lower incomes. This couple will be worse off because they will no longer receive two full GST credits. The cost of one lost GST tax credit can be as much as approximately $300.

3. *One high rate taxpayer and one person with no taxable income*

In this scenario Partner A pays tax at the top combined federal-provincial rate and Partner B has no taxable income. Partner A owns considerable capital property and Partner B has none. Partner B suffers from a long term illness and incurs considerable medical expenses. It is this couple who will reap the most significant benefits from any change that would include them as spouses for the purposes of the Act, although not all the consequences will be to their advantage. This result is consistent with a tax system that has historically recognised economic dependency as a factor deserving of some tax relief. This has been accomplished primarily by giving a spousal tax credit to the "supporting" partner and by permitting the transfer of some of the unused tax credits of the partner with little or no income to the wealthier partner who is then able to benefit from them.

The spousal tax credit is available to a taxpayer who "supports his spouse". For 1993 the credit reduces the taxpayer's tax bill by $2,013 which includes the basic personal credit ($1,098) and the spousal component ($915). The amount of the spousal component decreases when the

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78. Sections 122.6 to 122.64 of the Act.
79. Section 122.5 of the Act.
80. Section 118(1)(a) of the Act.
81. These amounts are in respect of the federal spousal tax credit and do not include the provincial component of the credit.
dependent spouse's income is in excess of $538 and is eliminated fully when that income reaches $5,920. Therefore, Partner A would be entitled to the full amount of the credit. Clearly this credit is directed at dependent relationships, although it is of limited value. Claiming this credit may also have negative consequences for those lesbian and gay taxpayers currently claiming the spousal equivalent tax credit in respect of a wholly dependent person, such as a child. A taxpayer with a spouse is ineligible for the spousal equivalent tax credit and this can cause hardship because the amount of the spousal equivalent tax credit is greater than the amount of the dependent child tax credit.

As mentioned, one of the main advantages for this couple would be the ability of one partner to transfer unused tax credits to the other. If, for example, Partner B is a full-time student entitled to the tuition tax credit and the education tax credit, she may transfer any unused portion of those credits to Partner A. Additionally, any unused portion of the age credit, the pension credit and the disability credit may also be transferred to a spouse. The result can be a considerable advantage. Permitting the transfer allows Partner A to reduce her tax liability by applying the credits to her income. Without the transfer any benefit from them would be completely lost.

There are other advantages for this couple. Partner B has incurred medical expenses but is unable to take the medical expenses tax credit because she has no tax liability to which the credit may be applied. In order to qualify for the credit, the medical expenses must be in respect of a "patient" which is defined to include a spouse. This allows the partners to pool their medical expenses, thereby permitting the expenses that qualify as deductible expenses to be deducted by Partner A. The rationale for this provision is, according to Revenue Canada, "as husband and wife frequently act for one another, a receipt in the name of either one of them

82. Section 118(1)(b) of the Act.
83. In Schachtschneider v. Canada, [1993] 2 C.T.C. 178 (F.C.A.) the taxpayer argued that she was discriminated against contrary to section 15 of the Charter on the basis of her religion and marital status because she was unable to claim the spousal equivalent tax credit because she was married. The court dismissed her appeal. In reaching his decision Linden J., at 197, described the distinction drawn between married taxpayers and unmarried taxpayers as "merely distinctions that Parliament is allowed to draw in order to operate an efficient, self-reporting tax system, not requiring undue intrusion on people's private lives".
84. Section 118.5 of the Act.
85. Section 118.6 of the Act.
86. Section 118.8 of the Act.
87. Ibid.
88. Section 118.2 of the Act.
89. Section 118.2(2)(a) of the Act.
is considered acceptable for a medical expense of either, and the amount may be utilised by husband or wife, as agreed upon them.\textsuperscript{90} The importance of extending the application of this provision to lesbian and gay couples is illustrated by an ongoing case in British Columbia where a gay man suffering from AIDS has incurred considerable medical expenses. He has no tax liability to which he can apply the medical expenses tax credit and yet because he is in a gay relationship, he cannot pool his medical expenses with his partner and thus allow his partner to apply the credit to reduce his tax liability.\textsuperscript{91} It is important to remember that the transfer of tax credits is a tax expenditure and thus an example of a significant tax subsidy not currently available to lesbian and gay taxpayers in relationships.\textsuperscript{92}

Another tax subsidy is provided as a result of Revenue Canada’s administrative policy to allow spouses to pool their charitable donation receipts. Currently charitable donations entitle a taxpayer to a tax credit of 17\% for the first $200 donated, increasing to 29\% for any amount in excess of $200.\textsuperscript{93} Allowing the donations to be combined and claimed by one spouse would be particularly advantageous in this scenario where the value of the tax credit to Partner B is nil because she has no tax payable to which the credit may be applied. Dividends received by the spouse of a taxpayer may be also transferred to the taxpayer.\textsuperscript{94} In this scenario the advantage would arise if Partner B had dividend income. By transferring that income to Partner A, the spousal tax credit to which Partner A would be entitled if Partner B had no other income would be preserved and Partner A would be entitled to reduce the tax payable on the dividend income through the dividend tax credit.

The subsidisation of employment pension plans by the tax system has been discussed earlier. The Act also subsidises contributions to registered retirement pension plans (RRSPs) by giving a tax deduction for the contribution and providing that income earned by the RRSP is sheltered from tax while it remains in the plan.\textsuperscript{95} The amount that a taxpayer may

\textsuperscript{90} Interpretation Bulletin IT-519, paragraph 9. This Interpretation Bulletin, dated March 31, 1989 has not been reissued since the definition of spouse was amended to include common law spouses.

\textsuperscript{91} The case of Josh Gavel and Brian Ritchie was reported in \textit{Xtra West}, September 10, 1993. Both men are caught in a true Catch-22 situation. Not only are they unable to use Gavel’s tax credit for medical expenses but the British Columbia Ministry of Social Services has determined that for the purposes of provincial legislation the men are “spouses” and therefore Brian Ritchie is obliged to cover the medical expenses of his partner, who is no longer eligible for provincial social assistance.


\textsuperscript{93} Section 118.1 of the Act.

\textsuperscript{94} Section 82(3) of the Act.

\textsuperscript{95} Section 146 of the Act.
contribute to a RRSP is subject to a monetary limit but, provided a taxpayer has not exceeded her limit, she may make a contribution to a spouse’s plan.\textsuperscript{96} This is particularly advantageous where one partner has no income and the other is well off. It can result in income splitting that is not otherwise available.\textsuperscript{97} The tax deductible contribution to the RRSP will generate income in the plan that will not be taxed and on retirement the spouse can withdraw that income. Consequently, the tax liability for that income is transferred from the contributor to the spouse. There is also another advantage. When a taxpayer holding an RRSP dies, the proceeds in that plan may roll over to the taxpayer’s spouse.\textsuperscript{98} This means that the tax that would otherwise be payable either by the taxpayer in the terminal year, or if the amount in the plan qualifies as a refund of premiums, by the spouse who receives the amount, is not taxable.\textsuperscript{99} The saving can be considerable depending on the value of the funds in the RRSP and the rate at which it would have been taxed.

Any change to the definition of spouse to include lesbian and gay couples will have one particular negative effect for this couple. The attribution rules are designed to prevent spouses from splitting income or capital gains between themselves and thereby lowering the aggregate amount of tax paid on the income or capital gain. Currently the attribution rules do not apply to lesbian and gay couples. This means that, in this scenario, there would be a considerable tax advantage if Partner A transfers property that generates income to Partner B. Any income from that property would be taxed at Partner B’s low tax rate and not at Partner A’s top rate. If, however, this couple are considered to be spouses for the purposes of the Act, the attribution rules will apply. They provide that any income from property transferred by a taxpayer to a spouse at less than fair market value and any income from property that is loaned on an interest free or low interest basis to a spouse will be taxed in the hands of the taxpayer and not the spouse. Similar rules apply to any capital gain, ensuring that the capital gain is attributed to taxpayer and not the spouse.\textsuperscript{100} The result is that the tax benefits of income splitting, which are

\textsuperscript{96} Ibid.
\textsuperscript{97} The attribution rules in section 74.1–74.5 of the Act effectively restrict income splitting between spouses. These provisions deem any income generated by property transferred by a taxpayer to her spouse (other than by way of a fair market value transaction or a loan on which interest is paid) to be attributed to the taxpayer. The income is therefore taxed in the hands of the taxpayer and not the spouse. These rules do not apply to spousal RRSPs.
\textsuperscript{98} Section 146(8.8) of the Act.
\textsuperscript{99} Section 60(1)(iv) and (v) of the Act. In order to qualify for the rollover the spouse must place the amount received from the deceased’s plan in her own RRSP or in an annuity contract.
especially beneficial for couples in which one partner pays tax at the top rate and the other has little or no taxable income, will no longer be available to lesbian and gay couples. Overall, however, it is clear that this couple will benefit from any change which would consider them to be spouses under the Act.

V. The Price of Equality

The previous discussion has analysed the impact of redefining spouse to include lesbian and gay couples by looking at the impact of such a change on three particular couples. Any analysis of this issue is, however, incomplete unless it moves beyond the micro level to look at the larger picture. Furthermore, that analysis cannot take place as though such a change would operate in a vacuum. Any changes would, presumably, take place with other changes designed to redress the inequality faced by lesbians and gay men. That raises the question of how far changes based on a formal equality model such as this and those introduced recently in Ontario’s Bill 167 take us in the struggle for substantive equality.\(^{101}\) The issues I now turn to are pertinent to that question and to the debate within the lesbian and gay community about the problems of patterning the legal rights and responsibilities of lesbian and gay men on the current heterosexual models.

Any analysis of the tax subsidies that I have discussed must take into account the class implications.\(^{102}\) To the extent that these subsidies are provided through tax deductions, they are provided by a tax system that privileges wealth. Consider, for example, tax subsidised employment benefits. The deduction of pension contributions and the non-inclusion of benefits under a private health services plan are worth more in terms of tax dollars saved to those who pay tax at a high rate of tax, than to those who have less income and pay tax at a lower rate. This is because the value of a deduction or an exclusion from income is tied to the rate of tax at which the taxpayer is taxed. We must also recognise that the employment benefits that lesbians and gay men are struggling to achieve are only available to some; that is those with full time jobs who work for relatively large employers who are economically able to provide the benefits. For


102. For an excellent discussion of the income class perspective for lesbians and gay men with respect to employment benefits and social assistance benefits see, Lefebour supra note 13. She makes the very important point that treating lesbians and gay men as spouses for the purposes of social assistance benefits will be to their detriment.
those lesbians and gay men who work part time, in non unionised jobs, or for small employers unable to finance these plans or who are self employed or unemployed, there is no direct benefit. Therefore it is those with the highest incomes and who work full time for relatively large employers who will benefit the most from gaining the right to designate their partners as spouses for the purposes of employment benefits.

Lesbians and gay men are not a monolithic group. We are present in all socio-economic groups. This requires us to use caution when arguing for rights and responsibilities which have a disparate impact. As illustrated in the three scenarios discussed earlier, it is the low income couple who stands to lose most if the Act is amended to include the partners of lesbians and gay men as spouses. By comparison, the couple in which both partners pay tax at the top rate stands to gain. The benefit of the deferred tax liability arising from the ability to transfer capital property on a tax free basis to each other either on an inter vivos basis or on death far outweighs the “penalty” of only one principal residence for the couple. In this case the disparate impact results in more privilege for the already privileged.

Employment benefits provide a good example of the how formal rights do not necessarily translate into substantive equality. Despite the fact that many employers now grant employment benefits to their lesbian and gay employees, not all those eligible to claim them do so. The reason is the fear of being “outed” at one’s place of employment. It is almost impossible for an employer to guarantee absolute confidentiality with respect to the identity and gender of the person one designates as one’s partner under an employment based benefits programme. An employee who does enroll in such a programme runs the risk of exposing herself to harassment in the workplace from other employees or her employer. Further the designation also means coming out for one’s partner. The right to equal benefits does not directly address the hatred against lesbians and gay men. Until that hatred is targeted and it becomes safer for lesbians and gay men to be open about their sexual identity such rights will be have a hollow ring to them and only be of benefit to the privileged few who are in a position to claim them.

103. Tax on the disposition of the second home can be deferred if the property is held until the death of the owner and then transferred to the surviving partner. Section 70(6) of the Act would provide a tax free rollover in this case.
104. The author is currently involved in discussions on how to ensure confidentiality of this information with her employer. The task is extremely difficult. It appears that insurance companies who underwrite employment benefit plans need information about the gender of insured persons.
The issue becomes even more problematic when one looks to consequences that would flow from being included in the definition of “spouse” in the Act. Unlike the granting of employment benefits, the Act is not about the exercise of options. The income tax return under the Act requires an individual to state the name of her spouse and to certify that the information on the return is correct. The Act makes it an offence to make a false or deceptive statement in a return. Therefore lesbians and gay men will, if they are considered to be spouses under the Act, have to declare the name of their partner. Information provided to Revenue Canada is not kept completely confidential. The list of purposes for which that information may be divulged and the persons to whom it may be communicated is extensive. This will put lesbians and gay men who do not wish to be “out” in an impossible position. Either they will have to run the risk of their relationship becoming public knowledge, or if they are not prepared to do that, they will be committing an offence under the Act.

Up to this point in the article I have considered the impact of treating lesbians and gay men as spouses without distinguishing between them on the basis of gender. But gender cannot be ignored when discussing the tax system. As I have demonstrated in other work, the tax system discriminates against women. Men tend to be wealthier than women and that makes a major difference when contemplating the impact of the tax system on taxpayers. As previously mentioned, the value of a tax deduction is tied to the rate of tax at which the taxpayer is taxed; the lower the rate, the less the amount of the subsidy. The feminisation of poverty is well documented. 35.6% of all single women live below the poverty line and on average their income is $3,756 below that line. In 1991 the average female headed family had an income of $23,812 while the average male headed family had an income of almost double that at $49,812. This means that gay men will, on average, benefit more than lesbians by being included as spouses under the Act.

105. The right to claim an employment benefit under a plan is “optional” in the sense that there is no mandatory requirement to designate one’s partner for the purposes of the plan. As discussed, however, the price to be paid for the exercise of that option may well be “outing” and that means no option for many.
106. Section 239(1)(a) of the Act.
107. Section 241(4) of the Act.
109. Statistics Canada, Income Distribution by Size in Canada, 1991 (Ottawa: Minister of Industry, Science and Technology, 1992). Because lesbian relationships are not recognised by the law or by Statistics Canada, lesbians fall into the category of single, whether or not they are in relationships.
The tax subsidies that I have discussed all have one thing in common; they are only available to persons in a relationship. While the nature of that relationship may vary for the purposes of employment benefits,\(^\text{110}\) for tax purposes it is defined as a “spousal” relationship. The question is should the state base the provision of certain benefits such as those relating to pensions and health care in this manner or should such benefits be available on a universal basis? Currently state subsidised benefits are provided to some persons (spouses) solely because they are in a relationship with another person. Single persons are discriminated against. Extending the definition of spouse to include the partners of lesbians and gay men would, to some extent, reinforce this inequity. Single lesbians and gay men will continue to receive no part of this subsidy, regardless of the responsibilities they may have to other individuals, while lesbian and gay couples stand to benefit.

This general issue of linking benefits to coupledom was considered by the Coalition for Lesbian and Gay Rights in Ontario (CLGRO) in its brief presented to the Ontario Legislature in 1992.\(^\text{111}\) In that brief CLGRO reproduced its 1990 statement of principle which reads as follows:

“CLGRO believes that while our preference would be that benefits be made available on an individual basis (with allowances for the dependence of children, the aged, and the disabled), whenever benefits are made available to heterosexuals living in couples, these same benefits must also be made available to same-sex couples on the same footing.”\(^\text{112}\)

This approach is understandable given the discrimination against lesbians and gay men over the years. Absent a major overhaul of the tax system and a move to provide these subsidies in a manner that does not link them to coupledom, treating lesbians and gay men in the same manner as heterosexual couples is seen by many as a first step towards equality.\(^\text{113}\) That is a philosophy that recognises the need to establish basic rights and responsibilities and, once they are in place, then the work of challenging the inequities in the system can begin. There is also the broader question of linking these benefits to a family status. The debate within the lesbian

\(^\text{110}\) For example, health benefits may be extended to the “spouse” of an employee (Vogel v. Manitoba (No. 2) (1992), 90 D.L.R. (4th) 84 (Man. Q.B.)), bereavement leave may be in respect of a death in an employee’s “immediate family” (Mossop v. Treasury Board of Canada, supra note 17), and survivor pension benefits may be provided under “family” coverage (Leshner v. Ontario (No. 2), supra note 19).


\(^\text{112}\) Ibid. at iv.

\(^\text{113}\) Interestingly CLGRO’s only recommendation with respect to the Act was that it “be amended so that common-law and same-sex spouses are not eligible for greater benefits than married persons”, supra note 111 at vii.
and gay communities about whether “we are family” or “we are not family” has been spirited and intense. It is well documented elsewhere.\textsuperscript{114} Rather than focusing on whether we should be seeking rights and responsibilities based on the heterosexual family model, I shall address the issue of predating entitlement to many of the tax benefits on dependent relationships. As illustrated in my three scenarios it is the couple in which one partner is economically dependent upon the other that will benefit most from being considered to be spouses under the Act. Historically, the tax system has looked to dependency as a state deserving of tax relief. Provisions such as the ability to transfer otherwise unusable tax credits and the availability of the spousal tax credit where one spouse has little or no income illustrate this historic trend.\textsuperscript{115} To a certain extent employment benefits have, in the past, also been based on a dependency model. In \textit{Leshner}, the board of inquiry was careful to point out that “the workforce has changed; so too has the conceptualization and eligibility for benefits. Increasingly, the benefits are seen as being based on ‘entitlement’ rather than need”.\textsuperscript{116} The tax system, however, does not take this approach and continues to base tax relief on dependency.

The result of basing entitlement to tax benefits on dependency is a privatisation of economic responsibility for dependent persons.\textsuperscript{117} Even though the tax system (public funding) is used to deliver the subsidy it does so in a privatising and inequitable manner. The subsidy goes to the wealthier partner in the relationship, not the “dependent” person who needs it. This manner of delivering the subsidy assumes that income will be pooled and wealth redistributed equitably within the relationship. As studies show these assumptions are false.\textsuperscript{118} There is also evidence that


\textsuperscript{115} It is interesting to note that tax relief is given to the economically dominant individual in the relationship and not to the economically dependent individual.

\textsuperscript{116} Supra note 19 at D/203.

\textsuperscript{117} For a discussion of this issue in the context of family law, see Susan B. Boyd, “(Re)Placing the State: Family, Law and Oppression” (1994) 9(1) Can. J. L. and Society 39.

lesbian relationships in particular are less interdependent in terms of finances. 119 Given this, the question for lesbians and gay men is twofold. First, do we wish to co-opted into this privatisation? Secondly do we wish to be part of a system that privileges those in economically dependent relationships over those in relatively economically equal relationships?

**Conclusion**

In this article I have tried to demonstrate how critically important it is for lesbians and gay men to think about the role of the tax system in our struggle for equality. As illustrated above the tax system subsidises many benefits through tax expenditures. It also explicitly excludes lesbians and gay men from access to those tax subsidised benefits by defining spouse to mean persons of the opposite sex. That discriminatory treatment is being challenged by the CUPE case. If CUPE is successful and the definition of spouse for the purposes of the tax rules respecting pensions is held to contravene the Charter, the issue of the exclusion of lesbians and gay men from that definition for all other purposes of the Act will become more pressing. 120 My concern is that in thinking through this issue and the appropriate strategy, we must reflect carefully on the problems that I have outlined in this paper. In short, there will be winners and losers and, as I have demonstrated, the losers will be those least able to afford the loss. Furthermore, lesbians and gay men not in “spousal” relationships will gain nothing. Is this too high a price to pay for equality? I believe that it may be.

But the issue of the application of the tax system to lesbians and gay men is not an isolated issue. It is part of a broader range of issues about the legal rights and responsibilities of lesbians and gay men. Consequently we also need to think about the impact of changes to the tax system in this broader context and as part of an overall strategy for equality. The support for Bill 167 in Ontario from the lesbian and gay communities clearly indicated that even though the Bill was based on a formal equality approach, for many lesbians and gay men recognition of our relationships is a vital first step in the quest for equality. I agree with this sentiment. I do, however, question the advisability of making that first step the recognition of lesbian and gay relationships in the context of the tax system. Many of the problems that I have discussed, such as the

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120. Even if CUPE is not successful, the issue is one with which the lesbian and gay communities will have to confront in their struggles for equality.
class implications, the linking of benefits to coupledom and, in some cases, dependent relationships, are also issues of concern in the struggle for lesbian and gay rights generally. Hopefully as more of these rights and responsibilities are secured by the lesbian and gay communities many of these problems will be debated and worked through. Certainly as long as the tax system continues to be used to deliver subsidies, we have to think seriously about changes to the system as it applies to lesbians and gay men in relationships. But I suggest that we need to resolve some of these issues in the general context before we embark on changing the tax system and treating lesbian and gay couples in the same manner as heterosexual couples. The tax system is not the place to start. The problems are too intractable and the costs too high.