

**AN ANALYSIS OF
THE SOUTH AFRICAN REVENUE SERVICES'
RECOGNITION OF UNMARRIED PARTNERS AS SPOUSES**

by

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ABSTRACT

The focus of this study is on the criteria and processes used by the South African Revenue Services (SARS) in recognising spouses in permanent, unmarried unions. In theoretically positioning this focus, four possible areas of tax benefits were reviewed. These include: (i) donations tax, (ii) capital gains tax, (iii) estate duty tax and (iv) transfer duty. Also, the focus of this study was positioned relative to South African taxation acts. Specifically, three Acts were selected for review, viz.: (i) the Income Tax Act, No. 58 of 1962, the Estate Duty Act, No. 45 of 1955, and the Transfer Duty Act, No. 40 of 1949. These Acts may be understood relative to the South African Constitution's framing of notions like equality - given that these Acts signal the legislation's intention to honour the constitutional rights of its tax-paying citizenry. Furthermore, a theoretical framework that highlights official and espoused perspectives of practice is reviewed as it provides a theoretical frame for this study. Given this legislative and theoretical background the following aims were focussed: (1) To identify the official and espoused criteria used by the South African Revenue Services to recognise unmarried partners as spouses, and (2) To identify the official and espoused processes used by the South African Revenue Services to recognise unmarried partners as spouses. The chosen methodology is an explorative-descriptive methodology, as situated within a qualitative framework. Data sources are described as constituting the three tax Acts, a senior SARS official, and SARS helpdesk personnel. Data selection criteria are described, and convenience and purposive sampling are the stated data selection techniques. Document analysis and interview schedules were used to collect data. Data was managed and analysed via the use of several data analysis techniques. Results are presented and discussed. Significantly, SARS has non-specific criteria that are nebulous, and open to interpretation. Furthermore, processes are poorly stated and provide insufficient guidance to the taxpayer. Given these outcomes, this study also offers two South African legal cases that cogently illustrate criteria and processes for recognising a spouse. Each of these cases are analysed regarding the criteria and processes used to determine the definition of 'spouse'. These cases, while dealing with issues of same-sex adoption and same-sex partner's rights to remuneration benefits serve to highlight factors that may be of use to SARS. Furthermore, international case exemplars are also discussed. Specifically, Canada's taxation laws were focussed. Canada's criteria and processes used to define common-law partners (read as spouse for purposes of this study) serves as an informative case exemplar, relative to other countries also investigated in this study, viz.: the United States of America, Belgium and other European countries. Finally, several recommendations are stated, and an evaluation of the study is provided.

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1.

**CHAPTER ONE:
THE SOUTH AFRICAN REVENUE SERVICES AND
THE INTERPRETATION OF 'SPOUSE'**

1.1. Introduction

In the last few years, particularly since the 1994 change in political order in South Africa, many socio-economic changes have been effected to reflect the new democratic principles of the country. In the light of these changes, a number of South African tax laws have been deleted, amended, and/or introduced with far-reaching consequences. One such situation, of paramount importance to many South African taxpayers, is the new definition of 'spouse' in tax law, and which definition the South African Revenue Services (hereinafter SARS) must recognise.

This study is focussed on the criteria and processes adopted by SARS in recognising spouses in permanent, unmarried unions; which is one aspect of the new definition of spouse. For purposes of this study, 'criteria' may be understood as stated (written or verbal) specifications that need to be met for a defined purpose.

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Conversely, 'processes' refers to the mechanics of satisfying the stated specifications (see criteria above). In the law, the definition of spouse has evolved over the last few years, and is the next point of discussion.

1.2. The 'New' Spouse

The term spouse has recently (2001) been defined in section 1 of the Income Tax Act, No. 58 of 1962 (hereinafter the Income Tax Act), as well as in other selected tax Acts (refer below) in the following manner:

"Spouse', in relation to any person, means a person who is the partner of such person -

- (a) in a marriage or customary union recognised in terms of the laws of the Republic;
- (b) in a union recognised as a marriage in accordance with the tenets of any religion; or
- (c) in a same-sex or heterosexual union which the Commissioner is satisfied is intended to be permanent,

and 'married', 'husband' or 'wife' shall be construed accordingly: Provided that a marriage or union contemplated in paragraph (b) or (c) shall, in the absence of proof to the contrary, be deemed to be a marriage or union without community of property;"

[Definition of 'spouse' inserted by s. 5(j) of Act 5 of 2001.]

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It is this definition of spouse, which also embraces so-called alternative relationships, that SARS must recognise, and treat accordingly in all its dealings with the South African taxpayers.

1.3. Changing Times, Changing Identities: SARS, Spouses and Marriage.

SARS, the government organization whose responsibility it is to administer and collect tax revenue, currently subscribes to the above, amended definition of spouse. SARS is located in a period of rapid political transformation. In the last decade, several changes have occurred in line with broader social and political ideologies. Previously SARS functioned as a bureaucratic institution within the confines of many narrow definitions contained in the various tax Acts.

The role of SARS today is changing to that of an institution which must align its policies and practices with the tenets of the Constitution of South Africa. In this regard, SARS should expect to deal with many situations and challenges which will necessarily arise as a direct result of the striving for equality by people regarding their taxation.

Prior to 2001, spouse appeared in the following definition of the term 'married' in section 1 of the Income Tax Act:

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" 'Married' includes joined together in a union recognised as a marriage in accordance with any law or custom, and 'husband', 'wife' or 'spouse' shall be construed accordingly; and

'married woman' does not include a married woman who is living apart from her husband in circumstances which indicate that the separation is likely to be permanent nor, where any husband is at any time married to two or more wives, any wife other than the wife of his longest subsisting marriage;".

Such laws clearly needed amendment, especially in terms of the new South African Constitution. In returning to the current definition of spouse (see extract, above) it is clear that customary unions are recognised by South African law. The Customary Marriages Act (Act no. 20 of 1998) provides for the full recognition of especially African customary, or traditional marriages, under South African law. Importantly, the Act gives recognition to existing customary marriages and may include monogamous or polygamous unions (Nkomo, 2000).

Furthermore, other marriages, including those joined in matrimonial union under, for example, Islamic or Hindu marriage rituals, may be recognised as spouses given that they were married under the 'tenets' of their respective religions. Regarding unions recognised relative to religious tenets, one may hypothesize several problems with establishing the validity of non-Christian unions in such a multi-faith country like South Africa.

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While this is an interesting issue, customary unions and unions based on 'other' religious tenets are dealt with under the separate South African marriage laws.

Importantly, once these unions are recognised, SARS must acknowledge the validity of these unions, and facilitate its interaction with the relevant taxation Acts. The process of recognising unions based on (non-Christian) religious tenets, does not fall directly under the ambit of the tax Acts, and is therefore not SARS's immediate responsibility. While these two types of unions may be problematic with regard to the tax Acts, it is the third type of union that places SARS (via the tax Acts) as directly responsible for recognising the nature of this union.

To explain: The tax Acts have stated that unmarried, heterosexual or same-sex unions may be recognised relative to the *permanency* of their relationship. Unlike the first two unions, it is the responsibility of the SARS Commissioner to recognise the permanency of individuals in unmarried unions. The researcher is interested in investigating this last category of unions as it brings into focus the issue of *how* the Commissioner may be satisfied with regard to the *permanent* nature of heterosexual or same-sex, unmarried unions. It must be noted that individuals in common law, heterosexual unions may *choose* not to enter a 'legal' marriage. However, for same-sex unions, such a choice is not afforded.

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Currently, while the SA Government is considering legitimating same-sex marriages, it is still legally not possible for same-sex individuals to marry. As noted by Mosikatsana (1996), with regard to South African marriage law, the South African Common Law of Marriage is based on the Roman-Dutch law, which is influenced in turn by Christianity. Apart from this (Christian) bias, and in spite of the changes that have occurred in the South African common law of marriage, it has consistently retained the characteristic feature of heterosexuality; this even in the face of current legislative reforms aimed at an inclusive definition of family status.

Whatever the case, unmarried individuals (in same-sex or heterosexual unions) are directly, and problematically positioned under the Tax Act for recognition. By implication the recognition of these unions is the responsibility of the SARS Commissioner. It stands to reason, then, that the Commissioner should be equipped with the necessary criteria and processes to facilitate the recognition of such permanent, unmarried individuals in a union.

The researcher chose to focus on four specific benefits available to people who satisfy the definition of spouse as defined in the various tax Acts, and which benefits relate to:

- donations tax
- capital gains tax (CGT)
- estate duty and
- transfer duty.

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The Acts that currently govern SARS's practices in this regard are:

- The Income Tax Act, No. 58 of 1962

(The Income Tax Act includes Normal Tax, Donations Tax, and Capital Gains Tax amongst others).

- The Estate Duty Act, No. 45 of 1955
- The Transfer Duty Act, No. 40 of 1949

In the next section, a review is provided regarding the nature of benefits afforded to people recognised as spouses, under the various taxation Acts - as selected for purposes of this study.

1.4. A Review of the Specific Spousal Benefits Regarding the Selected South African Taxation Acts

These benefits, in brief, impact in the following ways concerning spouses:

1.4.1. Donations Tax

S56 of the Income Tax Act states:

"Exemptions- (1) Donations tax shall not be payable in respect of the value of any property which is disposed of under a donation-

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(a) to or for the benefit of the spouse of the donor under a duly registered antenuptial or post-nuptial contract or under a notarial contract entered into as contemplated in section 21 of the Matrimonial Property Act, 1984 (Act No. 88 of 1984);

(b) to or for the benefit of the spouse of the donor who is not separated from him under a judicial order or notarial deed of separation; "

Donations tax is currently levied at 20%, which amount is significant and therefore represents a substantial, potential saving for those individuals previously excluded from the definition of spouse.

1.4.2. Capital Gains Tax

As noted by Geach (2001), when there has been a disposal between spouses then there is a rollover (that is, a deferment of capital gains tax). The CGT rules provide that transactions between spouses will be regarded as being at 'base cost' which means that the disposal neither results in a capital gain, nor in a capital loss.

Transactions between spouses could take place under any of the following circumstances:

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- (a) during the lifetime of the transferor
- (b) on the death of the transferor
- (c) as a result of divorce. (Thus assets transferred to an ex-spouse in terms of a divorce settlement would be regarded as a transaction at base cost).

CGT is contained in the Eighth Schedule to the Income Tax Act, No. 58 of 1962 (as amended by the Revenue Laws Amendment Act, No. 19 of 2001). Roll-overs are covered in Part IX, wherein the following is stated in s 67: "Transfer of asset between spouses

- (1) Where a person disposes of an asset to his or her spouse, the person disposing of that asset must be treated as having disposed of the asset for proceeds equal to the base cost of the asset and the spouse acquiring the asset at a cost of the same amount.
- (2) For the purposes of subparagraph (1)-
 - (a) a deceased person must be treated as having disposed of an asset to his or her surviving spouse, if that asset accrues to that surviving spouse upon the death of that person; or

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- (b) a person must be treated as having disposed of an asset to his or her spouse, if that asset is transferred to that spouse in consequence of a divorce order or, in the case of a union contemplated in paragraph (b) or (c) of the definition of 'spouse' in section 1 of this Act, an agreement of division of assets which has been made an order of court."

The full capital gain is not included in a taxpayer's 'taxable income' but only a percentage of that gain. This so-called 'inclusion rate percentage' is currently 25% of the gain if the taxpayer is a natural person. It can be appreciated that this could be a significant amount (which partners in alternative relationships would have been excluded from had the definition not been changed).

1.4.3. Estate Duty

The importance of the benefit attached to estate duty lies in the amount(s) which are excluded from the net value of the estate. The relevant section of the Estate Duty Act is contained in s 4:

"Net value of an estate

The net value of an estate shall be determined by making the following deductions from the total value of all property included therein in accordance with section 3, that is to say-

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(IA) the amount of any claim against the estate acquired under section 3 of the Matrimonial Property Act, 1984 (Act 88 of 1984), by the surviving spouse of the deceased or by the estate of his deceased spouse, in respect of an accrual contemplated in that section;

.....

(m) the value of any usufructuary or other like interest in property and of any right to an annuity charged upon property, included as property of the deceased under section 3 (2) (a), if such interest or right was created by a pre-deceased spouse of the deceased and-

(i) the property over which the deceased enjoyed such interest or right formed part of the estate of such pre-deceased spouse; and

(ii) no deduction in respect of the value of such interest or right was allowable in the determination of the net value of the estate of the pre-deceased spouse under the provisions of paragraph (q) of this section;

.....

(q) so much of the value of any property included in the estate which has not been allowed as a deduction under the foregoing provisions of this section, as accrues to the surviving spouse of the deceased: Provided that-

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- (i) the deduction allowable under the provisions of this paragraph shall be reduced by so much of any amount as the surviving spouse is required in terms of the will of the deceased to dispose of to any other person or trust;
- (ii) no deduction shall be allowed under the provisions of this paragraph in respect of any property which accrues to a trust established by the deceased for the benefit of the surviving spouse, if the trustee of such trust has a discretion to allocate such property or any income therefrom to any person other than the surviving spouse."

Estate duty is currently levied at a rate of 20%. The potential savings for individuals who satisfy the new definition of spouse (and who were previously excluded) is significant.

1.4.4. Transfer Duty

The applicable section in the Transfer Duty Act is s 9:

"Exemptions from duty. -(1) No duty shall be payable in respect of the acquisition of property by-

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- (f) a surviving spouse in respect of property acquired in any manner from the estate of the deceased spouse;
 - (i) a surviving or divorced spouse who acquires the sole ownership in the whole or any portion of property registered in the name of his deceased or divorced spouse to whom he was married in community of property, in respect of so much of the value of the property in which sole ownership is acquired as represents his share in that property by virtue of the marriage in community of property;
- (16) No duty shall be payable in respect of the acquisition by a natural person of a residence that will constitute that person's primary residence as defined in paragraph 44 of the Eighth Schedule to the Income Tax Act, 2001, from a company where-
- (c) that natural person or that person's spouse ordinarily resided in that residence and used it mainly for domestic purposes from 5 April 2001 to the date of that registration;".

Given these various benefits, as explicated above, the issue regarding the recognition of spouses in unmarried, alternative relationships remains a legal, practical and social conundrum given the changing political context South Africans presently experience. A central factor in the present political context is that South African's constitutional rights, an issue explored next.

1.5. An Act of Equality: Spousal Benefits

There exists the need in society today, to address the socio-economic needs of people in alternative relationships, which people were previously disadvantaged by being excluded from a number of benefits offered to people who were married in terms of South African marriage law.

Historically, in terms of its administration of the various tax Acts, and particularly under apartheid law, SARS has unfairly treated spousal taxpayers. In this way, the new tax Acts, with relevance to issues of Constitutional notions of equality, have helped to alter several forms of tax discrimination. For example, there were separate tax-rate tables for the following groups of people: 'married person', 'married woman' and 'unmarried person'. People were consequently taxed at different rates in accordance with the Income Tax Act definition into which they fell. This is presently not the case since there is just one tax table for all individuals. Additionally, besides discriminating between the genders, old tax laws promoted unfair discrimination against people involved in relationships other than heterosexual, monogamous marriages. While the Constitution/law now accommodates alternative relationships, it still needs to demonstrate equality in the actual practice of the various taxation Acts.

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Historically, it is relevant to consider the influence that the notion of 'marriage' (refer below to South African law of marriage) has had on the creation of the discriminatory regulations contained in previous tax Acts. Mosikatsana (1996) noted that ideas about marriage and the family are central to most public policy issues. These include, amongst others, the right to:

- Inheritance,
- medical insurance coverage,
- joint adoption,
- bring a wrongful death action,
- the benefit of spousal privilege,
- bereavement leave,
- spousal tax advantages, and
- post-divorce rights (such as the award of child custody and access as well as spousal and child support payments).

It is important also to consider the status quo of marriage in terms of statute. Mosikatsana (1996) has noted that the concept of marriage has not been legislatively defined in South African law, but has been judicially defined. In the main, legislation provides for the formalities that need to be complied with. In this regard, South African law currently recognises only those marriages that are celebrated before a state marriage officer or religious officer recognised by the state as a marriage officer.

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The relevance of the change in the definition of spouse is that such a change came about on account of the rights of human beings, which have been enshrined in the Bill of Rights. Herein the following is clearly stated:

"EQUALITY.

- 9(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

As the new definition of spouse incorporates references to 'marital status', 'religion', and 'sexual orientation', the taxation Acts are clear signals of the legislation's intention to honour the constitutional rights of its tax-paying citizenry, especially of those in so-called alternative relationships.

1.6. Rationale for the Study

The immediate concern of this study was to obtain data where there is none, or where there is data but it is unclearly stated and needs to be tested. The application of policies/practices of SARS needs to be critically evaluated. The definition of spouse has only recently been changed, so there is an understandable gap in the literature.

The researcher decided to undertake this study with the hope of highlighting any unclear points in the legal definition, and to evaluate the recognition procedures administered by SARS.

1.7. Theoretical perspectives

As stated above, this study is focussed on gaining insights into the nature of the criteria and processes used by SARS with regard to the tax Acts, and the new definition of spouse. However, one may view this issue via at least two theoretical perspectives.

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In order to theoretically situate the focus of the study, there are at least two perspectives that are identified as useful for purposes of this study. These perspectives have been adopted from Pillay (1997), and refer to:

- the official perspective
- the espoused perspective

The official perspective refers to that perspective of practice that is documented in writing, and sanctioned by authoritative sources as official. The status of such a perspective is due to the process employed by the state, and/or its bodies to legitimize it. In other words, official perspectives (for example, those presented via policies, official memoranda, and practice notes from SARS), are produced by a rigorous process of being discussed and referred to as official.

Conversely, the espoused perspective refers to that perspective that does not have official status due to the lack of the process involved in making official the concepts associated with practice. It refers to what actually occurs, and may be mediated in the verbal or written mode. In other words, it is what SARS officials say that they actually do.

1.9. Aims of the Study

Given the context, and theoretical perspectives provided in this chapter, the research focus may be stated via the selected aims of this study. In this regard, the aims of this study are two-fold:

CRITERIA

1. To identify the official and espoused criteria used by the South African Revenue Services to recognise unmarried partners as spouses.

PROCESSES

2. To identify the official and espoused processes used by the South African Revenue Services to recognise unmarried partners as spouses.

The next chapter provides an overview of the methodology by which the above two aims of the study were investigated.

2.

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METHODOLOGY

This chapter is focussed on describing the nature of the methodology used to perform this study. Reference is made to the stated aims of the study, that is:

- To identify the official and espoused criteria used by the South African Revenue Services to recognise unmarried partners as spouses.
- To identify the official and espoused processes used by the South African Revenue Services to recognise unmarried partners as spouses.

2.1. Methodological orientation

This study may be located as an attempt at *exploring* the nature of a specific phenomenon, that is, the legal notion of spouse within alternative relationships. Additionally, this chapter is intended to *elucidate* the nature of the specific criteria and/or processes used in the enactment of the tax Acts by SARS. Therefore, this study may be described as an 'exploratory-descriptive' study (McMillan & Schumacher, 2001).

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An exploratory-descriptive methodology may use techniques such as semi-structured interviews, reviews of documents, and thematic categorisation of data (Flick, 1998). This study is oriented toward the use of such research techniques that are qualitative in nature. The use of statistical, quantitative techniques are not deemed appropriate given this paradigmatic positioning of the study. Therefore, this study is located within a qualitative research paradigm.

2.2. Data Sources

2.2.1. Description of Data Sources

Given the theoretical perspectives (highlighted in Chapter One) two core data sources were identified, that is the official and espoused perspectives. Data sources for the 'official perspective' included the following:

- The Income Tax Act, No. 58 of 1962
- The Estate Duty Act, No. 45 of 1955
- The Transfer Duty Act, No. 40 of 1949

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Data sources for the 'espoused perspective' included the following:

- A senior SARS official from the Durban Regional SARS office
- SARS helpdesk personnel (total: four)

In selecting the above data sources, specific selection criteria were employed:

2.2.2. Data selection criteria

The criterion for the official perspective data sources was to consider all documents that make specific reference to the enactment of the Tax Act.

The criterion for the espoused perspective data sources was to consult SARS senior personnel with an authoritative, expert knowledge base regarding SARS policies and practices; and SARS helpdesk personnel regarded as possessing 'frontline' knowledge regarding SARS policies and practices.

2.2.3. Data selection techniques

Purposive and convenience sampling methods were applied. *Purposive sampling* refers to the selection of data that suits the purpose of the study (see Mishler, 1986; Edwards & Talbot, 1994). The purpose of the study is to identify both the criteria and processes used in the recognition of spouse in terms of the Tax Act.

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Convenience sampling may refer to a combination of the elements of practicality and utility. This is where data has been chosen according to that which has been practically convenient to the researcher regarding temporal constraints, and geographical accessibility; and that which has good utility, that is effective in responding to the specific aims.

Miles & Huberman (1984), Ely (1991), and Guba & Lincoln (1998), amongst other authors who have written about qualitative research, have referred to the use of a data sample for reasons of *practicality* and *utility*, that is data that is available and effectively serves its purpose in responding to the aims of a study.

2.3. Data Collection Process

Data for the official perspective was obtained via the following process:

- 2.3.1. The SARS regional office (in Durban) was contacted. The purpose of this contact was to obtain official documents regarding the Tax Act (refer to the aims of this study) and its criteria and processes.
- 2.3.2. Three relevant documents were obtained. These are official, public documents for which special permission to cite/refer to them need not be granted.

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Data for the espoused perspective was collected from the most senior official who is tasked to deal with the study's focal issues. Furthermore, supplementary information was also obtained from the SARS frontline customer services (known as the 'helpdesk').

2.3.3. An authoritative, expert officer (who fulfilled the data source selection criterion, as specified above) was identified within the SARS regional, Durban office.

This person was contacted on recommendation of SARS's human resources division, and because of the status of the person within SARS.

2.3.4. Informed consent was obtained from the relevant officer. This step in the data collection process was considered to fulfil relevant ethical requirements. (See **Appendix A**). Verbal consent was provided telephonically.

2.3.5. An interview was conducted. Due to pragmatic constraints, a telephonic interview was conducted. The aim of this interview was to obtain an espoused perspective regarding the Tax Act, and relevant criteria and processes used by SARS to implement this Act.

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Various interviewing techniques for semi-structured interviews were used, for example, the use of open-ended questions, paraphrasing, summarising, and the use of content relevant, follow-up questions (see Miles & Huberman, 1984; Patton, 1987, Fereirra & Puth, 1988).

2.3.6. All data was recorded in notational form for purposes of data analysis.

2.3.7. Additionally, SARS helpdesk (Durban Regional Office) was contacted to obtain the 'frontline' espoused perspective. Four different helpdesk staff were contacted telephonically. As the SARS helpdesk is a public service, no special consent was necessary to offer.

2.4. **Data Collection Methods and Instruments**

2.4.1. All official data was analysed using the data collection method of '**document analysis**', as suggested by Miles and Huberman (1984), Flick (1998), and Eisner (1998). This method involved the visual scanning and reading of documented data. A document analysis schedule was used (see **Appendix B**) to obtain the relevant data.

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2.4.2. An **interview schedule** (see **Appendix C**) with similar content areas as for the document analysis schedule, was devised for use within a semi-structured **interview**. Supplementary data (obtained via SARS helpdesk) was also obtained with reference to this interview schedule. However, the researcher made these queries as part of a general income tax inquiry, and as a member of the public.

2.4.3. As suggested by its name, the 'semi-structured interview' (Patton, 1987, Eisner, 1998, Alvesson and Skoldberg, 2000) is a method that facilitates the open exploration of an issue within the structure of an interview.

Such methods are deemed useful in a study framed as exploratory-descriptive as it allows for the researcher to enter the data collection phase with a specific focus, and simultaneously with an open, unbiased agenda, that seeks to neutrally investigate aspects like criteria and processes.

2.4.4. The Document Analysis Schedule and Interview Schedule consisted of the following four, broad content categories:

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2.4.4.1. Stated criteria regarding recognition of spouse in unmarried, permanent alternative relationships.

- Description of criteria
- Stated rationale per criteria
- Persons involved in specifying criteria

2.4.4.2. Stated processes used when recognising spouse in unmarried, permanent alternative relationships.

- Description of procedures engaged to satisfy criteria.
- Stated rationale per procedure.
- Person's responsible for recognising a spousal relationship.
- Specified time period for the recognition procedure.

2.4.4.3. Stated benefits of being recognised as a spouse. Specific factors focused included:

- estate duty
- donations tax

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- capital gains tax
- transfer duty tax
- other (as identified by participant)

2.4.4.4. Other relevant information

This section is intended to capture any relevant information that may be omitted from the above specified categories.

2.5. Data Analysis Methods.

Data was managed in the following manner:

2.5.1. Firstly, all data were thematically categorised. The method of thematic categorisation essentially involves the grouping of common themes/categories of data together in order to 'make sense' of information transcribed from the interview, and documents (Miles & Huberman, 1984).

This method may be construed as involving more of a deductive categorisation procedure than an inductive one, that is, the sense-making process is directed from the general to the specific, from theoretical reasoning to hypothesis testing, and confirmation/negation of findings (Trochim, 2002).

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2.5.2. Secondly, each theme that was identified was allocated a numerical code. The use of codes is considered to be simple data management strategies.

2.5.3. In this study all themes that related to the same idea (or factor, such as a similar criterion) were labelled with the same code.

In this way it has been possible to collate similarly coded themes. This resulted in the production of several 'groups', with each group centred on similar themes. Therefore each group represented a 'factor'. These factors were then reproduced as data lists. These data lists refer to criteria and processes.

2.5.4. Finally, data analysis included the use of five data analysis techniques, including:

2.5.4.1. plausibility

2.5.4.2. data clustering

2.5.4.3. subsuming particulars into the general

2.5.4.4. factoring, and

2.5.4.5. weighting data.

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Each of these techniques, used widely in qualitative research, are defined below:

2.5.3.1. Plausibility incorporates the use of one's natural, intuitive sense associated in the meaning-making process in a systematic way to understand the data.

Additionally, plausibility may be used to draw conclusions (Miles & Huberman, 1984) or critical insights. This method, as used in this study, is related to process of data clustering - the next analytical tactic.

2.5.3.2. Data clustering (Guba & Lincoln, 1998) is a basic analytical process of grouping similar data/findings into further conceptual categories for analysis. Via this process minor data may be subsumed within the general focal areas/data categories. This is the next analytical tactic described, below.

2.5.3.3. Subsuming particulars into the general is a "...conceptual and a theoretical activity" (Miles & Huberman, 1984) in which the clustered, general categories and their relationship to the minor (or subsumed areas) are made explicit. This is performed so that more meaning is made of the data, and categories are not interpreted as mutually exclusive. This tactic, as used in this study, was also intended to develop factors - the next strategy described:

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2.5.3.4. Factoring, as described by Miles & Huberman (1984), is the process that underlies thematic categorisation, that is, the broad method of analysis utilised in this study.

By placing items into categories, one is assuming that there are factors inherent to an item that 'makes it' part of a common category. In the creation of these categories one is attempting to reduce a 'mountain of information' (Guba & Lincoln, 1998) to meaningful units/categories.

While such a process is necessary to facilitate an understanding of the findings of this study, the other tactics of plausibility, subsuming the particular within the general (and the next tactic of weighting data) are all intended to ensure validity and reliability of findings.

2.5.3.5. Weighting data is a tactic that Miles & Huberman (1984) refer to when some data are considered 'stronger' than other data. In this study, data/categories proffered by the officer (the interviewee) were considered stronger than those of the researcher's or external and traditionally conceptualised categories (Patton, 1987).

2.6. Data representation

Data has been represented by the use of representative utterances and/or textual extracts - all in the form of direct quotes. Additionally, and where relevant, data has been collated into criteria lists and process lists.

2.7. A Comment on Validity and Reliability.

In order to increase the validity and reliability of data for this study, the qualitative method of triangulation was attempted. Triangulation is a procedure to ensure validity and rigour (Patton, 1987) and may be achieved via collecting data from more than a single data source. This is usually performed in order to strengthen the validity of one's study (Ferreira & Puth, 1988).

In this study, the collection of data across the two perspectives (that is, the official-, and espoused perspectives) via the use of different data collection methods (interviews, and document analysis) was intended to achieve such validity.

2.8. Summary

This chapter has provided a detailed overview of the methodology used in this research. Importantly, a qualitative methodology framed as an exploratory-descriptive study was performed. Several data sources were focussed across the official and espoused perspectives. These specific data sources include three taxation Acts, namely the Income Tax Act, the Estate Duty Act, and the Transfer Duty Act. Data for the espoused perspective was primarily obtained by interviewing a senior SARS officer. Supplementary data was obtained via four SARS helpdesk personnel.

Data collection instruments (a Document Analysis Schedule, and an Interview Schedule) were described, as these were used during the key data collection strategies of document analysis, and interviewing (telephonic). Several data analysis strategies were described, and data representation was detailed. Finally, triangulation of data sources, and data collection methods, was described. This qualitative technique assists in improving the validity and reliability of the data collected, and analysed.

In Chapter three a basic description of the results obtained is provided. Subsequent chapters (that is, Chapters Four and Five) refer to these basic results, and contain further levels of analysis and interpretation.

3.

A REVIEW OF SARS's RECOGNITION CRITERIA AND PROCESSES

3.1. Overview of the chapter

This chapter deals with the findings of the study. A basic discussion is also included, and developed in subsequent chapters. Results are presented within official and espoused perspectives, as explained in Chapter One, in relation to the aims of the study which are as follows:

- To identify the official and espoused criteria used by the South African Revenue Services to recognise unmarried partners as spouses.
- To identify the official and espoused processes used by the South African Revenue Services to recognise unmarried partners as spouses.

Results of the study are detailed in the next section. These results have been organised relative to the aims of the study, that is, within criteria and processes.

3.2. Official Criteria Used by SARS to Recognise an Unmarried Spouse in an Alternative Relationship.

SARS (vis-à-vis the selected tax Acts) have not developed any official criteria to assist their recognition of spouse in an alternative relationship. Here, official criteria refers to documented statements which are usually recorded in the form of practice notes used by SARS.

However, it was reported that the following three tax Acts (and that which bears relevance to this study) is what SARS will consider relative to the process of recognising spouses in alternative relationships.

- The Income Tax Act, No. 58 of 1962
(The Income Tax Act includes Normal Tax, Donations Tax, and Capital Gains Tax amongst others)
- The Estate Duty Act, No. 45 of 1955
- The Transfer Duty Act, No. 40 of 1949

While recognition criteria are not enunciated by SARS, all Acts refer to the amended definition of spouse (see section 3 (a) of Act 5 of 2001). This definition of spouse (see Chapter One for a full citation) refers to a wide range of alternative relationships, including:

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- (i) customary marriages
- (ii) marriages in accordance with the tenets of any religion, and
- (iii) same-sex/heterosexual permanent unions

This definition is used *verbatim* across all three tax Acts that have been selected for analysis in this study. Within the focus of this study, the only criterion that bears relevance, via the official perspective, is that of the 'permanent' nature of the relationship, as stated in the following extract that defines spouse :

- (a) in a same-sex or heterosexual union which the Commissioner is satisfied is intended to be permanent:

Income Tax Act, Inserted by s.5(j) of Act 5 of 2001.

Importantly, this new definition of spouse signals an alignment with the South African Bill of Rights (as nested within the South African Constitution) that espouses the notion of 'equality' for, amongst others, people on the grounds of sexual orientation, and marital status (see Constitution of the Republic of South Africa, Section 9, number 3).

In conclusion, via the official perspective, while the law has broadened its definition of spouse, it is not clear what specific, official criteria may be used to satisfy SARS. However, it does appear that SARS officers have given some thought to the matter of criteria, as is elucidated below (in the espoused perspective).

3.3. Official Processes Used by SARS to Recognise an Unmarried Spouse in an Alternative Relationship.

SARS has not produced any clear, specific processes (practice notes) to guide the recognition of spouses in alternative relationships. However, and in returning to the broader tax Acts that govern SARS, the following findings bear relevance:

"The burden of proof that any amount is exempt from or not liable to any tax chargeable under this Act or is subject to any deduction, abatement or set-off in terms of this Act, shall be upon the person claiming such exemption, non-liability, deduction, abatement or set-off, and upon the hearing of any appeal from any decision of the Commissioner, the decision shall not be reversed or altered unless it is shown by the appellant that the decision is wrong".

Section 82, of the Income Tax Act, number 58 of 1962

In Section 82 (above), it is clearly stated that the onus is on the taxpayer to submit satisfactory proof to the Commissioner with regard to being recognised as a spouse.

3.4. Espoused Criteria Used by SARS to Recognise an Unmarried Spouse in an Alternative Relationship.

The following data from the SARS officer at the Durban Regional Office was obtained:

The officer stated that some form of proof (or evidence) was required in order for SARS to establish the *permanent* nature of spouses in alternative relationships. Furthermore, there were two examples provided by the officer, which the researcher has termed as 'probability' criteria. These probability criteria include the following:

- that the duration of the relationship would be considered
- that individuals in an alternative relationship actually shared the same house.

In summary, the Durban Regional SARS senior officer indicated that multiple criteria may be needed to satisfy SARS as to the permanency of the relationship. This officer did not offer/state further specifications regarding the nature of criteria, and explained that SARS had yet to deal with such cases.

Importantly, the officer did state that SARS would react to any submission, to its offices, of such claims regarding the recognition of spouses in alternative unions.

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Additionally, personnel at the SARS helpdesk, at the Durban Regional Office did not provide any further information regarding criteria. However, they were able to provide more detail regarding processes.

3.5. Espoused Processes Used by SARS to Recognise an Unmarried Spouse in an Alternative Relationship.

The SARS officer, and SARS helpdesk personnel all stated that the submission of evidence, or proof of the spousal relationship was necessary.

The following information was offered by the SARS officer, and the helpdesk personnel as tentative, and as requiring confirmation. Importantly, two of the four helpers initially stated that no evidence of the spousal status of taxpayers in alternative relationships was necessary. However, upon probing further, helpdesk personnel offered specific information. This information was offered to the researcher, who framed the following case within his inquiry.

Hypothetical case facts provided to SARS helpdesk personnel:

- Taxpayer in same-sex (male) relationship
- Initial query referred to how the caller's partner would be treated upon his death
- This query specifically highlighted that the caller wished to avoid estate duty taxes, as the partner was deemed a spouse.

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- Related queries regarding donations, and transfer duty taxes were made within the same hypothetical frame.

In response to the above query, made to four separate helpdesk personnel, the following represents a collated response:

The submission of a last will and testament was considered an important document for SARS to evaluate, especially regarding the issue of estate duty. It was, apparently, not necessary to prove spousal relations until after the death of a significant other. During the process of winding up the deceased partner's estate, helpdesk personnel advised that an appointed trustee/executor of the deceased's estate should inform SARS of the status of the beneficiary as spouse. This process was deemed necessary for SARS to act accordingly, treating the remaining spouse as a married partner, and not levying estate duty.

Furthermore, helpdesk personnel directed the researcher/caller toward an Income Tax declaration, that is a form referred to as IT/IB 144, 'Declaration by Donor'. The researcher/caller was advised to inform SARS of his intention to donate money/property to his partner by completing this form. Helpdesk personnel stated that specifying the donee as spouse will result in the lawful avoidance of donations tax. However, should there be cause for SARS to suspect fraudulent donations, then an investigation may be launched, and an audit performed.

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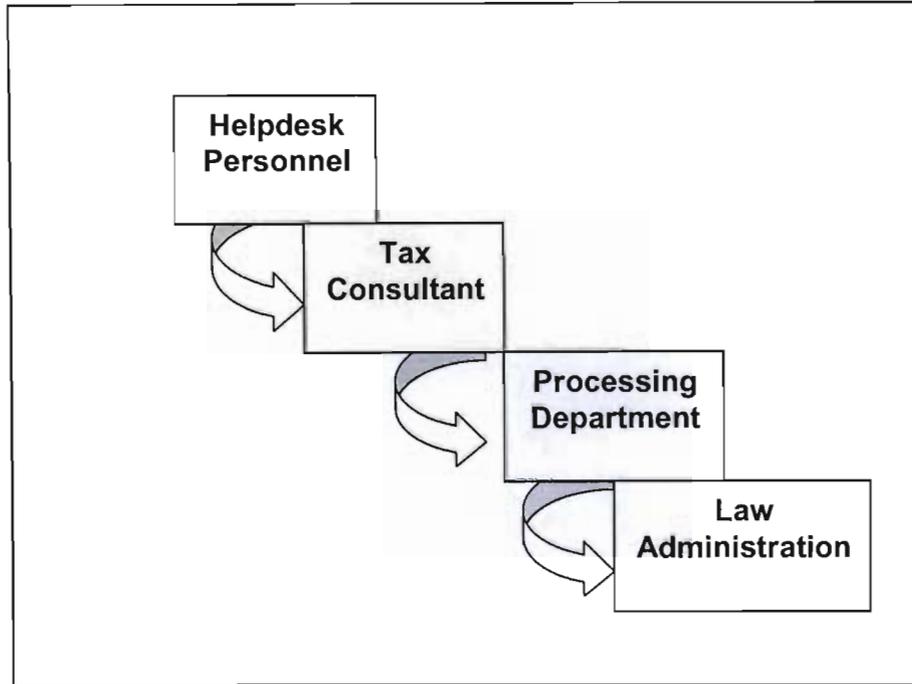
The SARS officer highlighted the criteria of residency, that is, that spouses should be sharing homes; and of permanency, that is, the duration of the relationship. However, no detail was provided regarding how these, and related criteria, may be recognised.

The senior SARS officer provided the following information regarding the chain of communication via which any claim may be processed, for the recognition of spouses in alternative relationships.

Figure 3.1 is a diagrammatic representation of the chain of people, who may be involved in the process of recognising spouses in alternative relationships. In Figure 3.1 there are at least four groups of personnel who may involved in this process:

- Helpdesk personnel
- Tax consultant
- Processing department
- Law administration

Figure 3.1: Diagrammatic Representation of People Involved in Recognising Spouses in Alternative Relationships



With reference to Figure 3.1, the frontline personnel are identified as the helpdesk personnel, available via telephonic services. Helpdesk personnel marshal queries, and generally interact with the taxpaying public. Tax consultants, also available via the helpdesk telephonic services, may advise taxpayers regarding their various tax inquiries. Additionally, specific cases may be dealt with in person, via appointments with such consultants. Thereafter, the processing department, and the law department will be involved - and (as apparent by their titles) the recognition of spouse will be subject to administrative and legal processing.

Additionally, the SARS officer re-stated that SARS would, indeed, be responsible for evaluating cases, and that each case would be considered on its individual merits.

The officer highlighted Section 82 of the Income Tax Act, stating that the onus is on the taxpayer to prove his/her spousal status.

The officer also stated that, given the novelty of such cases in South African law, there would a need to further investigate how spouses may be recognised by referring to authoritative legal resources, such as legal texts. In particular a text, referred to as 'Silke' (see De Koker, 2001) was identified as one such source that may be referred to.

The officer also stated that it would be beneficial to review other countries' revenue services, and the processes by them to recognise spouses.

In summary, Table 3.1 contains composite 'criteria' and 'process' lists, across the official and espoused perspectives.

Table 3.1, may be used as both a summary, and to cross-reference the basic data contained within this chapter.

Table 3.1: Composite Criteria and Process List for Recognising Unmarried Spouses in Alternative Relationships

CRITERIA	DATA SOURCE
SPECIFIC CRITERIA NOT PROVIDED	Official (tax acts)
Taxation Acts definition of spouse	Official (tax acts)
Permanent nature of spousal relationship	Official (tax acts), and espoused (senior SARS officer)
Probability criteria: shared residence, duration of relationship	Espoused (senior SARS officer)
Multiple criteria (unspecified) will be required	Espoused (senior SARS officer)

Table 3.1: Composite Criteria and Process List for Recognising Unmarried Spouses in Alternative Relationships (Continued)

PROCESSES	DATA SOURCE
By satisfaction of the SARS Commissioner	Official (tax acts)
Taxpayer has 'Burden of proof'	Official (Section 82, Income Tax act); and espoused (senior SARS officer)
Submission of last will and testament, specifying beneficiary is actually the spouse	Espoused, SARS helpdesk
Submission of IT/IB 144 (Declaration by Donor) to specify that donee is actually spouse	Espoused, SARS helpdesk
SARS would consider all claims to recognise spouse in alternative relationships	Espoused (senior SARS officer)
Need to refer to South African authoritative legal resources	Espoused (senior SARS officer)
Need to refer to cases from other countries	Espoused (senior SARS officer)

3.6. Conclusion

This chapter contains a list of criteria that may be used to recognise unmarried spouses in alternative relationships. This list has been elicited via various taxation Acts, and from SARS personnel. What remains to be stated is that the criteria - be it via the official or espoused perspective - may be described, at best, as being nebulous in nature. Furthermore, they are rather non-specific in that, for example, while permanency is a stated criterion, the duration of a relationship is not clearly specified. This leaves such criterion open to interpretation, and contestation.

Similarly, while there are processes stated (especially at the espoused level), these processes are poorly stated and provide insufficient guidance to the taxpayer regarding what it is that is expected of them to do.

In the next chapter, a possible solution to remedy this situation is investigated. In this regard, South African legal cases that refer to the definition of unmarried partners recognised as spouses in alternative relationships, are analysed for purposes of this study.

4.

**CHAPTER FOUR:
SOUTH AFRICAN LEGAL CASES THAT COGENTLY
ILLUSTRATE CRITERIA AND PROCESSES FOR
RECOGNISING A SPOUSE**

4.1. Introduction

Two recent decisions of the Constitutional Court, although not dealing with tax legislation, touch on the concept of 'permanent same-sex relationships' and are considered below with a view to ascertaining criteria. This methodological decision, that is, the reviewing of related legal cases, is due to the nebulous, non-specific nature of criteria and processes provided by SARS, as was revealed in Chapter Three.

In order to generate data regarding criteria and processes the methodological strategy of selecting cases is akin to Silverman's (2001) suggestion to use case studies.

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The term 'case exemplars' is used to refer to legal cases that are intended to illuminate, in this instance, the nature of criteria and processes used to recognise spouses in alternative relationships. In this regard, two case exemplars have been selected.

The selected case exemplars have - as their content focus - the issue of same-sex relationships. While this content focus is on same-sex relationships, it must be remembered that it bears relevance to the broader issue of recognition of spouses in alternative relationships. Furthermore, these case exemplars are selected due to the recent number of same-sex related cases in law. In this regard, as there is a growing pool of such cases, there is a resource base, both theoretical and legal in nature, from which one may take precedent. Given the dynamic nature of the issue in question, it is imperative that case exemplars be drawn from the most current legal case pool.

In the study of these two case exemplars, two focal areas bear relevance, that is, the issue of same-sex adoption, and same-sex partner's rights to remuneration benefits.

The following two cases serve as exemplars, that is:

- *Satchwell v President of the Republic of South Africa and Another* 2001 (12) BCLR 1284(T). [Hereinafter referred to as the Satchwell case]
- *Du Toit and Another v Minister of Welfare and Population Development and Others* 2001 (12) BCLR 1225 (T). [Hereinafter referred to as the Du Toit case]

4.2. Review of the Nature of Each Case

In this section the Satchwell and Du Toit cases are reviewed regarding the nature of the facts of each case. Importantly, the purpose of this review is to identify potential criteria and processes used in these cases to recognise the spousal status of unmarried partners in alternative relationships.

4.2.1. The Satchwell Case

The Satchwell case centered on the issue of partners in a same-sex relationship where one of the partners in question, Satchwell, is a South African judge. Her partner is identified as Ms Carnelley.

Specifically, the case focussed on the entitlements enjoyed by spouses of judges under the Judges Remuneration and Conditions of Employment Act 88 of 1989, and under certain regulations of the 'Regulations in respect of Judges Administrative Recesses, Leave, Transport and Allowances'. This case proceeded from the Pretoria High Court to the Constitutional Court of South Africa. Amongst the five orders made by the Pretoria High Court, regarding the relevant provisions of the Act and Regulations referred to above, it was ordered that these provisions be read as though the words '*or partner in a permanent same-sex life partnership*' appear after the word '*spouse*'.

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Indeed, the constitutional issue in question is the definition of spouse, within the regulations that are designed to afford judges' spouses several benefits. An example of such benefits is the payment to the surviving spouse of the deceased judge of two-thirds of the salary that would have been payable to that judge, until the death of that spouse.

In confirming the High Court's decision to read in to the regulation the words '*or partner in a permanent same-sex life partnership*' after the word '*spouse*', the Constitutional Court decided that such a decision fails to regard the nature of the reciprocal duties of support that the applicant and Carnelley have committed to each other. In this regard, the Constitutional Court substituted the High Court's order with the following:

"With effect from the date of this order, Regulations 9(2)(b) and 9(3)(a) of the Judges' Remuneration and Conditions of Employment Act 88 of 1989 are to be read as though the following words appear therein after the word "spouse" - "or partner in a same-sex partnership in which the partners have undertaken reciprocal duties of support"

Madala, J. (2002) Case CCT 45/001: page 22

The above extract, from the Satchwell case, highlights the nature of the criteria used to recognise spouses in alternative relationships. In the next section, a detailed analysis of the Satchwell case, and relevant specific criteria, are reviewed.

4.2.1.1. Criteria Used in Recognising an Unmarried Spouse in the Satchwell Case.

Several criteria are noted in the factual background to the Satchwell case that bear relevance to this study. All factual statements made, and evidence provided, shall be interpreted (for purposes of this study) as criteria used to recognise unmarried spouses. In terms of the criteria submitted for recognition, the court recorded the applicant's statement that she and her partner were involved in:

- an intimate,
- committed,
- exclusive, and
- permanent relationship.

Furthermore the duration of their relationship bears significance to this last criterion of a 'permanent relationship':

- The duration of this relationship was recorded as beginning *circa* 1986, that is, approximately sixteen years.

The following factual statements were also made, and bear relevance to the issue of qualifying the nature of the relationship:

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- The applicant and her partner live as a married couple, and
- they are acknowledged as a married couple by friends and families.

The above criteria may be interpreted as referring to, what may be termed: *emotional commitment* criteria. In fact, this broad descriptor of the several specific criteria listed above is a term used within the Constitutional Court report on this case (see Case CCT 45/01).

Finally, the applicant and her partner provided the Constitutional Court with evidence of their emotional and financial inter-dependence. '*Financial Commitment* criteria, then, is the second broad descriptor of several specific criteria. These included the following:

- Both partners have last wills and testaments in each other's favour
- They are jointly registered as owners of their current residence/property
- This property is considered as a family residence
- The applicant's partner is listed as the beneficiary in all her insurance and other investment policies
- The applicant's partner is also listed as beneficiary on her current medical aid scheme, that is, 'Parmed' the Parliamentary Medical Aid Scheme.

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The presiding Constitutional Court Judge Madala, in commenting on the nature of the applicant's relationship with her partner stated the following:

"In the present case the applicant and Ms Carnelley have lived together for years in a stable and permanent relationship. They have made financial provision for one another in the event of their death. It appears probable that they have undertaken reciprocal duties of support".

Madala, J. (2002) Case CCT 45/01: page 15

It is clear that the issue of undertaking reciprocal duties of support is paramount in understanding the nature of a permanent relationship between unmarried spouses. In the next section, a comment is provided regarding the processes used to recognise spouses in alternative relationships.

4.2.1.2. Processes Used in Recognising an Unmarried Spouse in the Satchwell Case.

In the Satchwell case, although the nature of the relationship between the applicant and her partner was relevant, the Constitutional Court's primary goal was not to develop a set of processes by which South African courts may establish whether there is a permanent spousal relationship. Rather the Constitutional Court had to confirm or not the High Court order regarding the relevant provisions of the Act and Regulations referred to above.

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Therefore, it may only be inferred that the criteria, stated above, assist in an understanding of what processes may be necessary in order to prove one's status as permanent spousal partners, that is, in unmarried relationships. For purposes of this study, such an interpretation of the Satchwell case serves as probable emotional and financial commitment criteria. In this regard, the following processes may be inferred:

- Production of statements (verbal) demonstrating emotional commitment;
- Referring to documents that demonstrate that the partners are financially tied into each other's life, for example, last wills and testaments, medical aid, insurance policies and investments.

In the next section, the Du Toit case is presented. While this case has some relevance to the Satchwell case, in that it is also centered on same-sex relationships, it is focussed on adoption.

4.2.2. The Du Toit Case

The two applicants in this case, Suzanne du Toit and Anna-Marie de Vos, partners in a longstanding same-sex relationship, some years ago wanted to jointly adopt two children.

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They were unable to accomplish their wish because current legislation in South Africa only permits joint adoption by married couples. Consequently De Vos, the second applicant, alone became the adoptive parent.

A few years later the applicants decided to bring an application in the Pretoria High Court challenging the constitutional validity of certain sections of the Child Care Act, No. 74 of 1983, and the Guardianship Act, No. 192 of 1993, which provide for the joint adoption and guardianship of children by married persons only. The relevant provisions were challenged on the grounds that they violated the applicants' rights to dignity and equality and did not give paramountcy to the interests of the child as required by section 28(2) of the Constitution.

The fact that same-sex partners cannot adopt children jointly, does not mean that they cannot adopt children at all. A person living with a same-sex partner may apply to adopt children in his or her own right, intending to raise the children with his or her partner. However, the partner will have no legally recognised right in relation to the children because that partner is not recognised in law as a spouse. Du Toit was prohibited from becoming a joint parent of the two children, in spite of the fact that she spent more time nurturing the children than her partner De Vos (due to the time constraints of De Vos' job - she is a judge).

Kgomo J found that these provisions did violate the Constitution and ordered a reading in of certain words to allow for joint adoption and guardianship of children by same-sex life partners. The applicants were seeking confirmation by the Constitutional Court of this High Court order.

4.2.2.1. Criteria Used in Recognising an Unmarried Spouse in the Du Toit Case

The issue in this case was the right of joint adoption by individuals involved in a long-term same-sex relationship. However, the evidence/criteria put forward with regard to validating the applicants' commitment to each other (that is, as confirmation of their 'spousal relationship'), is of great relevance.

Indeed, its relevance regards the matter of what criteria SARS could employ to recognise individuals in same-sex relationships as spouses. The facts of the Du Toit case are that:

- the applicants have lived together as life partners since 1989
- they formalized their relationship with a commitment ceremony (performed by a lay preacher in September 1990)

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- They live as a couple married in community of property to all intents and purposes:
 - (i) immovable property is registered jointly in both their names
 - (ii) they pool their financial resources
 - (iii) they have a joint will in terms of which the surviving partner of the relationship will inherit the other's share in the joint estate
 - (iv) they are beneficiaries of each other's insurance policies
 - (v) and they take all major life decisions jointly and on a consensual basis

- The adoptive children (siblings), who have lived with the applicants since December 1994, consider the applicants to be their parents.

Since the matters, listed above, were accepted as valid criteria by the Constitutional Court in its factual recognition of spouses in unmarried, long-term relationships, it is logical to conclude that these criteria could well serve the same purpose in SARS's recognition of spouses.

4.2.2.2. Processes Used in Recognising an Unmarried Spouse in the Du Toit Case

The common link between the Satchwell case and the Du Toit case, as regards this study, is that of same-sex couples having to convince the court of the permanency of their relationship. The reason for this was to ensure that they were then eligible, just like married couples, of equal treatment in the law.

Though the main objective of the latter case was to challenge the exclusion of joint adoption and guardianship to same-sex partners, the importance to this study is the list of facts enunciated confirming criteria considered in recognising the permanent spousal nature of the relationship between Du Toit and De Vos.

It may only be inferred that the criteria, stated above, assist in an understanding of what processes may be necessary in order to prove one's status as permanent spousal partners, that is, in unmarried relationships. For purposes of this study, such an interpretation of the Du Toit case serves as probable data. In this regard the following processes may be inferred:

- Production of statements (verbal) that they live together as life partners and that they take all major life decisions jointly and on a consensual basis

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- Production of statements attesting to a committed relationship: formal document/statement issued by the lay preacher of their commitment ceremony, title deeds vouching joint ownership of property, joint wills, and insurance policies naming the other partner as the beneficiary
- A statement (written or verbal) from the adoptive children confirming that they consider the applicants as their parents.

In the next section, all data regarding criteria and processes referred to in the Satchwell and De Toit case exemplars, above, shall be collated, and summarised in the form of lists. Thereafter, the collated lists shall be used as the basis for further discussion.

4.3. Collating the Case Exemplars: Criteria and Processes

As in the last chapter, criteria lists and process lists shall serve as summaries for the case exemplars.

The reader is reminded that these case exemplars have been selected in light of the fact that SARS has nebulous criteria and poorly specified processes to assist in its recognition of unmarried spouses in alternative relationships.

Table 4.1: Collated Criteria List for Recognising An Unmarried Spouses in Alternative Relationships via the Satchwell and De Toit Cases (Continued)

Financial Commitment	
• Last wills and testaments in each other's favour	Satchwell, Du Toit
• Joint registered ownership of current residence/property	Satchwell, Du Toit
• Property considered as a family residence	Satchwell, Du Toit
• Partner listed as the beneficiary in all insurance and other investment policies	Satchwell, Du Toit
• Pooling of financial resources	Du Toit
• partner listed as beneficiary on current medical aid scheme	Satchwell

As may be noted, with reference to Table 4.1, both cases have been collated within the over-arching frame of the Satchwell case. This is because it has been useful to refer to the notion of reciprocal duties of support, and the specified emotional and financial commitment criteria.

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Table 4.2 below, contains a collated list of processes used to recognise unmarried spouses in alternative relationships.

Table 4.2: Collated Process List for Recognising An Unmarried Spouses in Alternative Relationships via the Satchwell and De Toit Cases.

PROCESSES	DATA SOURCE
<ul style="list-style-type: none">• Production of statements (verbal) demonstrating emotional commitment	Satchwell; Du Toit
<ul style="list-style-type: none">• Referring to and/or production of documents that demonstrate that the partners are financially tied into each other's life, e.g.<ul style="list-style-type: none">-title deeds vouching joint ownership of property,-joint wills, and-insurance policies naming the other partner as the beneficiary	Satchwell; Du Toit
<ul style="list-style-type: none">• A statement (written or verbal) from adoptive children confirming that they consider the applicants as their parents.	Du Toit

In the next section, an evaluation is provided of these collated criteria and process lists (in Table 4.1, and Table 4.2).

4.4. An Evaluation of the Criteria and Processes used in the Case Exemplars

In this section, three core points of discussion are detailed. These include the following:

4.4.1. The Need for Evidence

4.4.2. The Quality of Evidence Needed

4.4.3. The Extent of Evidence Needed

As may be noted, above, these three discussion points are all focussed toward the notion of 'evidence'. The submission of evidence (or proof) appears to be central to the recognition of unmarried spouses in alternative relationships. Of particular concern within this study is the nature of evidence relative to the issue of 'permanence'.

As may be noted, in Chapter Three, the issue of permanency - irrespective of sexual orientation - as it relates to individuals in alternative relationships is of paramount concern via the official, and the espoused perspective.

In law, evidence may be defined as that which is 'relevant' to the case at hand (Skeen & Van der Merwe, 1997). This rather broad definition of evidence is that which forms the basis of the three, selected points of discussion that follow:

4.4.1. The Need for Evidence

Why is there a need to produce evidence when the definition of spouse arises? Indeed, why is it even necessary to produce evidence? Indeed, when evidence is called for, what criteria is such evidence meant to satisfy?

Arguably, one may contend that that which is necessary for the legally privileged definition of spouse within South African law (that is, of married, heterosexual individuals) is a marriage certificate. What is being argued, is the rationale for producing evidence of one's spousal status in South African law. In considering the rationale, one must make reference to the inherent biases of South African law.

When evidence is called for, what underlies the need for evidence is the law's religiously inspired understanding of marriage. This understanding of marriage represents a dominant reality, one that is primarily constructed relative to Christian based religious ideologies. With reference to both Satchwell and Du Toit, it is clear that both cases delivered evidence with regard to criteria that reflect (rather mimic) monogamous, heterosexual, Christian marriages - with the Du Toit case demonstrating this in further ways via evidence of a commitment ceremony, performed by a lay-preacher.

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Mosikatsana (1996) has already highlighted the biased nature of South African marriage law - and its Christian bias. What is necessary to contemplate is that South African law - and its Christian character -simultaneously privileges heterosexuality, and monogamy.

Notably, with the introduction of laws like the Customary Marriages Act of 1998, it may be noted that, at least, the legislation's attitude toward polygamy and non-Christian marriages has altered. However, and as may be noted with the Satchwell and Du Toit case exemplars, much work remains as regards the issue of sexual orientation and of marital status.

In South Africa, marriage was for years viewed from a Christian bias. Similarly, the fundamental religious bias of South African law has consequentially framed heterosexuality and marriage as the crucial factors that determine one's lawful rights in society. Therefore, individuals - such as unmarried heterosexual, or unmarried same-sex couples - who choose to exist according to their orientation or life values - are ideologically at odds with the law. In this way, the need for evidence is intricately wound up in South Africa's religious, ideological foundations. Furthermore, the need for evidence is also tied up with what one may consider as generally accepted legal practice. Evidence that satisfies the criteria of what a spouse is, reflects that which is common practice in the Courts. In this way, evidence is, indeed, necessary as part of the legal system's way of practicing the law.

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Such a practice, that is the submission of evidence, must be understood and valued for what it represents in the sanctity of legal institutions throughout the land. If this is to be respected, if South Africans are bound to a law governed society - an inherent constitutional value, then the need for evidence is a valid need, given that it is common practice of the legal fraternity.

If, as per acceptable legal practice, evidence is required - and that such evidence reflects the ideological biases of Christianity; there is a need to evaluate the nature of the quality of evidence required.

4.4.2. The Quality of Evidence Needed

Quality used in this instance refers to the *strength* of evidence regarding criteria and related processes for recognising unmarried spouses.

One cannot demand stronger evidence than that regarding emotional and financial commitment vis-à-vis wills, insurance policies, related investments, title deeds, and medical aids - amongst other forms of evidence.

It may be concluded that the nature of evidence required for such purposes relates to the broad criterion of a reciprocal duty of support (as interpreted via the Satchwell and Du Toit cases).

4.4.3. The Extent of Evidence Needed

In evaluating the strength of evidence between the Satchwell and Du Toit cases, it must be noted that several factors were covered (refer below). Furthermore, this may then be considered as an indication of the extent of evidence needed to convince the law. In this regard, a reviewing of the emotional and (especially) the financial criteria is necessary, relative to several contextual factors. Of importance are the following three factors:

- duration of relationship as evidence of permanence;
- financial commitments that indicate beneficiaries other than one's unmarried spouse; and
- social (and related economic) status factors.

Regarding the issue of duration, consider how difficult it may be for SARS to recognise the validity of same-sex or heterosexual, unmarried individuals who have declared their emotional commitment to each other (be it via a commitment ceremony or not) and if theirs is a relatively new union (for example, *only* one year old or less). In the case of married individuals, the duration of the relationship is insignificant, as even spouses married for only a day are entitled to full taxation benefits, without prejudicial requirements of some form of proof as to their proposed life-long commitment.

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In the Satchwell and Du Toit cases, it conveniently transpired that both relationships were of 16 and 13 years duration, respectively. On the basis of duration alone, 'years together' is a well recognised, socially valued factor that may convince SARS of the permanence of a relationship. The problematic issue to be considered is: how long is long enough? What - in terms of years - may be judged as 'permanent'?

Matters may be further complicated if SARS must consider unmarried partners involved for a short period, for example, a two-month period. For married individuals, the issue is clear: they have a marriage certificate, and married persons do not have to prove permanence. However, how does *intention* to be permanently involved in an unmarried relationship become determined in the absence of a marriage certificate? One may hypothesise several ways in which intention of permanence may be determined, such as the Du Toit's commitment ceremony. However, in unmarried relationships this issue remains a problematic one for SARS to consider.

The second issue is related to financial commitments that indicate beneficiaries other than one's unmarried spouse. What SARS must be equipped to evaluate are those cases where, for whatever reason, individuals do not wish to financially tie partners into some significant aspect of their lives, for example, the purchasing of property.

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In fact, the first issue (re: duration of the relationship) is actually tied into this issue. This is because one may assume that people who are involved in 'long-term' relationships (such as in the Satchwell and Du Toit cases) may have reached a point in their emotional commitment where they decide/are ready to fuse their financial affairs. In this regard, people in long-term relationships are far more readily able to produce evidence of financial commitment, for example last wills and testaments.

Undoubtedly, it may be considered that such 'hard' evidence is more convincing in a court of law than applicants' declarations of emotional commitment. In this way, there may be problems with such a state of affairs. This may occur where greater credence is granted to the demonstration of financial commitment than emotional commitment when evaluating reciprocal duties of support.

Such expectations - or the call for evidence to prove financial commitment - may prejudice those unmarried spouses who are, for example, just beginning their relationship, and have yet to think about such aspects like last wills and testaments, insurance policies, and the like. Indeed, it may be questioned why unmarried spouses in alternative relationships should have to prove their emotional and financial commitment, when married spouses need not do so. The question being raised here is: are married spouses as financially tied into each other's lives as is (perhaps) expected of unmarried spouses?

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Whatever the case, it appears that unmarried heterosexual and same -sex spouses may have to prove too much union in order to gain taxation benefits that are afforded to married spouses. It is also important to consider that the couples in the two cases were in the strongest possible position to claim a conjugal relationship, but that their relationships should not provide the benchmark against which all others are judged.

A final point, regarding the extent of evidence needed has to do with the contextual factors related to issues of social (and related economic) status. What if De Vos (Du Toit's partner) and Satchwell were not judges? Does this socially significant, high status vocation have anything to do with both the evaluation of the validity of the spousal relationship, and of the manner in which their commitment is widely socially accepted - by friends/family? What of those with less sophisticated medical aids, and those without investments? Indeed, what of less-educated, less financially secure couples?

It must be remembered that those in lower social and economic classes may not have a range of financial commitments that could serve as possible evidence regarding reciprocal duty of support.

Further, people with low-economic jobs (usually without the same level of social significance as that afforded to such people as judges) may not be as comfortable with the level of exposure regarding their sexual orientation, and or marital status.

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This may be due to the *same* social prejudices and processes that concern people from *all* social/economic strata; but that which may have more of a penalising effect on poorer people, and/or those with less social status. Such a statement may be regarded as a stereotypical comment, but consider, for example, the limited power a low-income worker in a same-sex relationship may have in the workplace. Due to several social prejudices it may not be as easy as it is for people in higher status jobs to widely expose their sexual orientation due to, e.g., the fear of losing employment, and being victim to homophobia from upper management in work places.

In such cases, when there is limited evidence of financial commitment, and also limited evidence of emotional commitment from others such as family, friends, work peers (such as that which was available in the Satchwell and Du Toit cases) unmarried spouses from low social and economic classes may have that much more of a difficult time proving their reciprocal duty of support.

4.5. Concluding on Satchwell and Du Toit: Setting a Precedent?

Given the discussions above, and the factual data of both the Satchwell and Du Toit cases, is it possible to use the criteria and processes used in these cases for recognising unmarried spouses for taxation purposes?

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A simple answer to this would be 'yes'. However, a qualifier to this response is required. Such criteria and processes are problematic, and must be considered relative to various factors, such as the social and economic status of unmarried spouses in alternative relationships. However, be that as it may, as criteria one may evaluate those used within the Satchwell and Du Toit cases to be valid, strong criteria and processes. Therefore, SARS may well refer to such cases in its search to establish criteria and processes to recognise unmarried spouses in alternative relationships.

Furthermore, the fact that both these cases were judged in the Constitutional Court of South Africa means that they bear the weightiness of a Constitution that is one of the most respected, most democratic and equitable in the world. In this way, such criteria are easily referenced to human rights, and general equality issues.

However, it is important to stress the following points:

- The two couples clearly pass the test for the purposes of tax legislation.
- But they are extreme cases and should not be regarded as the definitive criterion, otherwise injustice may occur.
- Perhaps a minimum checklist could be devised by SARS for future cases of unmarried partners.
- It is important that SARS approaches each case not with a prescribed checklist, but rather that it judged each case on its merits.

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In conclusion the Satchwell and Du Toit cases provide SARS with both strong, and constitutionally valid criteria and processes for recognising unmarried spouses. In this way, these case exemplars have set a legal precedent that should be referred to when the issue of unmarried spouses is focussed within South African taxation acts.

Having stated the above, however, there is still a need to evaluate other types of criteria and processes. In order to do this, the researcher has reviewed other countries' engagement with similar taxation issues. This is presented in the next chapter.

5.

**CHAPTER FIVE:
INTERNATIONAL CASE EXEMPLARS REGARDING THE
RECOGNITION OF SPOUSES**

5.1. Introduction

In the interview conducted with the senior official (from the Durban regional office of SARS¹), an approach was suggested that may be adopted by SARS in the recognition process for spouses in an unmarried permanent relationship. The suggested approach would be to turn to an investigation of the international scene. This would be done in an effort to establish what procedures have been followed in similar tax and legal situations in other countries.

Therefore, the focus in this chapter is on an investigation of related international cases and applicable information that could be used in the South African context by SARS. In this regard the researcher has selected one main country to investigate in detail, that is Canada.

¹This is a reference to the interview conducted by the researcher, and reported in Chapter Three.

This literature analysis revealed that Canada had made some significant strides in an attempt to treat its citizenry equally. However, mention will also be made of other countries where situations have arisen that are of relevance to this study.

5.2. Reasons for selecting Canada as a Case Exemplar

Canada was chosen after an analysis of taxation literature from other similar democracies to South Africa. This served as an important reason for deciding on which country to select for a detailed analysis regarding this study.

Additionally, it was imperative to select a country where recorded information existed regarding the matters at hand in this study. Research revealed that Canada has a comparative wealth of information relating to the issue of benefits previously denied to individuals who were in alternative relationships. In particular, there is information about the sometimes, contentious issue of the recognition of spouses in unmarried, permanent relationships.

5.3. Spouses and Tax Laws in Canada

In recent years many of the federal and provincial laws in Canada have been amended to recognise same-sex partners' rights, obligations and benefits. Before these amendments were passed, same-sex partners were denied numerous benefits, including tax benefits, allowed only to married or unmarried, heterosexual partners.

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In June 2000, the Income Tax Act (Canada) was amended to reflect the fact that all common-law relationships, either heterosexual or same-sex should be treated equally under the tax laws. This was a very welcome improvement to the plight of people previously denied spousal tax benefits; and which benefits amounted to significant personal savings in many instances.

Under the new Canadian rules, same-sex common-law partners are to be treated the same as heterosexual common-law partners. In this regard, all tax legislation has been amended to extend the same treatment to all common-law partners.

Consequently, same-sex common-law partners are now eligible for the same tax benefits, and are subject to the same obligations as married couples and heterosexual common-law couples. The new rules were effective from 2001. Of importance, then, is the Canadian definition of common-law partners.

5.3.1. Definition of Common-law Partners in Canada

For tax purposes, same-sex common-law couples are now referred to as 'common-law partners', which is defined as:

- two persons, regardless of sex,
- who cohabit in a conjugal relationship and
- have done so for a continuous period of at least twelve (12) months.

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Same-sex partners who meet this definition, were required, as from the 2001 tax year, to declare themselves common-law partners (on page 1 of the Personal Income tax return) by ticking off the 'common-law partner' box. It should be noted that this new definition encompasses both heterosexual and same-sex common-law relationships.

It is also important to note that same-sex common-law partners who do not correctly declare their status, for example, to avoid losing benefits that are based on the combined net income of both partners, can be reassessed and asked to repay the benefits. This is currently true for legally married or heterosexual common-law couples who can be reassessed if they collect benefits they are not entitled to because they fail to correctly identify their status as married or common-law.

Such a situation would also be appropriate to the South African context, where it remains the responsibility of SARS to ensure that all taxpayers contribute to the coffers that amount which is their due. An example would be of an unmarried couple in a permanent relationship who, prior to their entering into such a relationship, owned separate homes. They would henceforth not be able to claim two separate residences for CGT purposes, but only one in line with the fact that they are now considered by SARS to be a spousal couple.

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The importance to same-sex partners to be accepted as being in a conjugal relationship cannot be over-emphasised. However, an important question that needs to be addressed is that of how the Canada Customs Revenue Agency (CCRA) will know if two same-sex partners are living in a 'conjugal relationship'. This is a problem since married persons have their status legally registered in a public document, the marriage certificate, whereas same-sex partners do not. The same issue will arise with common-law heterosexual couples whose status is not registered anywhere.

5.4. Criteria and Processes Used To Recognise Common-law Partners in Canada

The CCRA proceeds in exactly the same manner as they have done (in the past few years) with heterosexual common-law couples. They have a self-assessment system in which taxpayers are expected to tell the truth and in which persons who make false statements on their tax returns can be penalized.

Whether or not two persons (opposite-sex or same-sex) are living in a conjugal relationship is a question of *fact*. In determining whether two people are in a conjugal relationship, seven core issues are examined.

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These issues are summarised (adapted from 'AIM Funds'² (2002), a Canadian based company providing tax and estate information and advice) in Text Box 5.1, below:

Text Box 5.1: Canada Customs Revenue Agency's Criteria for Recognising Common-Law Partners.

1. Shelter
2. Sexual and personal behaviour
3. Services
4. Social
5. Societal
6. Support (economic)
7. Children

With reference to Text Box 5.1, each of these factors are investigated via a series of pertinent questions, detailed below:

- Shelter:

This aspect refers to the living, and sleeping arrangements of common-law partners. Questions in the regard are framed as follows:

Do the parties live under the same roof and what are the sleeping arrangements?

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- Sexual and personal behaviour:

This issue refers to sexual relations, and to fidelity. Specific questions asked are:
Do the parties have sexual relations and do they maintain an attitude of fidelity to each other?

- Services:

This factor focuses on domestic services. Questions include:
What is the conduct and habit of the parties in relation to domestic services such as preparing meals and performing household maintenance?

- Social:

This aspect refers to social activities, and investigates the following:
Do the parties participate together in social activities?

- Societal:

This issue refers to the community perspective of the common-law partners. Specific questions asked include:
How does the community view the parties, both individually and as a couple?

- Support (economic):

Specifically financial matters are of concern. Questions include:
What are the financial arrangements of the parties in terms of their relationship?

² Refer to AIM Funds webpage, . <http://www.aimfunds.ca>, retrieved on 09/10/02.

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- Children:

This factor concerns the common-law partners' perspective and behaviour regarding children. The following question is posed to common-law partners:

What is the attitude and conduct of the parties concerning any children?

These criteria may serve as useful factors for consideration by SARS who may wish to develop their services to unmarried spouses. In the next section, these criteria are reviewed relative to other pertinent developments in Canada.

5.5. Other Developments in Canada

A pervasive study of the literature on these matters reveals that with tax laws, family-law acts and other legislation in Canada becoming more inclusive, it is only a matter of time before same-sex partners have all the same rights and obligations as everyone else does. There is, however, still more work to be done; for example, estate legislation is behind the times. But with same-sex couples having been recognised by the government for tax and pension purposes, the evening out of the rest of the playing field should not be far behind (Vaz-Oxlade, 2001). There is also concern, from the CCRA perspective, that these changes are problematic in some circumstances.

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For example, there is concern that bringing gays and lesbians under the spousal umbrella could make the tax system harder to police because there is no way to confirm same-sex relationships in the absence of a marriage licence. The problem envisaged, that is that couples will only claim their status when it is financially beneficial, is a problem that also exists on a much larger scale for common-law couples of the opposite sex.

The potential for abuse could be reduced if the government adopts registered domestic partnerships. This would entail all couples in relationships of economic dependency, ranging from widowed siblings to even old army compatriots, simply having to sign up to be included in the benefits and obligations currently reserved for married and common-law couple (Tibbets, 1999).

An interesting feature is where a parent is involved in a common-law relationship. In the deliberations of whether individuals are involved in a permanent relationship, and bearing in mind the requirement of having to live together for a continuous period of at least one year (refer to the definition of common-law partner above), it is important to consider what the term 'parent' embraces. It should be noted that a 'parent' includes someone who has custody and control of a child where the child is wholly dependent on that person for support. If you move in with someone who has a child and you meet this definition, you will, therefore, be considered to be common-law partners as of that date, rather than after the first year of cohabitation (Coles, 2001).

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The discussions in this chapter, so far, have concentrated on the importance to people of being recognised as common-law partners in respect of the benefits that await them. But what are these benefits, and how important are they? This issue is discussed next.

5.6. The Importance of Being a Spouse

AIM Funds³ have noted that the addition of the term 'common-law partner' to the Canadian Income Tax Act has affected more than 150 different tax provisions. It is perhaps appropriate to briefly state and describe the most significant of these, in order to emphasise the substantial beneficial financial consequences to numerous taxpayers that the amended law has created. The most significant changes that impact common-law partners include the following:

- 5.6.1. Transfers of property to a common-law partner
- 5.6.2. Spousal Registered Retirement Saving Plans (RRSPs)
- 5.6.3. Estate planning
- 5.6.4. Testamentary Spousal Trusts
- 5.6.5. Alter-ego and Joint partner Trusts
- 5.6.6. Married or Common-law Partner Credit
- 5.6.7. Transfers of Credits
- 5.6.8. Charitable Donations

Each of these benefits shall now be discussed in detail:

³This Canadian based tax and estate information and advice service has been referred to above (see 5.4) [<http://www.aimfunds.ca>]

5.6.1. Transfers of property to a common-law partner

Transfers of capital property made to a spouse or common-law partner automatically 'roll over' at the adjusted cost base. This means that there is a whole new opportunity for same-sex partners to transfer property between themselves on a tax-deferred basis.

Before the change in rules came into force, any transfer of property from one same-sex partner to another was deemed to occur at fair market value, which could obviously have resulted in the realisation of a capital gain (or loss).

5.6.2. Spousal Registered Retirement Saving Plans (RRSPs)

Contributions made to a spousal RRSP are deductible by the contributing spouse or common-law partner within the applicable contribution limits. The funds, when they are withdrawn, will be taxed in the hands of the annuitant spouse or partner.

This allows a same-sex partner to take advantage of a significant income-splitting opportunity. These types of plan will generally make sense where one partner's income is significantly higher than the others are, and therefore the higher income partner can claim the deduction for the contribution on his or her return. The lower income partner may pay little or no tax on the ultimate withdrawal of the funds from the RRSP.

5.6.3. Estate planning

Generally, upon death, an individual is deemed to have disposed of all of his or her capital property at fair market value. The main exception to this rule is where property is left to a spouse or common-law partner. In this case the property may be transferred at its adjusted cost base.

This is probably one of the most significant benefits now available to same-sex partners. They are now able to leave their capital property to their surviving partner without incurring a capital gains tax liability upon death.

5.6.4. Testamentary Spousal Trusts

The ability to achieve post-mortem income splitting is now available to same-sex partners. A partner who is planning to leave money to his or her partner who is also earning income can take advantage of an extra set of graduated tax rates.

This may occur by the placing of an investment portfolio in a testamentary trust (in terms of his will) to accomplish post-mortem income splitting.

5.6.5. Alter-ego and Joint partner Trusts

In June 2001 legislation came into effect which allows individuals to establish a trust to help meet their various estate planning objectives while minimising the tax implications.

The plan involves transferring assets to an alter-ego trust or joint partner trust, primarily to avoid probate tax on the value of assets that pass to a surviving spouse or partner.

The joint partner trust is now available to same-sex partners. It allows for a tax-free transfer of assets to a joint partner trust. On the death of the last surviving partner, the assets in the trust will be deemed to be disposed of at fair market value, and tax will be payable at that time on capital gains realised because of the deemed disposition.

5.6.6. Married or Common-law Partner Credit

A married or common-law partner credit is available if an individual lives with and supports a spouse or common-law partner.

This credit is reduced based on the net income of the other partner.

5.6.7. Transfers of Credits

A same-sex partner can now transfer to another partner any part of the following credits: the age amount, pension income amount, disability amount, tuition and education amounts if he/she does not need the credits to reduce his/her federal income tax to zero.

5.6.8. Charitable Donations

One partner can claim charitable donations made by either partner. In this case the partner with the higher income will generally claim the donation and gift tax credit and achieve a greater level of tax savings than the partner with the lower net income.

As may be noted from the above section, there are many benefits which same-sex partners, recognised as 'common-law partners', may gain from the legal framing of their political (and taxable) persona.

In the next section, a brief review of pertinent, relevant tax laws and developments in other countries will be provided.

5.7. Other Countries: Lessons for South African Tax Laws

5.7.1 The United States of America

As noted by Ettelbrick (2000) the state of Vermont leapt ahead of other states by ushering in a change to the official rules of marriage and family structure as defined by state laws across the country. The Vermont legislature adopted a Civil Union Law, effective July 1, 2000, which allows same-sex couples to 'certify' their relationships with the county clerks' offices in Vermont.

Any couples so certified, will automatically then receive the exact same benefits, right and privileges, and will be beholden to the same responsibilities and burdens, as any heterosexual married couple. Thus from a legal perspective, marriage and civil union extend the same benefits.

In the same vein, a more recent development occurred in New York City. An amendment to the New York City's Domestic Partnership Law, effective from August 30, 2002, permits couples with a certificate of 'domestic partnership, civil union, or marriage' to receive the same benefits as those enjoyed by married heterosexual couples. In the United States, certificates of civil union for same-sex couples are issued only in Vermont, while California has set up a register of same-sex partnerships.

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- who have joint financial accounts and joint financial responsibilities,
- who would be married to each other if Oregon law permitted it,
- who have no other domestic partners, and
- who are 18 years of age or older."

The court, in *Tanner v OHSU*, did not address the constitutional rights of unmarried heterosexual domestic partners.

5.7.2 Belgium

Tax laws were amended in 1998 in Belgium so that a surviving partner in a same-sex relationship would pay lower inheritance taxes. To qualify such partners must have lived together for at least 3 years.

5.7.3 Other European Countries

A number of European countries including Denmark, Holland, Sweden, Norway, Finland, the Czech Republic, Germany, Greenland and Iceland have introduced registered partnership laws under which same-sex partners may register their relationships. In France, same-sex couples can register Civil Solidarity Pacts, which offer some of the tax, welfare and inheritance rights that married couples enjoy.

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The importance of this in the South African context, is that if such civil unions were adopted, then there would be a register that would testify to the permanency of such alternative relationships. This could be used just as a marriage certificate is used to allow unmarried couples to be eligible for benefits (and obligations) to the same extent as legally married couples.

5.8. Conclusion

The countries investigated all appear to be in a state of flux. The issue of recognising same-sex partners, and to a lesser extent heterosexual partners, as equal before the law, is a contentious issue. Progress in this regard is quicker in some countries than others. However, much can be learnt from the developments in the countries referred to in this chapter.

6.

CHAPTER SIX:

RECOMMENDATIONS, EVALUATION AND CONCLUSION

6.1. Introduction

In this chapter, a recommended way forward for SARS is provided, regarding the recognition of unmarried spouses in alternative relationships. In this regard, a set of possible criteria and processes are suggested for consideration.

Additionally, several implications for future policy, theoretical and research issues are provided. Furthermore, this chapter also consists of an evaluation of the study.

6.2. South Africa's Political Transformation relative to the Recognition of Spouses in Alternative Relationships

The South African Constitution is the main beacon of light as it provides the contextual space for transformation of taxation laws and the practice thereof.

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Fortunately for the South African taxpayer, this Constitution is widely regarded as one of the fairest and most liberal in the world. Taxpayers can thus confidently turn to the tenets contained in the Constitution as the ultimate resort for fundamental support in their struggle to ensure equity of treatment in the various tax Acts.

It is noteworthy too, that South Africans, generally, enjoy principle, moral and political support. This is true because most institutions realize the need to align their laws and practices with the tenets of the Constitution. Indeed, as noted in Chapter Four, the respondents in both the Satchwell and Du Toit cases did not oppose the application and conceded that the challenged provisions were discriminatory.

It is relevant to take cognizance of who the respondents in these cases were. In the Satchwell case they were:

- The President of the Republic of South Africa (the first respondent)
- The Minister of Justice and Constitutional Development (the second respondent)

In the Du Toit case they were:

- The Minister for Welfare and Population Development (the first respondent)
- The Minister of Justice and Constitutional Development (the second respondent)
- The Commissioner of Child Welfare, Pretoria (the third respondent)

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It is reasonable to assume that South African citizens will not face the same level of opposition as that encountered in hostile constitutional cases in other countries where marital status and sexual orientation are *not* specifically constitutionally enshrined - as is the case for several European countries, other African nations, in Asian, and most American states.

The Satchwell and Du Toit cases, both High Court cases that successfully proceeded to the Constitutional Court, have set precedents for constitutional changes. These cases have shown that it is possible to accomplish equality of treatment in tax in actual practice. Significantly, these cases chart the way forward in the endeavour to achieve parity in the tax Acts.

6.3. People and their Political Will: Relevant Resistance to Inequality

In spite of, both the rights enshrined in the South African Constitution and the various amendments to the tax Acts, much still needs to be challenged in the realm of taxation. This is true because, as shown in this study, in many instances amended provisions often do not state clearly - if at all - how they are to be effected practically. There are often no official or espoused criteria and processes to distinctly clarify the position in law, for example, whether a definition has been satisfied or not.

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It is perhaps appropriate to recall that South Africa has a history of resistance. In light of this history, it is likely that the political will, which destroyed apartheid, is also available as a resource to resist all other forms of discrimination.

In a focussed capitalist economy, and given the presence of political parties like the South African Communist Party, it is most likely that South Africa's neo-liberal policies of economic development, will help to promote resistance to discriminatory forms of taxation - amongst other things.

6.4. The Way Forward: A Suggested Process.

In this section, the researcher offers a simple, yet powerful way forward. The suggestion is as follows:

In considering the development of criteria and processes to recognise unmarried spouses for taxation purposes, it may be necessary to organise consensual, consultative processes. In a democratic political society, this is expected. An aspect of this process, perhaps initiated by SARS, may involve the meeting of several organisations who may decide on criteria and processes. Such a meeting will be premised on several existing legal realities, for example, that same-sex marriages are not possible.

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Therefore, it may be necessary for SARS to meet with representatives of civil society, such as gay and lesbian activist organisations like the Lesbian and Gay Equality Project, and legal aid bureaus. The speedy success of such a process requires the combined efforts of society at large.

This way forward is offered in the knowledge that South Africa is wonderfully poised for all forms of political transformations, as elucidated above vis-à-vis the constitutional and civil context of change.

Furthermore, a final copy of this research report will be provided to the Durban Regional office of SARS. This report does indeed contain an effective analysis, and may be used as a starting point from which to consider SARS's criteria and processes. However, the researcher believes that it is only out of a consultative process, that acceptable criteria and processes may be borne for consideration regarding the recognition of unmarried spouses in alternative relationships.

Finally, it needs to be borne in mind that there are many issues to be considered, for example, the sensitivity of the issue regarding peoples' sexual orientation. There exists a catch-22 situation for many people. Such people have the right to expect equal treatment in the law, but in having to disclose their sexual orientation in order to achieve this, they may face homophobic victimisation in their work environment. Therefore, the system may therefore need to be more sensitive to discretion, in context of several social realities related to the pernicious society we live in.

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In conclusion, it is believed that both civil society and the tax authorities should be responsible for satisfactorily resolving the issue at hand.

6.5. An Evaluation of the Study

This section reviews the limitations and strengths of the study.

6.5.1. Limitations of the Study

At the outset, it must be stated that this study was limited by temporal and practical constraints. In this regard, the following limitations are identified:

- A small sample (that is, restricted to Durban Regional SARS office) was used, and has limited the generalisation of data obtained in this study.
- The focus of this study was on the recognition of partners as spouses in unmarried relationships. This focus has excluded other couples in alternative relationships, such as those based on custom and religious tenets. The reason for this is that such couples do not have to satisfy the Commissioner as to the permanence of their relationship. Although peripheral to taxation issues in itself, it may have been beneficial to comparatively analyse how, for example, non-Christian marriages - such as Hindu and Muslim marriages are in themselves recognised by the law.

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- This study could definitely have benefited from the opinions of unmarried heterosexual couples, gay and lesbian activist organisation's, and their constituents' views.

6.5.2. Strengths of the Study

- The subject under study is extremely current. Therefore, it is a well-timed contribution to the transformation of practice in SARS; at a time when it is changing from a mainly administrative organisation to one that is assisting South African taxpayers in their move toward parity. In regard to its being topical, following is noteworthy: At the time of submission of this research report, that is, 16 October 2002, a lesbian couple has just made national news by challenging (in the Pretoria High Court) the unconstitutional prohibition of same-sex marriage (Daily Mail & Guardian, 16 October 2002).
- The qualitative methodological design used is a novel and appropriate one for this specific field of study. The researcher believes that its adoption as another method of research may add value by tax researchers in this specialist professional area.
- The comparative analysis - both to related cases in South African law, as well as relevant, international law - positions this study in the global arena and increases its utility value.

6.6. Suggestions for Future Research

It is suggested that future research in this area may be extended an investigation of SARS's practices at a national level. Furthermore, a more detailed analysis of international tax laws for comparative purposes may yield more useful, globally relevant data.

It is also recommended that a study of this nature engage several disciplines. For example, it is beneficial to garner the expert input of people from the legal fraternity, and even sociologists - given the social, and legal nature of the issue in this study.

6.7. Conclusion

It is comforting to people in unmarried relationships to know that certain tax laws have been amended to accommodate them as spouses, and that they are now eligible for tax benefits that go hand-in-hand with this recognition.

However, what remains to be seen is how SARS honours its declared vision, as reproduced below:

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To become an innovative revenue and customs agency that enhances economic growth and social development, and supports our integration into the global economy in a way that benefits all South Africans.

Source: SARS Charters (from http://www.sars.gov.za/ho/sars_charters/htm)

Furthermore, SARS must also consider how it intends to put into practice its constitutionally adopted values of 'equity and fairness' (see SARS Charters). In actively engaging these values, it is hoped that this study will contribute to assisting in documenting criteria and processes required in the recognition of spouses in terms of the tax Acts of South Africa.

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APPENDIX A: LETTER OF CONSENT

UNIVERSITY OF DURBAN-WESTVILLE SCHOOL OF ACCOUNTANCY

INFORMED CONSENT TO PARTICIPATE IN A RESEARCH STUDY

Thank you for agreeing to participate in my study. This study is performed in partial fulfillment of the requirements toward the completion of a Masters degree in Commerce (Tax). My study is focused on obtaining information regarding the South African Revenue Services' implementation of the Tax Act.

- 1. Title (working) of Study:**
A critical analysis of the South African Revenue Service's recognition of spousal relationships
- 2. Purpose of Study:**
To identify criteria and processes used to recognise 'spouse' in alternative relationships
- 3. Procedures:**
Qualitative research framework, using interview and document analysis procedures.
- 4. Risks:**
There are no anticipated risks for the participants in this study.
- 5. Benefits:**
Your contribution will help develop the provision of services to the tax-paying community.
- 6. Participant's rights:**
You have the right to withdraw from the study at any time.
- 7. Confidentiality:**
Information you provide will be used only for the purposes of the study. However, please inform me, should you wish that your input be treated as confidential and wholly or partially restricted.
- 8. Anonymity:**
Unless otherwise agreed, your identity (name and job designation) will remain strictly anonymous.

A copy of my final research report will be provided to you, for your information.

Your assistance is greatly appreciated.

I understand my rights as participant in this study, and I voluntarily consent to my participation.

Participant's Name : _____ Date: _____
Name and Signature

Researcher's Name : Harold H. Galt(Student number: 9509582)
Discipline of Taxation (School of Accountancy)
University of Durban-Westville

APPENDIX B: INTERVIEW SCHEDULE

**INTERVIEW SCHEDULE REGARDING TAX ACT
(SEMI-STRUCTURED INTERVIEW)**

Name of interviewee : _____
Designation : _____
Date of interview : _____
Place of interview : _____

CONTENT AREAS FOR REFERENCE IN INTERVIEW

1. Stated criteria/criterion regarding recognition of 'spouse' in unmarried, permanent alternative relationships.

- Description of criteria
- State rationale per criteria
- Persons involved in specifying criteria

2. Stated processes used/guidelines to implement when recognising 'spouse' in unmarried, permanent alternative relationships.

- Description of procedures engaged to satisfy criteria.
- Stated rationale per procedure.
- Person's responsible for recognising a spousal relationship.
Who is responsible for recognising a spousal relationship?
-specify entire chain of people (e.g., from initial point of contact to final recognition)
- How long does the recognition procedure (estimate) take?

3. Stated Benefits of being recognised as a spouse

Specific factors focused included:

- estate duty
- donations tax
- capital gains tax
- transfer duty tax
- other (as identified by participant)

4. Other Relevant Information (offered by the interviewee)

APPENDIX C: DOCUMENT ANALYSIS SCHEDULE

DOCUMENT ANALYSIS SCHEDULE (FOR SARS POLICY/RELATED DOCUMENTS)

Name of document	:	_____
Author/Source	:	_____
Date document written/published	:	_____
Status of document	:	_____
Location of document	:	_____

1. Stated criteria/criterion regarding recognition of 'spouse' in unmarried, permanent alternative relationships.

- Description of criteria
- State rationale per criteria
- Persons involved in specifying criteria

2. Stated processes used/guidelines to implement when recognising 'spouse' in unmarried, permanent alternative relationships.

- Description of procedures engaged to satisfy criteria.
- Stated rationale per procedure.
- Person's responsible for recognising a spousal relationship.
Who is responsible for recognising a spousal relationship?
-specify entire chain of people (e.g., from initial point of contact to final recognition)
- How long does the recognition procedure (estimate) take?

3. Stated Benefits of being recognised as a spouse

Specific factors focused included:

- estate duty
- donations tax
- capital gains tax
- transfer duty tax
- other (as identified by participant)

4. Other Relevant Information