T. D. 10/ 96

Decision rendered on September 13, 1996

CANADIAN HUMAN RIGHTS ACT R. S. C. 1985, c. H- 6 (as amended)

HUMAN RIGHTS TRIBUNAL

BETWEEN:

NIELS LAESSOE Complainant

- and

CANADIAN HUMAN RIGHTS COMMISSION Commission

- and

AIR CANADA Respondent

- and

AIRLINE DIVISION, CANADIAN UNION OF PUBLIC EMPLOYEES Interested Party

TRIBUNAL DECISION TRIBUNAL: S. Jane F. Armstrong - Chairperson
Oksana Kaluzny - Member
Julie Pitzel - Member

APPEARANCES: Lisa Kelly - CAW Canada, Counsel for the Complainant

Eddie Taylor - Counsel for the Canadian Human Rights Commission

Guy Delisle - Counsel for Air Canada

DATES AND LOCATION OF HEARING: March 25 to 29, 1996

Vancouver, British Columbia

DECISION

INTRODUCTION

This Tribunal was appointed on January 18th, 1996, pursuant to Section 49 of the Canadian Human Rights Act, R. S. C. 1985, Chapter H- 6 to inquire into the complaint filed under Sections 7 and 10 of the Canadian Human Rights Act by Niels Laessoe dated June 2nd, 1993.

HEARING

This matter was heard in Vancouver on March 25 to 29th, 1996. The parties present were the complainant, Niels Laessoe, the Canadian Human Rights Commission and the respondent, Air Canada.

The Airline Division of the Canadian Union of Public Employees was granted interested party status by this Tribunal, however, such party did not appear nor were they in attendance at any time during the hearing.

THE COMPLAINT

The complainant alleges that the respondent has engaged in a discriminatory practice on the grounds of family status, marital status and sexual orientation in a matter related to his employment.

The particulars of the complaint filed as Exhibit C- 2 read as follows: "Air Canada discriminates against me on the grounds of family status, marital status and sexual orientation, by pursuing a policy which limits spousal benefit coverage to heterosexual married and common law couples, contrary to Sections 7 and 10 of the Canadian Human Rights Act.

I commenced employment with Air Canada as a Customer Sales and Service Agent in April 1987. I have resided in a common law relationship with a partner of the same sex since July 1, 1988. On April 17, 1991, I filed the required affidavit to request that my common law spouse be

registered for spousal and other applicable benefit coverage. On April 22, 1991, I was advised by the Manager of Personnel Services, Air Canada, that under their current policy, a common law spouse is defined as a person of the opposite sex, and therefore my partner was not eligible for benefit coverage.

On February 24, 1993, I again inquired as to the status of the company policy concerning common law spouses. I was advised on March 19, 1993, that the policy had not changed."

AGREED STATEMENT OF FACTS

The complainant, Niels Laessoe, the Canadian Human Rights Commission and the respondent, Air Canada agreed to a statement of facts which was filed as Tab 1, Exhibit HR- 1.

The Agreed Statement of Facts is as follows: "Niels Laessoe began his employment with Air Canada in Vancouver, B. C. on April 1, 1987 as a customer sales and service agent. During the course of his employment, Mr. Laessoe became a member of CAW and Local 2213, the bargaining agent. At all material times Mr. Laessoe was covered by the collective agreements between Air Canada and the union. The collective agreements provide for certain benefits for employees. Among these are group life insurance, group life insurance disability income plan, supplementary health insurance, dental insurance, vision care and pension. Available to all employees, but not contained in the collective agreement, are other benefits such as Voluntary Accidental Death, Dismemberment and Loss of Use Insurance, Supplementary Life Insurance and certain travel privileges.

On or about July 1, 1988 Mr. Laessoe entered into a common law relationship with Ronald Sowden. On April 17, 1991 Mr. Laessoe filed an affidavit application with Air Canada requesting that his same sex partner be registered as his common law spouse for the purpose of obtaining employment benefits. On April 22, 1991, Mr. Laessoe was informed by Air Canada's Manager of Personnel Services that such a registration was unacceptable under the company's Policy. The Air Canada policy limited common law spousal benefits to persons of the opposite sex. On February 24, 1993 Mr. Laessoe made further inquiries about the company's policy. On March 19, 1993 he was informed that the policy had not changed.

On June 2, 1993 Mr. Laessoe filed a complaint with the Canadian Human Rights Commission alleging that the respondent provides employment benefits to heterosexual married and common law couples but refused to provide similar benefits to same sex common law couples.

On October 20, 1995 Air Canada announced that it was going to extend benefits, excluding pensions, to Canadian- based employees with same sex spouses effective January 1, 1996. Air Canada further announced that since current tax legislation does not allow the inclusion of same sex partners in registered pension plans, the company will only be able to extend that particular benefit once Canadian fiscal laws have been modified.

The company gave notice of the extension to its employees by way of the CIC* INFO on October 20, 1995.

On December 21, 1995 Air Canada published an internal circular waiving the requirement for employees with an existing claim for benefits. The company gave notice of the waiver to its employees by way of CIC* INFO on December 21, 1995."

EVIDENCE PRESENTED BY AIR CANADA

In addition to the Agreed Statement of Facts the Tribunal finds the following facts:

1. Air Canada is a federally regulated corporation which was privatized in 1989.

2. Air Canada lost a billion dollars during the period 1990 to 1993 and had not been paying taxes for a number of years due to a lack of profit.

3. Air Canada has an employee population of approximately 20,000. 4. Air Canada published a Corporate Human Rights Policy and Employee Appeal Procedure in January of 1986. Such policy states inter alia:

"It is the policy of Air Canada to serve the public and treat its employees in a non-discriminatory, fair and equitable manner, within the spirit and intent of applicable human rights and social legislation."

The policy goes on to say that the corporation will: "Ensure that all employees are treated fairly and equitably in an environment free of all forms of proscribed discrimination." (Exhibit R- 1, page 5)

5. Air Canada informed its employees respecting its policy of nondiscrimination and non-harassment through the distribution of a number of pamphlets. The pamphlet distributed during the first five years, after 1986, sets out a definition of harassment as follows:

"It is any conduct, comment or gesture, whether overt or subtle, that is likely to be offensive to an individual, and can be related to any of the grounds of discrimination prohibited by law:

- Race - National or Ethnic Origin - Colour - Religion - Age - Sex - Marital Status - Family Status - Pardoned Conviction

- Disability." (Exhibit R- 2, Tab 1) 6 >6. A subsequent document relating to harassment was distributed by the Company to its employees in October 1995. Such document provides a definition of harassment as follows:

"Harassment is any conduct, comment or gesture, either overt or subtle, that is likely to offend an individual. Harassment is often related to one of the 10 grounds of discrimination prohibited by Canadian law:

1. Race 2. Religion 3. Sex 4. National or ethnic origin 5. Marital status 6. Family status 7. Colour 8. Age 9. Disability 10. Pardoned conviction." (Exhibit R- 2, Tab 2)

7. The document further provides: "Air Canada's policy also prohibits personal harassment which may or may not be based on any of the grounds mentioned above."

and lists as an example, "you are being harassed if someone... makes a derogatory reference to your sexual orientation." (Exhibit R- 2, Tab 2)

8. Air Canada educated its Managers in the investigation of complaints of harassment. The Company has in its employ a Manager of Human Rights and Equity Programs who, as part of her responsibilities, meets with management and administrative support people to provide them with instruction on the corporate harassment policy and the investigation of harassment complaints.

9. In addition to documentation dealing solely with human rights and harassment, the booklet distributed to employees containing a description of their employee benefits further contained a chapter on harassment. This document was made available to all employees in Air Canada at the end of 1995.

10. The respondent is party to a Collective Agreement with the National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW). The most recent version of such Collective Agreement was entered as Exhibit C- 4. Section 19.01.01 of the Collective Agreement provides in part as follows:

"No employee will be unlawfully interfered with, restrained, coerced or discriminated against by the Company or the Union, their officers or agents on the grounds of race, national or ethnic origin, colour, religion, age, sex, marital status, sexual orientation or political affiliation ..."

EVIDENCE PRESENTED BY THE CANADIAN HUMAN RIGHTS COMMISSION AND THE COMPLAINANT, NIELS LAESSOE

Mr. Laessoe testified that he had been separated from his common- law spouse, Mr. Ronald Sowden, for at least one year prior to the hearing. In addition, Mr. Laessoe described the effect upon him of the failure by Air Canada to grant benefits to his same sex spouse.

The Tribunal heard evidence from Mr. Gerry Spencer, National Representative of the CAW. Mr. Spencer outlined, inter alia the course of the negotiations between Air Canada and the CAW in particular with respect to sexual orientation. Article 19.01.01 was first included in the Collective Agreement in 1988.

Starting in 1990 the Union put on the table a request that benefits for same sex spouses be included in the Collective Agreement. During the course of negotiations in 1992 and 1993, the Union again requested the inclusion of same sex spousal benefits in the Collective Agreement.

Mr. Spencer testified that when Article 19.01.01 was included in the Collective Agreement in 1988 it was the commitment of the Union, at that time, that such section would not be used to establish rights that were not supportable by law at a particular point in time.

In 1992, despite the above, the CAW put Air Canada on notice that they were of the view that the law had changed and that should the Company not accept the extension of spousal benefits to cover same sex spouses that they would deal with the matter in a three step process.

1. Attempt to bargain the inclusion of such benefits in the Collective Agreement

2. File a grievance under Article 19.01.01 3. Support a Human Rights complaint. In 1993 again the Union sought to include same sex spousal benefits in the course of its bargaining. The Company did not agree with the position of the Union.

Mr. Spencer stated that, during the course of negotiation if the Union is unable to convince the Company on a particular issue, then their option is to take it to a point of impasse and a possible strike, or to withdraw the proposal from the bargaining agenda, but tell the Company that if the Union is unable to get the concession through bargaining that they will get it some other way. As set out above, this was the position that the Union put to the Company in 1992.

In the proposals for amendment to the collective agreement in 1992 and in 1993 the Union sought:

"Benefits to be extended [to same sex spouses] everywhere that legislation doesn't restrict (i. e. pensions)." (Exhibit C- 1, Tab 8)

In her testimony Ms. Jo- Ann Hannah, National Representative of the CAW, Pensions and Benefits Department stated that it is the pattern of the CAW to pick a target for the purposes of achieving certain benefits and then the Union is in the position to put such benefits in place with other employers. Ms. Hannah further stated that the Union's energy may have been focused on Air Canada.

The witnesses for the complainant and the Commission outlined a number of companies in Canada who had extended health care benefits to same sex spouses and a few companies who had extended pension benefits to same sex spouses.

Of those companies named, who had extended pension benefits to same sex spouses, two of them, 3- M and Northern Telecom, were provincial companies incorporated under the jurisdiction of the Province of Ontario, which has had, as a part of its Human Rights Code, sexual orientation as a prohibited ground of discrimination for a number of years.

Ms. Hannah, in her evidence also pointed out that these two companies have each been quite profitable and each have considerably fewer employees than Air Canada, 4500 in the case of Northern Telecom and 350 in the case of 3- M. However, neither of those companies have yet to fully implement same sex pension benefits and are still working out the administrative details, despite the fact that the companies agreed to extend such benefits in 1994, in the case of Northern Telecom and 1995, in the case of 3- M. We further heard that to date neither of such companies has experienced a claim for pension benefits as no employees eligible under the plan, to extend same sex benefits, have died.

In his evidence, Mr. John Christie, the actuary called by the Commission further outlined a number of entities who had extended survivor pension benefits to same sex partners. Those entities were Bank of Montreal, Bell Canada, BC Hydro, Northern Telecom and the Ontario Government.

Mr. Christie acknowledged that it was general knowledge that the Bank of Montreal has been in record- breaking profit mode for the last several years. We heard evidence that Bell Canada was the subject of an arbitration hearing dealing with pension benefits prior to implementing same and BC Hydro and the Ontario Government are government organizations.

We heard evidence that Canadian Airlines agreed to provide same sex benefits excluding pensions commencing July 1st, 1996. The memorandum of settlement agreement Number 3 between Canadian Airlines and National Automobile Aerospace and Transportation and General Workers Union of Canada (CAW- Canada) and its Local 1990 was entered as Exhibit C- 5. In reviewing Exhibit C- 5 it is clear that the Union was required to grant certain concessions in exchange for the extension of health care benefits to same sex spouses. In particular, C- 5 sets out that:

"The issue of same sex benefits is a Corporate policy issue and as such it was agreed that for those unions that have ratified the 17.1% cost reduction program the Company would amend the policies as required recognizing that eligibility requirements will be established by the Company, in consultation with the Union. This program would be implemented no later than July 1, 1996. It is understood that the pension plan will be a benefit excluded from the amendments. It is also understood that any cost increases resulting from the modification to the benefit plans for same sex spouses would be absorbed by the Unions in the form of annual productivity improvements or some other method mutually agreed to between the Company and the Union."

Ms. Hannah in her testimony stated that the announcement by Air Canada of the extension of their health care benefits to cover same sex spouses certainly moved things in terms of negotiations between Canadian Airlines and the CAW to bring about this agreement.

At the time of the hearing not all unions had ratified the Canadian Airlines letter agreement.

ISSUES

The issues before us are:

1. Whether the failure by the respondent to extend benefits excluding pensions to the same sex spouses of its employees until October 20th, 1995, was a discriminatory practice contrary to the provisions of the Canadian Human Rights Act;

2. Whether the failure by the respondent to extend survivor pension benefits to same sex spouses is a discriminatory practice contrary to the provisions of the Canadian Human Rights Act;

3. Should the respondent be found to have committed a discriminatory practice is the complainant entitled to damages?

EVIDENCE PRESENTED BY RESPONDENT REGARDING AIR CANADA PENSION PLAN

Under the Air Canada pension plan death benefits are payable in the event of the death of the employee. Such death benefits vary depending upon whether the employee's death occurs before, or after, retirement.

A) DEATH BEFORE RETIREMENT

If the employee dies without a spouse the employee's contributions with interest will be refunded to his or her estate regardless of his or her age or years of service.

If the employee dies leaving a spouse the benefits payable will depend upon the employee's years of service and how close the employee was to pensionable age. If the employee has completed less than two years of continuous service the employee's contributions with accrued interest will be refunded to the eligible spouse. If the employee has completed at least two years of continuous service, benefits will be determined as follows:

a) Death occurring before fifteen years of qualifying service: For service before 1987 The surviving spouse will receive a refund of the employee's contributions with accrued interest

For service since 1987 If the employee's death occurs more than ten years before his or her pensionable age, the employee's surviving spouse will be entitled to receive the actuarial equivalent of the benefit to which the employee would have been entitled if the employee had terminated employment the day before he or she died.

If the employee's death occurs within ten years of the employee's pensionable age, the surviving spouse of the employee will be entitled to receive a monthly pension equal to sixty percent of the pension that the employee would have been entitled to receive if the employee had terminated employment the day before he or she died.

b) Death occurring after at least fifteen years of qualifying service For service before 1987 The employee's surviving spouse will receive a survivor pension equal to fifty percent of the employee's accumulated pension. The employee's surviving spouse may elect to transfer the value of this pension to a locked in vehicle if the employee dies more than ten years before the employee's pensionable age.

For service since 1987 If the employee's death occurs more than ten years before the employee's pensionable age, the employee's spouse will receive a survivor pension equal to fifty percent of the employee's accumulated pension or, if greater, a pension provided with the actuarial equivalent of the employee's benefits, as if the employee had terminated employment or retired just before the employee's death. The employee's spouse may transfer the value of this pension to a locked in vehicle.

If the employee's death is within ten years of pensionable age the employee's spouse will receive a survivor pension equal to fifty percent of the employee's accumulated pension or, if greater,

sixty percent of the pension the employee would have received if the employee had retired or terminated employment just before the employee's death, and applied for a reduced immediate pension.

B) DEATH AFTER RETIREMENT

If the employee has a spouse upon retirement, his or her pension is reduced so that, after the employee's death, the spouse will receive a lifetime monthly pension equal to sixty percent of the employee's monthly pension. The sixty percent joint and last survivor form of pension is mandatory, unless the spouse waives his or her entitlement.

In the event that the eligible spouse waives the payment of the sixty percent joint and survivor pension prior to the retirement of the employee the eligible spouse will receive a lifetime monthly pension equal to fifty percent of the employee's pension after the employee's death.

If the employee does not have a spouse upon his or her death any difference between the employee's contribution plus accrued interest up to his or her retirement date and the cumulative pension payments made from the Air Canada pension plan until his or her death will be paid to his or her Estate.

C) DEFINITION OF SPOUSE OR ELIGIBLE SPOUSE

The definition of eligible spouse or spouse under the Air Canada pension plan is:

"the person of the opposite sex who has been living with the employee in a conjugal relationship for at least one year or, if there is no such person, the legally married spouse of the employee."

STATUTES GOVERNING AIR CANADA PENSION PLAN AND THEIR IMPLICATIONS TO THE EXTENSION OF BENEFITS TO SAME SEX SPOUSES

Pension plans of federally regulated companies are governed by the federal Pension Benefits Standards Act, 1985. Pension plans are further governed by the Income Tax Act, Canada.

Under the Pension Benefits Standards Act, 1985, spouse is defined as follows:

"spouse", in relation to a member or former member, means, except in section 25,

(a) if there is no person described in paragraph (b), a person who is married to the member or former member or who is a party to a void marriage with the member, or former member, or

(b) a person of the opposite sex who is cohabiting with the member or former member in a conjugal relationship at the relevant time, having so cohabited with the member or former member for at least one year." (Exhibit R- 3, page 4)

The definition of spouse under the Income Tax Act for the purpose of pension plans is as follows: "A person of the opposite sex with whom a plan member is married or has been living in a conjugal relationship for at least twelve months. (Section 252(4))". (Exhibit R- 3, page 4)

Given the definition of spouse an employee of Air Canada with a same sex spouse would not be considered as having a spouse for the purposes of the pension plan and accordingly would be treated as single for the purposes of paying any survivor benefits.

ANALYSIS OF THE EVIDENCE REGARDING THE AIR CANADA PENSION PLAN

We heard from actuaries retained by the Commission and the respondent, Mr. John M. Christie and Mr. Louis Georges Simard respectively, as to the implications brought about by the existing provisions of the Pension Benefits Standards Act and the Income Tax Act to the extension of pension benefits to same sex spouses.

An analysis of the law applicable to registered pension plans makes it clear that in order to qualify as a tax sheltered registered pension plan under the Income Tax Act, a pension plan cannot contain a definition of spouse which differs from that provided under such Act.

The Pension Benefits Standards Act sets up a minimum scheme or requirement for pension plans. However, by reason of the definition of spouse contained in such Act, certain rights or privileges respecting pension benefits could not be extended to same sex partners until such time as such legislation was changed.

The Pension Benefits Standards Act and the Income Tax Act provide for certain legislative characteristics of pension benefits.

The provisions of the Income Tax Act allow the transfer of lump sum amounts payable to the surviving spouse into an RRSP or a locked in RRSP on a tax free basis. Lump sum pension payments made to a same sex surviving spouse may not be transferred to an RRSP on a tax free basis.

The provisions of the Pension Benefits Standards Act and in particular Section 26(1) require that lump sum amounts, payable to a surviving spouse in certain circumstances, be transferrable to an RRSP on a locked in basis i. e. the transferred amount would not be cashed and must be paid in the form of a life annuity or life income fund. This does not apply to pension payments made to a same sex surviving spouse.

The Pension Benefits Standards Act in particular Sections 18 and 31 provide that benefits payable to a surviving spouse are inalienable and are exempt from seizure or execution. This does not apply to pension benefits payable to same sex surviving spouses.

The Pension Benefits Standards Act further provides that if the member is survived by a spouse, as defined under the Pension Benefits Standards Act, payment of a survivor’s benefit to such spouse is mandatory. This does not apply to pension benefits payable to same sex surviving spouses. If a member of a pension plan has a spouse at the time of his or her retirement the

pension benefit payable to such member will be reduced by the amount necessary to pay a sixty percent joint and last survivor pension to such member's surviving spouse. The payment of a sixty percent joint and last survivor pension benefit, to a surviving spouse, is mandatory as is the reduction in the employee's pension benefits to fund same unless the spouse waives such requirement.

By reason of the provisions of the Pension Benefits Standards Act should an employee have both a common- law spouse and a legally married spouse the common- law spouse would take priority over the legally married spouse with respect to the receipt of survivor benefit payments.

In the event that the employee was at the time of his death in a same sex relationship but also left a legally married spouse from whom he or she had not been divorced the legally married spouse would take priority to any survivor benefits payable under the employee's pension plan by reason of the provisions of the Pension Benefits Standards Act.

As the provisions of the Pension Benefits Standards Act and the Income Tax Act do not extend to pension benefits payable to same sex partners an employee who wishes to benefit the same sex partner would have to designate such same sex partner as a beneficiary of his pension contributions under his or her Will.

Even if the employee named his or her same sex partner as a beneficiary of his or her pension benefits under his or her Will, should such employee leave a legally married spouse the intentions of the employee would be defeated by the priority provisions of the Pension Benefits Standards Act. In the alternative, should the employee fail to designate his or her partner as a beneficiary the same sex partner would not be entitled to benefits.

To alleviate this concern, it was suggested, at the hearing, that the employee could be required to contract to designate his or her same sex partner as a beneficiary under his or her Will. It would appear, however, that if the employee still failed to so designate the same sex partner as a beneficiary under his or her Will, that the Company could be open to a claim both for payment of the pension benefits to the beneficiaries of the deceased employee's estate and as a party to any lawsuit launched by the same sex spouse to enforce the contract whereby the employee agreed to name such spouse as his or her beneficiary.

Where the Pension Benefits Standards Act would give priority to a commonlaw spouse residing with the employee at the time of his death even though the employee might also leave a legally married spouse at the time of his or her death, the same priority would not be granted to a same sex spouse.

The mandatory sixty percent joint and last survivor form of pension required to be paid to the spouse unless such spouse waives his or her entitlement under the provisions of the Pension Benefits Standards Act would not be extended to a same sex spouse. In drafting the alternative scheme the same mandatory requirement will not be present. Accordingly, same sex spouses of employees will not have the same type of benefit as opposite sex spouses of employees.

The discrepancy and in fact inequality between the benefits afforded to opposite sex spouses and same sex spouses by reason of the current legislative scheme is apparent in a number of circumstances and cannot be alleviated entirely in the drafting of the alternative scheme.

ANALYSIS OF THE ALTERNATIVE SCHEMES PROPOSED TO PROVIDE SAME SEX PENSION BENEFITS

In order to extend same sex pension benefits to same sex spouses of employees Air Canada would be required to set up an alternative scheme outside of its registered pension plan so as not to affect the tax sheltered status of its registered pension plan.

Both actuaries set out various options open to the employer to set up an alternative scheme for the purposes of paying same sex pension benefits.

Pay As You Go The first proposal is what is known as a pay as you go plan. The pay as you go plan essentially provides that the Company will pay same sex survivor benefits as and when such payments become due out of the employer's general revenues. No separate plan is set up. No contributions are set aside. The Company simply agrees to pay such benefits at the time they become payable.

The difficulty with such plan is that no monies are held in trust. No monies are set aside and protected to ensure that such pension benefits are payable. We heard testimony both from Ms. Hannah and from Mr. Christie that those companies who have agreed to pay same sex survivor pension benefits to date have agreed to do so on a pay as you go plan.

As Mr. Christie stated in his report other large employers who have extended survivor pension benefits to same sex spouses:

"... have not addressed the issue of providing benefit security for these benefits because they hope that the alternate arrangements are only a temporary stop gap until the legislation is changed." (Paragraph 6.2, HR- 4)

With respect to the Ontario Government Mr. Christie points out: "... They have developed administrative procedures to deal with the various differences which arise although, of course, the tax differences cannot be altered. They have not dealt with benefit security which is of much lesser concern because a government is much less likely to be unable to fulfill its financial promises than a private employer." (Paragraph 6.3, HR- 4)

As there is no security in place to ensure that pension benefits are paid when required, the pay as you go plan results in considerable risk particularly to employees of companies with poor financial performance.

Pay As You Go With Letter of Credit In order to ensure that security is available for the payment of benefits under a pay as you go plan, Mr. Christie suggested a letter of credit be obtained by the corporation essentially as insurance for the payment of the same sex survivor benefits should the company be unable to pay same.

The manner in which a letter of credit is maintained and the income tax provisions applicable to same are fairly complex. In fact, according to Mr. Christie they are more complex than the registered compensation arrangement considered by Mr. Simard.

In order to maintain a letter of credit the corporation, through arrangements with its bank, pays a yearly premium, the amount of which will be determined by the corporation's bank based in large part upon the corporation's credit worthiness.

The letter of credit is maintained in a registered compensation arrangement, a creature of the Income Tax Act. By reason of the income tax rules relating to registered compensation arrangements (RCAs) an amount equal to the yearly premium must be paid to Revenue Canada as refundable tax. Accordingly, whatever the premium payable to the bank, the corporation must contribute a sum equal to the premium to Revenue Canada for the purposes of maintaining the letter of credit.

Registered Compensation Arrangement The third and final alternative is to set up a registered compensation arrangement. By reason of the income tax provisions relating to such an arrangement an amount equivalent to each contribution made by the corporation to such plan would be required to be paid to Revenue Canada as a refundable tax. This would severely affect the ability of the Plan to grow and contribute significantly to the employer's costs of providing same sex benefits.

Both actuaries and Ms. Hannah rejected the registered compensation arrangement as a viable scheme to provide for same sex survivor pension benefits.

The Commission's actuary recommended the pay as you go with letter of credit plan as a viable option to provide same sex survivor benefits in the Air Canada pension plan, should any concern be raised as to the corporation's financial viability and its ability to pay pension benefits when due.

ANALYSIS OF EVIDENCE RE ALTERNATIVE SCHEMES

Should the respondent be required to create an alternative scheme for the purposes of extending same sex benefits to its employees, would Air Canada not be in the position of providing unequal benefits to its employees with same sex spouses and be left open to further claims by reason of this inequality?

The actuaries called by each of the respondent and the Commission agreed that the current provisions, of the Income Tax Act and the Pension Benefits Standards Act, prevent a survivor pension benefit from being provided to a same sex partner from a registered pension plan. The actuary, called by the Commission, further stated that the effect of the current legislation will be to prevent the same sex partner from receiving an identical benefit to that received by an opposite sex partner. The identical benefit will be received by the same sex partner only after legislation is changed.

Mr. Christie, further concurred with the difficulties of dealing with conflicting claims pointed out by Mr. Simard, and agreed that where the Pension Benefits Standards Act establishes a priority, the employer must recognize such priority. (Exhibit HR- 4, Paragraph 3.2)

In paragraph 3.4 of his report, entered as Exhibit HR- 4, Mr. Christie states:

"The PBSA [Pension Benefits Standards Act] requires a mandatory spouse benefit where an opposite sex partner exists on social policy grounds. Social policy has not yet developed to require the same mandatory benefit for same sex partners. The employer has no reason to require this benefit to be mandatory for same sex partners. It can be made available for those employees who choose to take advantage of it. An employee in a same sex partnership who wishes to designate another beneficiary may still do so."

What Mr. Christie is suggesting appears, to us, to maintain an inequality between the benefits available to opposite sex spouses and those available to same sex spouses thereby creating the potential for further claims of discrimination against the Company. For instance, employees with same sex spouses will have the option of naming their same sex partners as beneficiaries of their pension while employees with opposite sex spouses will be granted no such option but will continue with the mandatory scheme.

With respect to the sixty percent joint and survivor pension, which requires a reduced pension benefit to be payable to the employee, in order to fund the increased payment to the surviving spouse, Mr. Christie suggests that the registered pension plan may have to continue to pay a single life pension to the employee i. e. a pension that has not been reduced, but that the alternative arrangement would have to be structured in such a way to require the employee to pay part of his pension to the alternative arrangement in order to provide for the sixty percent survivor pension to be paid to the same sex partner after the pensioner's death. (Exhibit HR- 4, Paragraph 3.8)

Under Section 18(1) of the Pension Benefits Standards Act however, an employee's benefit under the pension plan is not capable of being assigned, charged, anticipated or given as security and accordingly the alternative scheme would be unable to compel the pensioner to pay a portion of his pension to the alternative scheme in order to fund the sixty percent joint and survivor pension payment.

If one were to grant the member the option of reducing their pension in order to provide a sixty percent survivor pension to their same sex partners, we are again creating an inequality in that the opposite sex spouse of an employee will be entitled to a mandatory sixty percent survivor's pension while the same sex spouse of an employee will have an optional sixty percent survivor's pension determined at the option of the employee.

It would appear then, from the above, that it would be quite difficult to ensure that an equivalent sixty percent joint and survivor pension would be available to the same sex partner.

Similarly, as a further example, as the employee with the same sex partner will be granted the option of naming the same sex partner or another individual as the beneficiary of his or her

benefits, it would be open to the same sex partner of an employee, who has not been named as a beneficiary of the employee's pension benefits, to claim against Air Canada discrimination on the basis of sexual orientation, in that the pension plan maintained by Air Canada renders the naming of a same sex partner as a beneficiary of pension benefits as optional whereas an opposite sex commonlaw spouse or married spouse will be entitled to a mandatory pension payment.

In his report, Mr. Christie points out that the tax treatment of benefits from an alternate arrangement will be different than those of benefits from a registered pension plan. He states in paragraphs 4.2 and 4.3:

"In my opinion, the employer should provide an equivalent benefit from the alternate plan without trying to adjust for the different tax treatment of the recipient. The fact that a same sex partner will receive a different after tax benefit is due to the ITA [Income Tax Act] provisions over which the employer has no control."

"... The differences in after tax amounts received by a same sex partner compared with an opposite sex partner would then be solely attributable to the differences in the ITA [Income Tax Act]."

(Exhibit HR- 4, paragraphs 4.2 and 4.3) This clearly underlines the difficulties facing the respondent if required to provide survivor pension benefits to same sex partners. The current legislative scheme will tax these amounts differently.

In testimony Mr. Christie indicated that the alternative scheme provided by the employer could be structured to compensate for the differences in tax treatment between same sex and opposite sex pension benefits in order that the outcome to the same sex partner would be the same as that paid to the opposite sex partner. (Transcript, Vol. 4, p. 482)

Mr. Christie further stated: 'The employer to eliminate what in my view is discrimination should provide an equivalent benefit. Now, if that equivalent benefit is taxed differently because of the Income Tax Act, that is a problem with the Income Tax Act.

Now, some of the discussion this morning has been to the effect that the human rights legislation is structured to provide an equivalent outcome, that is the after- tax benefit has to be the same for both situations. If that is the case, and that I think is a legal question, but if that is the case, then the employer would have to provide an equivalent benefit, an equivalent aftertax benefit, and therefore would have to pay the additional cost, if any, of the less favourable tax treatment." (Transcript, Vol. 4, p. 547- 548)

In his report and in testimony, Mr. Christie, played down considerably the complications and unequal treatment that would continue to affect benefits extended to same sex spouses pending a change in the law.

As noted above, the report of Mr. Christie sets out that it was the responsibility of the employer to provide, to the same sex partner, a benefit equivalent to that provided to the opposite sex

partner. He expressed the view that should such benefits receive different tax treatment then that was not the concern of the employer but in fact is due to the provisions of the Income Tax Act.

By contrast, during his testimony Mr. Christie stated that should an equivalent outcome be required, then the employer would have to pay what additional costs might be due, to render the after- tax benefit to a same sex spouse equal to that of an opposite sex spouse.

In our view, Mr. Christie's testimony reflects a significant departure from the comments made in his report as to the responsibility of the employer respecting the tax treatment of pension benefits paid to same sex spouses. It would appear that the conclusions of his report would, in part, have been premised upon his view that the employer need not take into account the effect of the Income Tax Act when extending the payment of survivor pension benefits to same sex spouses. In our view, Mr. Christie's report must be considered in that light.

In the report submitted by him, Mr. Christie acknowledges the various discrepancies between same sex and opposite sex spouses which will be perpetuated by the current legislative scheme. Notwithstanding these differences it is Mr. Christie's position that the employer should proceed to provide what, in our view, will be an unequal benefit.

Therefore, insofar as to the administrative complexity of administering the alternative scheme or as to the cost of setting up an alternative scheme we prefer the evidence of Mr. Simard to that of Mr. Christie.

EVIDENCE OF THE COST OF EXTENDING SAME SEX BENEFITS AND ANALYSIS THEREOF

Mr. Christie and Mr. Simard disagreed with respect to the cost of providing same sex survivor benefits through the pay as you go with letter of credit scheme. Mr. Simard questioned the after tax discount rate used by Mr. Christie in order to determine the present value of the company's contributions.

Mr. Christie uses eight percent (8%) and in his report, he states: "The correct rate of discount to use in this calculation is the employer's after tax return on capital, which could be higher or lower than the rate earned in the pension plan. A higher rate of discount will produce a lower present value and vice versa." (Paragraph 5.4, HR- 4)

Mr. Simard suggests five percent (5%), which is the respondent's net after tax borrowing cost, as a more appropriate rate.

If one uses the net after tax borrowing cost suggested by Mr. Simard then the cost of the letter of credit is even higher than the registered compensation arrangement which both actuaries had rejected.

In response to Mr. Simard's selection of five percent (5%) after tax as opposed to eight percent (8%) after tax, Mr. Christie stated he was of the view that five percent (5%) would be rather low,

however, he was not prepared to say that Mr. Simard was wrong and he was right. Mr. Christie did note that:

"The after- tax discount rate to be used in this type of calculation will depend, to a large extent, on what theemployer feels is appropriate for use." (Transcript, Vol. 4, p. 506)

Accordingly, given that the employer's actuary has selected the five percent (5%) after tax discount rate and that the Commission's actuary suggests that the discount rate would be that, which the employer feels is appropriate for use, we are of the view that the five percent (5%) after tax discount rate selected by the employer's actuary is in fact the appropriate rate in this instance. In light of same we must determine that the pay as you go plan with letter of credit insurance would be equally if not more costly than the registered compensation arrangement that all parties rejected as a proposed alternative scheme.

It was apparent that none of the witnesses could accurately ascertain the number of employees of Air Canada who would apply for same sex survivor benefits. It was agreed that so far 150 employees have applied for spousal benefits, excluding pension, but Mr. Christie testified that he was not aware of: " any valid statistical evidence of the number of same sex partnerships compared with the number of opposite sex partnerships..." (Transcript, Vol. 4, p. 486) Mr. Aronovitch of EGALE, Equality for Gays and Lesbians Everywhere, was unable to provide any definitive number or percentage of the general population represented by gays and lesbians.

Mr. Aronovitch further noted: "Many of those people who are in long- term relationships probably do not have a need for the spousal benefits they are offered by their employer, because particularly in relationships between two men, both men are likely to be employed and it may well be that the partner is already receiving medical or dental or pension benefits or what have you, from his own employer. Many of the people who are in relationships, again, are perhaps not comfortable with coming out and declaring their sexual orientation to their employer." (Transcript, Vol. 2 p. 277)

Mr. Christie estimated that the cost of providing survivor benefits to same sex spouses within a registered pension plan would be approximately .018 to .3 percent of covered payroll. Mr. Christie did not provide an estimate of the costs to provide same sex survivor benefits outside the registered pension plan. In his view the additional costs for an employer are below the level which would normally be considered significant. His view, however, was based on certain assumptions which were contradicted by the actuary for the respondent.

As such, we are left with considerable uncertainty as to the number of individuals who would participate in the extension of same sex survivor benefits and further as to the cost imposed upon the respondent to provide such benefits.

These benefits, should they be extended to same sex spouses would not be equivalent benefits both by reason of the provisions of the Pension Benefits Standards Act and the provisions of the Income Tax Act. In some instances, as set out above the very individuals intended to be benefitted, will be denied their benefits by reason of the priority provisions of the Pension Benefits Standards Act or by reason of the failure of the employee to exercise the options open to

him or her to designate the same sex spouse as a beneficiary of his or her Will or to provide for the sixty percent joint and survivor benefit for his or her same sex spouse.

It would appear that what we are being asked to do is to impose upon the respondent the duty and responsibility to extend benefits to the spouses of a segment of its employee population, the number of which we cannot ascertain, at a cost which has not been fully calculated, and upon terms which may well give rise to future discrimination. This Tribunal is asked by the Commission and the Complainant to make a leap of faith without the evidence of cost and numbers which in our view are necessary to the making of a fair and considered determination.

ANALYSIS OF THE LAW

Section 3(1) of the Canadian Human Rights Act provides:

3.(1) For all purposes of this Act, race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability and conviction for which a pardon has been granted are prohibited grounds of discrimination.

Section 7 of the Canadian Human Rights Act reads: 7. It is a discriminatory practice, directly or indirectly, (a) to refuse to employ or continue to employ any individual, or (b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination.

Section 10 of the Canadian Human Rights Act states: 10. It is a discriminatory practice for an employer, employee organization or organization of employers

(a) to establish or pursue a policy or practice, or (b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment, that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

On the 29th day of April, 1996, the Federal Government introduced Bill C33. This Bill amends Section 3.(1) of the Canadian Human Rights Act by adding inter alia Sexual Orientation as a prohibited ground of discrimination.

As earlier stated the issues before this Tribunal are whether the failure to extend health care and pension benefits to same sex spouses is discrimination by the respondent on the basis of a prohibited ground of discrimination. In order to determine whether the complainant has established a prima facie case in this regard, we must determine at what point sexual orientation became a prohibited ground of discrimination under the Canadian Human Rights Act.

Before examining this issue further, let us first consider what is the burden and order of proof in discrimination cases.

"... a complainant must first establish a prima facie case of discrimination; once that is done, the burden shifts to the respondent to provide a reasonable explanation for the otherwise discriminatory behaviour. Thereafter, assuming the employer has provided an explanation, the complainant has the eventual burden of showing that the explanation provided was merely a "pretext" and that the true motivation behind the employer's actions was in fact discriminatory. " Basi v. Canadian National Railway Co., Human Rights Tribunal 1988, 9 C. H. R. R., D/ 5029 at D/ 5037, para. 38474.

What then are the elements of a prima facie case?

"... a prima facie case is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent- employer." O'Malley v. Simpson Sears, (1986), 7 C. H. R. R., D/ 3102 (SCC) at D/ 3108, para. 24782.

The Agreed Statement of Facts does establish that Mr. Laessoe was an employee of Air Canada; that he was a partner in a same sex spousal relationship; that he applied to Air Canada for spousal benefits for his spouse; and that such spousal benefits were denied by Air Canada, as the complainant's spouse did not fit within the definition of spouse contained in the respondent's employee pension plan, which definition is consistent with that found in the Income Tax Act and the Pension Benefits Standards Act. Those facts are agreed upon by all parties.

The question becomes whether the denial of spousal benefits to a same sex partner is discrimination based upon a prohibited ground of discrimination as same is defined in the Canadian Human Rights Act.

The legislation (Bill C- 33) recently introduced by the government of Canada unquestioningly includes sexual orientation as a prohibited ground of discrimination in the Canadian Human Rights Act. Such legislation has now received Royal Assent. Such legislation was not in force and effect at either the time when the complaint was filed nor at the time when this matter was heard nor is such legislation expressed to be retroactive. Accordingly, we must look to the case law to assist us in determining at what point sexual orientation became a prohibited ground.

ANALYSIS OF THE CASE LAW

The complainant alleged that the actions of Air Canada in denying benefits to his same sex spouse resulted in discrimination against him not only on the basis of sexual orientation but also on the basis of family status and marital status. This Tribunal is bound by the decision of the Supreme Court of Canada in Canada (Attorney General) v. Mossop, (1993) 17 C. H. R. R., D/ 349. The Court, in such case, when asked to find discrimination on the basis of family status, found that the complainant, Mossop's sexual orientation was so closely connected with the grounds that lead to a refusal of the benefit, that the denial could not be condemned as discrimination on the basis of family status without indirectly introducing protection against sexual orientation discrimination, which parliament had specifically decided not to include.

Accordingly, in the present case, it would appear that the determination of whether or not the respondent, Air Canada, discriminated on the basis of family status hangs on the Tribunal's finding that sexual orientation was in fact a prohibited ground.

We further find that, in terms of the allegation that discrimination was perpetrated by the respondent on the basis of marital status, that the complainant's marital status is also inextricably linked to his sexual orientation. Only an individual with the sexual orientation of the complainant would choose a same sex spouse. It is not the fact that Mr. Laessoe is considered single for the purposes of the pension plan that gives rise to the discrimination but rather that his spouse does not fit within the prescribed definition of spouse under the pension plan by reason of his sexual orientation.

In our view, therefore, we must look to the alleged ground of sexual orientation to determine whether any of the alleged grounds of discrimination formulated in the complaint have actually been proven.

In the decision of Egan and Nesbit v. Canada, [1995] 2 S. C. R. 513 released in May of 1995, the Supreme Court of Canada for the first time unanimously held that sexual orientation is an analogous ground of discrimination under Section 15(1) of the Charter of Rights and Freedoms. The case considered certain provisions of the Old Age Security Act in particular, the definition of spouse under such Act as being "a person of the opposite sex" and the consequent denial of pension benefits to the same sex spouse of the appellant, James Egan.

Four of the Justices namely, Justices Lamer, La Forest, Gonthier and Major found that although sexual orientation was a prohibited ground, the denial of pension benefits by the Old Age Security Act's definition of spouse did not constitute discrimination in contravention of Section 15(1). These four Justices further found that should such legislation have been found to have infringed Section 15(1), that same would be justified under Section 1 of the Charter of Rights and Freedoms.

Four Justices found that the legislation contravened Section 15(1) of the Charter of Rights and Freedoms and was not saved by Section 1. Those Justices were Justices L'Heureux- Dubé, Cory, McLachlin and Iacobucci.

Mr. Justice Sopinka found that although the legislation contravened Section 15(1) of the Charter that such legislation should be saved by Section 1.

In order to consider the full impact of this decision on the case at bar we must give some in depth consideration to the reasoning of the Justices.

Justice La Forest writing for Justices Lamer, Gonthier and Major found that:

"Simply stated, what Parliament clearly had in mind [in the passage of the Old Age Security Act and the definition of spouse thereunder] was to accord support to married couples who are aged and elderly, and this for the advancement of public policy central to society."

"... Suffice it to say that marriage has from time immemorial been firmly grounded in our legal tradition, one that is itself a reflection of long- standing philosophical and religious traditions. But its ultimate raison d'etre transcends all of these and is firmly anchored in the biological and social realities that heterosexual couples have the unique ability to procreate, that most children are the product of these relationships, and that they are generally cared for and nurtured by those who live in that relationship. In this sense, marriage is by nature heterosexual. It would be possible to legally define marriage to include homosexual couples, but this would not change the biological and social realities that underlie the traditional marriage." (Egan v. Canada, supra, p. 535- 536) Mr. Justice La Forest found that: "The singling out of legally married and common law couples as the recipients of benefits necessarily excludes all sorts of other couples living together such as brothers and sisters or other relatives, regardless of sex, and others who are not related, whatever reasons these other couples may have for doing so and whatever their sexual orientation." (Egan v. Canada, supra, p. 535)

And referring to the decision of Mahoney J. A. in the Court of Appeal (p. 412) "Unless subjective pressures are in play, sex, whether same or opposite, need not be a consideration in the choice of a live- in companion." (Egan v. Canada, supra, p. 535)

"In a word, the distinction made by Parliament is grounded in a social relationship, a social unit that is fundamental to society. That unit, as I have attempted to explain, is unique. It differs from all other couples, including homosexual couples. Other excluded couples, it is true, do not have to be described by reference to sex or sexual preferences, but this is of no moment. The distinction adopted by Parliament is relevant, indeed essential, to describe the relationship in the way the statute does so as to differentiate the couples described in the statute from all couples who do not serve the social purposes for which the legislature has made the distinction. Homosexual couples are not, therefore, discriminated against; they are simply included with these other couples." (Egan v. Canada, supra, p. 539)

As set out above, in his Judgment, Justice Sopinka finds that the definition contained in the Old Age Security Act does infringe Section 15(1) of the Canadian Charter of Rights and Freedoms. He further finds, however, that such infringement is saved under Section 1. In so finding, Justice Sopinka states:

"I agree with the respondent the Attorney General of Canada that government must be accorded some flexibility in extending social benefits and does not have to be pro- active in recognizing new social relationships. It is not realistic for the Court to assume that there are unlimited funds to address the needs of all." (Egan v. Canada, supra, p. 572)

Mr. Justice Sopinka further observes: "Given the fact that equating same- sex couples with heterosexual spouses, either married or common law, is still generally regarded as a novel concept, I am not prepared to say that by its inaction to date the government has disentitled itself to rely on S. 1 of the Charter." (Egan v. Canada, supra, p. 576)

Accordingly, the Supreme Court of Canada found that although sexual orientation was an analogous ground of discrimination under the Charter, that the definition of spouse under the Old

Age Security Act which limited benefits to heterosexual spouses, could continue to be justified by the Federal Government.

We were urged by counsel for the Commission, to adopt the analysis of Justice L'Heureux- Dubé found in Egan v. Canada, supra. Justice L'HeureuxDubé takes the view that one should not be restricted by the enumerated grounds in the Charter in finding discrimination. In our view, this analysis is applicable to Charter challenges, given the wording of Section 15(1) of the Charter, however, with respect, it is not applicable in analyzing the provisions of Sections 2 and 3 of the Canadian Human Rights Act where no general prohibition against discrimination is found and instead discriminatory practices are limited to the enumerated grounds listed therein.

Section 15(1) provides: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." (and now sexual orientation due to the decision in Egan, supra)

Section 2 of the Canadian Human Rights Act provides that: "... every individual should have an equal opportunity with other individuals to make for himself or herself the life that he or she is able and wishes to have, consistent with his or her duties and obligations as a member of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability or conviction for an offence for which a pardon has been granted."

Section 3(1) of the Canadian Human Rights Act provides: "For all purposes of this Act, race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability and conviction for which a pardon has been granted are prohibited grounds of discrimination."

It is our view that the wording of Sections 2 and 3 of the Canadian Human Rights Act is more restrictive than the wording of Section 15(1). Section 15(1) provides that every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and then sets out in particular a number of examples of discrimination. Section 2 and Section 3 of the Canadian Human Rights Act strictly define discriminatory practices as those based upon the enumerated grounds. The expansive protection against discrimination found in Section 15(1) is absent from Sections 2 and 3 of the Canadian Human Rights Act.

As stated by Mr. Justice Sopinka, the Supreme Court of Canada found for the first time in Egan v. Canada, supra, that sexual orientation was an analogous ground under the Charter. It was argued before us that the addition of sexual orientation as an analogous ground under the Charter necessarily brings sexual orientation into the Canadian Human Rights Act as a prohibited ground of discrimination.

Section 52 of the Constitution Act, 1982, provides: 31 >" 52(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."

It is our view that the recognition of sexual orientation as a prohibited ground of discrimination under the Canadian Human Rights Act can only be made to the extent that such ground was recognized in Egan, supra. That is to say that, although the Supreme Court of Canada found that sexual orientation was an analogous ground under the Charter, such Court further found that a definition of spouse which excluded a same sex spouse for the purposes of pension benefits under Federal legislation could continue. As such, the introduction of sexual orientation as a prohibited ground of discrimination in the Canadian Human Rights Act by reason of Egan is limited by the findings in Egan and thus, when a fact situation, similar to that found in Egan, is before us we are bound to find that a similar definition of spouse contained in the respondent's pension plan is not discriminatory.

The decision of Haig v. Canada (1992), 16 C. H. R. R., D/ 226, is a decision of the Ontario Court of Appeal. In that case the respondents, Haig and Birch, brought a Charter challenge seeking a declaration that the absence of sexual orientation from the list of prescribed grounds of discrimination under Section 3 of the Canadian Human Rights Act infringed Section 15(1) of the Canadian Charter of Rights and Freedoms. The application was upheld at the Ontario Court (General Division) and appealed by the Attorney General of Canada to the Ontario Court of Appeal. The Ontario Court of Appeal upheld the Ontario Court (General Division) decision and found that the Canadian Human Rights Act infringed Section 15(1) by failing to include sexual orientation as a prohibited ground of discrimination. The Court further found that sexual orientation should be read in as a prohibited ground in Section 3(1). The Attorney General of Canada did not appeal the decision of the Ontario Court of Appeal.

In the decision of Canada v. Mossop, supra, Brian Mossop an employee of the federal government who had taken a day off work to attend the funeral of his same sex lover's father had brought a complaint to the Human Rights Tribunal that he had been discriminated against on the basis of family status in being denied bereavement leave. The Supreme Court of Canada found that the complainant's sexual orientation was so closely connected with the grounds that lead to a refusal of the benefit that the denial could not be condemned as discrimination on the basis of family status without directly introducing protection against sexual orientation discrimination which Parliament had thus far specifically decided not to include.

"Whatever may be my personal views in that regard, I find that Parliament's clear intent throughout the CHRA, before and at the time of the amendment of 1983, was to not extend to anyone protection from discrimination based on sexual orientation. 32 >Absent a Charter challenge of its constitutionality, when Parliamentary intent is clear, courts and administrative tribunals are not empowered to do anything else but to apply the law."

(Mossop, supra, at D/ 363, para. 34 and 35) Prior to the delivery of the reasons in Mossop, supra by the Supreme Court of Canada, the Ontario Court of Appeal rendered its decision in Haig, supra and the Minister of Justice announced her intention not to appeal the decision.

The Supreme Court of Canada in Mossop, supra invited the parties to the appeal before them to submit new arguments. Chief Justice Lamer states:

"... Relying on the reasons of the Ontario Court of Appeal in Haig, supra, the appellant could then have challenged the constitutionality of Section 3 of the CHRA on the basis of the absence of sexual orientation from the list of prohibited grounds of discrimination. This would have enabled this Court to address the fundamental questions argued in the Ontario Court of Appeal in Haig. It would then have been possible to give a much more complete and lasting solution to the present problem." (Mossop, supra, at D/ 361, para. 28)

The appellant, in Mossop, supra, the Canadian Human Rights Commission, chose not to take the approach requested by the court and requested the court to dispose of the action solely on the basis of the meaning of family status.

The Supreme Court of Canada found that Parliament had not included sexual orientation in its amendments to the Canadian Human Rights Act in 1983 and accordingly Parliament's clear intent was not to extend to anyone protection from discrimination based on sexual orientation.

"... Absent a Charter challenge, the Charter cannot be used as an interpretative tool to defeat the purpose of the legislation or to give the legislation an effect Parliament clearly intended it not to have." (Mossop, supra, D/ 363, para. 36)

It is clear from the comments of Chief Justice Lamer that the Supreme Court of Canada in Mossop, supra, did not consider the decision in Haig, supra, as one that finally determined whether sexual orientation was a prohibited ground of discrimination under the Canadian Human Rights Act.

In our view, the Haig, supra, decision can be distinguished from the case at bar upon its facts. In Haig the respondents were unable to challenge a rule of the Armed Forces, that severely limited the advancement of those members of the forces who openly declared their homosexual orientation, by - reason of the fact, that sexual orientation was not a prohibited ground under the Canadian Human Rights Act.

In the instant case we have a definition of spouse in the respondent's pension and benefit plans which is consistent with that found in Federal legislation. Such legislation forms part of the legislative scheme to provide for retirement planning in particular for couples who:

"serve the social purposes for which the legislature has made the distinction." (Egan v Canada, supra, page 539).

Krever J. A. in Haig finds: "The distinction created by the legislation alone, however, is not sufficient to justify a conclusion of discrimination within the meaning of S. 15(1) of the Charter ... The larger context, social, political and legal, must also be considered. In the words of Wilson J., speaking for a unanimous Supreme Court of Canada in R. v. Turpin, [1989] 1 S. C. R. 1296 at 1331- 32: In determining whether there is discrimination on grounds relating to the personal characteristics of the individual or group, it is important to look not only at the impugned legislation which has created a distinction that violates the right to equality but also to the larger social, political and legal context.

McIntyre J. emphasized in Andrews (at p. 167): For, as has been said, a bad law will not be saved merely because it operates equally upon those to whom it has application. Nor will a law necessarily be bad because it makes distinctions. Accordingly, it is only by examining the larger context that a court can determine whether differential treatment results in inequality or whether, contrariwise, it would be identical treatment which would in the particular context result in inequality or foster disadvantage. A finding that there is discrimination will, I think, in most but perhaps not all cases, necessarily entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged." (Haig, supra, D/ 230)

In Egan, supra, it was the larger context, social, political and legal that Justice LaForest considered in finding that the definition of spouse under the Old Age Security Act did not contravene Section 15(1) and it was also such larger context that Justice Sopinka considered in the same decision, in finding that such definition, although contravening Section 15(1) was permitted and justifiable under Section 1 of the Charter.

How, then, can the same distinction between heterosexual and homosexual spouses found in the definition of spouse under the respondent's pension plan be considered discriminatory in the case before us?

In the recently released reasons of Vriend v. Alberta (181 A. R. 16) the Alberta Court of Appeal found that the Alberta government's failure to include sexual orientation as a ground of discrimination in the Individual Rights Protection Act, of that Province, did not violate the antidiscrimination provisions in Section 15 of the Charter. Accordingly, contrary to the submissions made by counsel for the Commission and the Complainant, it cannot be said that the law in Canada was settled by the delivery of the decision of the Ontario Court of Appeal in Haig v. Canada, supra. The comments of the Chief Justice in Canada v. Mossop, supra, are telling in this regard, particularly where Chief Justice Lamer finds that the failure to address these issues before the Court, rendered it impossible to give a more complete and lasting solution to the present problem.

The decision of Leshner v. Ontario (2) (1992), 16 C. H. R. R. D/ 184 is a decision of an Ontario Board of Inquiry arising from the complaint of an Ontario government employee that he had been discriminated against on the basis of sexual orientation as the provisions of the Ontario Government Pension Plan did not provide for same sex survivor benefits for his spouse. It is important to note that sexual orientation was a prohibited ground of discrimination under the Ontario Human Rights Code at the time and that the Ontario government conceded that the failure to provide survivor benefits to Mr. Leshner's spouse, as part of his pension benefits, was prima facie in breach of Section 5 of the Code.

A Board of Inquiry under the Ontario Human Rights Code is of equivalent status to a Tribunal under the Canadian Human Rights Act. Accordingly, its decisions are persuasive but not binding. There are a number of areas in the fact situation of Leshner that distinguish it from the case before us.

One of the most important distinctions is that the respondent in Leshner was the Ontario government and accordingly there was no concern that the Ontario government would be unable

to fund same sex survivor benefits if same were paid on a pay as you go basis. One must acknowledge as well that the Ontario government is in somewhat different financial circumstances than a private employer such as Air Canada, in the present case, and one would expect that the Ontario government would be a leader in this field more so than one would expect a private employer, particularly when the government having jurisdiction over such private employer has not been required to extend pension benefits to same sex spouses.

The Board of Inquiry of Ontario gives consideration to many of the issues that were before us.

While precise statistical estimates were not provided to the Board, the Board found that only a relatively small percentage of the population is homosexual and only a percentage of this population will have a spousal relationship and in turn only a very small number of this group were employees of the respondent.

In the situation before us, as outlined above, insufficient information, in our view, was provided to the Tribunal to allow us to draw a conclusion as to the number of employees who might avail themselves of the benefits if same were provided.

The Board, relying on the decision of the Supreme Court of Canada in Tetrault- Gadoury v. Canada (1991), 81 D. L. R.(4th) 358 found that:

" If what is being argued is that a discriminatory measure can be supported by placing it within a wider discriminatory pattern of legislation, we would dismiss this as an objective." (Leshner, supra, D/ 204, para. 144)

However, it is clear that the Supreme Court of Canada in Egan v. Canada, supra, was prepared to permit the continued distinction between homosexual and heterosexual spouses found in the definition of spouse in the Old Age Security Act as part of a legislative scheme to provide for retirement income which scheme in our view includes the provisions of the Income Tax Act and the Pension Benefits Standards Act.

The Board in Leshner, supra, rejected the respondent's argument that the Supreme Court of Canada decision of McKinney v. University of Guelph, [1990] 3 S. C. R. 229 was directly applicable to the case before it.

In McKinney, supra, the Supreme Court of Canada found that the mandatory retirement scheme, which was the subject matter of the complaint, was seen as an integral part of a benefit scheme in employee relations. Most importantly it involved an exchange. Faculty received tenure, academic freedom and job security in return for an age cutoff to employment. Mandatory retirement was integrated with pension benefits and contributions.

The Court in McKinney, supra, found that the legislature is entitled to proceed cautiously in effecting change on important issues of social and economic concern. The legislature should not be required to deal with all aspects of a problem at once, and that it can take account of the difficulties whether social, economic or budgetary that would arise if it attempted to deal with social and economic problems in their entirety.

The Board in Leshner, supra, distinguished McKinney, supra from the case before it finding:

"... the limitation on unemployment benefits to Mr. Leshner is not a result of the collective bargaining process; it is the result of statute rather than negotiation and agreement." (Leshner, supra, p. D/ 205, para. 150)

In the present case, the Tribunal heard evidence that the extension of survivor benefits to same sex spouses had been on the negotiation table during collective bargaining since 1990. We further heard that Canadian Airlines in extending health care benefits to same sex spouses required concessions on the part of its employees and the Union.

It can well be argued that the extension of same sex survivor benefits to Mr. Laessoe and his fellow employees is a negotiated term not unlike that found in McKinney, supra and accordingly the principles enunciated by the Supreme Court of Canada could well be applicable to this case. That is, that the Court and in this instance the Tribunal, can take into account the difficulties whether social, economic or budgetary that would arise if it attempted to deal with the social and economic problems in their entirety. Accordingly, contrary to the findings by the Board of Inquiry in Leshner, supra, we are of the view that this Tribunal can consider the administrative cost and complexity put forward by the respondent entailed in establishing an alternative plan for the provision of same sex survivor benefits.

The Board of Inquiry of Ontario found that the inability to provide an identical benefit does not influence liability for an infringement of the Code.

"We consider the critical factor in 'equal treatment' to be satisfied by equality of result from the point of view of the employee whose rights have been infringed... We believe that equivalence of outcome satisfies the requirements of equal treatment." (Leshner, supra, p. D/ 195)

In arriving at this conclusion the Board found: "We accept that the source of payment to a survivor of a same- sex conjugal relationship, and the underlying structuring and cost of the benefit in such instance, would differ from that pertaining to a survivor of an opposite- sex conjugal relationship. However, the quantum and basic conditions of receipt could be made to approximate those of an opposite- sex survivor." (Leshner, supra, p. D/ 195)

These are not the facts we found in the case before us. The basic conditions of the receipt will not approximate those of an opposite sex spouse. The pension benefit will not be inalienable. The pension benefit may be optional and not mandatory. The pension benefit may be lost in the event of priority claims by a married spouse. If provided through a pay as you go plan, the benefit is not secure and may be lost in the event of the bankruptcy or receivership of the company. This in our view is not equivalence of outcome.

In our view equivalence of outcome and equality of result will not be achieved in the setting up of any of the alternative schemes proposed to us.

The Board of Inquiry in Leshner, supra, further states that "... While the benefits may cost more to provide outside the scheme of the registered pension plan, there is no evidence before us that

the cost is so significant as to imperil the ability of the respondent to continue to provide benefits to those workers who currently receive them."

The Board further finds: "... The price in this case is less than the harm which is done if a minority in our population would continue to be punished for being different" ... As well, the cost of extending such benefits is minor when spread to all government employees." (Leshner, supra, pages D/ 205, para. 151 and D/ 206 para. 160)

In the case before us, we have no precise estimate as to the costs of extending the benefits outside the registered pension plan. The estimates of cost as a percentage of covered payroll provided by Mr. Christie were estimates related to the provision of such benefits within the registered pension plan and not outside of same.

It is important to remember too that the Board of Inquiry in Leshner, supra, was dealing with the Ontario government. Certainly the Government of Ontario is an organization that has greater capacity to deal with additional cost than a private employer such as Air Canada which, has been in somewhat strained financial circumstances. In addition, there was a difference of opinion between the actuaries in their evidence before us as to the appropriate discount rates to be applied and no true figure was arrived at as to the number of employees who would claim such benefits.

Mr. Christie noted that employees of corporations in financial circumstances similar to that of Air Canada would certainly have a greater need for benefit security than employees of government type organizations such as that before the Board of Inquiry in Leshner, supra. As Mr. Christie further noted, when a company is marginal in its operations it has to watch every dollar.

In dealing with the issue of cost to the respondent, we were directed to the decision of Singh et al vs. M. E. I. [1985] 1 S. C. R. 177. This decision of the Supreme Court of Canada considered the constitutionality of the appeal provisions of the Immigration Act 1976. The Court found that the procedure for determining refugee status claims established in the Immigration Act 1976 was inconsistent with the requirements of fundamental justice articulated in Section 7.

In arriving at its decision, the Court heard argument from the respondent that to implement other procedures with respect to the adjudication of refugee claims would result in considerable cost and complexity. Madame Justice Wilson finds:

"Even if the cost of compliance with fundamental justice is a factor to which the courts would give considerable weight, I am not satisfied that the Minister has demonstrated that this cost would be so prohibitive as to constitute a justification within the meaning of s. 1." (Singh, supra p. 220)

Singh, supra, deals with a government agency namely, the Immigration Appeal Board. It further deals with the right of an individual not to be removed from Canada to a country where his or her life or freedom would be threatened. With due respect, we do not believe the failure to extend survivor pension benefits to same sex spouses can be equated with the denial of fundamental

justice dealt with in the Singh decision. Accordingly, a higher onus would be demanded of the federal government to demonstrate its inability to afford protection to the rights infringed in Singh than would be demanded of Air Canada in the case before us.

The complainant argues that based upon Singh, supra, the employer respondent must demonstrate prohibitive cost as a justification for denial of fundamental justice.

The evidence before us was clear that the cost to the respondent to extend survivor pension benefits to same sex spouses was considerably higher than if such benefits could be extended through the registered pension plan. In fact, two or three times higher.

And without a precise indication of the number of employees who would claim such a benefit or the cost thereof, which is neither known to Air Canada or to this Tribunal, it would be unfair to place the onus upon Air Canada to establish "prohibitive cost".

We heard evidence of the precarious financial condition of the respondent company.

The evidence of the number of employees who might participate in the plan, if the respondent were ordered to provide same and of the exact cost to the respondent of providing same, left more questions than answers.

If we were to order that the respondent provide extended benefits, registered compensation arrangement was an alternative rejected by all parties, the pay as you go scenario appears too risky for the employees given the financial circumstances of the respondent and the pay as you go secured by a letter of credit again results in significant cost to the respondent, the exact amount of which, will in part, be dependent upon the respondent's bank and its perception of the respondent's financial viability.

Given the many unknowns, we are of the view that it is not appropriate for this Tribunal to order the respondent to set up an alternative plan for the provision of survivor benefits to same sex spouses, as this Tribunal has limited information as to the costs that would be attributed to the respondent.

In the Canadian Airlines plan it was clear that any cost attributed to the employer by reason of extending same sex benefits in the health care plan would be absorbed by the Union in productivity savings. We are not asked here to require the Union to absorb the cost, in fact, the Union is not a party and cannot be made to so absorb the costs. We are asked to require the respondent to absorb all costs of extending same sex spousal benefits under the pension plan without a clear and concrete indication of what those costs will be. In our view that is prohibitive to our making such an Order in favour of the complainant.

We are asked as well to consider that any additional costs attributed to the respondent should be discounted in light of the alleged savings the respondent has made as a result of its failure to pay same sex survivor benefits to its gay and lesbian employee population.

Yet it was admitted by the Complainant and the Commission that even the companies who have extended pension benefits to same sex spouses, in practice, have not been required to implement same. In addition, no evidence was provided to this Tribunal of the number of retired employees at Air Canada with same sex spouses who might have benefited from the extension of the benefits claims nor any evidence of the amount of "savings" purported to have been realized by the respondent, Air Canada.

In our view, the actions of Air Canada to date have been lawful and justified. It cannot be suggested that Air Canada has made savings by an alleged discriminatory treatment. Secondly, Air Canada has throughout paid pension benefits to its gay and lesbian employee population. An attempt therefore to determine the actual "savings" attributed to Air Canada would be in our view speculative and of little value.

The complainant asks that we consider that the administrative complexity raised by the respondent is a mere pretext. In support of this contention the complainant states that although the actuary was asked by Air Canada to determine the cost of providing benefits to same sex spouses in 1992, the administrative complexity was never raised by the respondent as a ground for denying such benefits until the hearing before us. One cannot fault Air Canada, if during the course of administering its affairs, it gave consideration to the cost of providing same sex spousal benefits as early as 1992.

Same sex benefits, as we know, was an issue that was on the bargaining table as early as 1990. Air Canada is a large employer and must keep abreast of potentially changing social values and policies in anticipation of matters to be negotiated in collective bargaining.

It is clear that Air Canada would have to give consideration to the cost of the provision of same sex spousal benefits even if it ultimately found that it was not legally required to do so.

With respect to the complexities raised by Mr. Simard in his report the complainant suggests that the issue of priority between married spouses and same sex spouses can be alleviated by the completion of an affidavit by an employee, to the effect that at the time of the registration of his or her same sex spouse, the employee has no married spouse. This affidavit may, in and of itself, give rise to a claim for discrimination on the basis of marital status as the employee with the same sex spouse who is unmarried will be entitled to benefits while the employee, with the same sex spouse, who is married will not. Although we understand that such affidavit is currently in use for the purposes of extending benefits to common- law spouses, it is not a course of action that we recommend.

The fact that this particular complexity is found to have some remedy, albeit questionable, does not address the numerous other complexities that exist, nor does it achieve the equivalence of outcome in the benefits extended to same sex spouses as they compare with those extended to opposite sex spouses.

The complainant asks us to distinguish the justification raised by Justice Sopinka in Egan vs. Canada, supra, and that raised by the respondent in the case before us. The complainant points out that Justice Sopinka determines that the federal government is entitled to more latitude as it

must assess the impact of extending the benefits contained in some fifty federal statutes. Presumably two of those statutes are the Income Tax Act and the Pension Benefits Standards Act. Justice Sopinka has given the federal government latitude in amending those statutes to extend protection and benefit payments to same sex spouses.

How can we suggest to the respondent that it should be ahead of the federal government in terms of extending such benefits when it is the very lack of action on the part of the federal government in failing to amend the Income Tax Act and the Pension Benefits Standards Act that has prevented the respondent from acting? The Government of Canada has recently amended the Canadian Human Rights Act to include sexual orientation as a ground of discrimination. Notwithstanding its awareness that amendments to other Statutes would be required in order to prevent discrimination on such ground, the Federal Government chose not to amend the definition of spouse in the Income Tax Act and the Pension Benefits Standards Act.

We do not agree with the complainant that deference should not be granted to the respondent in this instance.

The complainant suggests that what may be novel for the federal government is not novel in the private labour relations field; that the issue of extending benefits to same sex spouses has been on the bargaining table for a number of years.

We do not believe that you can consider the federal government in isolation. If one accepts that the issue of extending same sex spousal benefits has been on the bargaining table in the private labour relations field for a number of years, then one would expect that the federal government, too, would be aware of this issue.

We adopt the reasoning of Mr. Justice Sopinka that this issue is in fact novel and that, as a result of this novelty, Air Canada should not be put to a higher standard than has been required of the federal government in the extension of pension and retirement benefits to same sex spouses.

The complainant referred us to two arbitration cases Re: Bell Canada and C. T. E. A. 43 L. A. C. (4th) 172 and Re: Canadian Broadcasting Corp. and Canadian Media Guild 45 L. A. C. (4th) 353.

Arbitration decisions are not binding upon this Tribunal. Nonetheless in reviewing their reasons, in the Bell decision we note that the arbitrator relies upon the decision of Haig v. Canada, supra, in determining that the failure to provide pension benefits to same sex spouses is unlawful discrimination contrary to a provision of the collective bargaining agreement which proscribed unlawful discrimination on the basis of sexual orientation. The arbitrator considered the Mossop, supra, decision and was of the view that the decision of Haig by the Court of Appeal had not been reversed. With respect, we are of the view that until the matter of the inclusion of sexual orientation as a prohibited ground of discrimination was considered by the Supreme Court of Canada or brought about by statute, the matter was not finally decided. We further find that the reasons in Haig may be distinguished from the present case on their facts.

In the CBC, supra, arbitration reference is made again to the Mossop, supra, and Haig, supra, decisions. And again with respect, we disagree with the interpretation made by the arbitrator of the effect of Haig upon the Canadian Human Rights Act, particularly in light of the recent Alberta Court of Appeal decision in Vriend, supra. It is also important to note that these two arbitration decisions predated the Supreme Court of Canada decision in Egan v. Canada, supra, as did the decisions of Mossop, supra, and Haig, supra. As it has been noted, the Supreme Court of Canada, although finding that sexual orientation was an analogous ground of discrimination under Section 15(1) of the Charter, further found that the discriminatory definition of spouse, excluding same sex spouses for the purposes of pension benefits under the Old Age Security Act, was permitted.

Mr. Delisle, in argument, pointed to the provisions of the guidelines under the Canadian Human Rights Act as permitting discrimination in a pension plan on the basis of marital status. As we are of the view that the issue here is really one of discrimination on the basis of sexual orientation and not one of discrimination on the basis of marital status, the guidelines under the Canadian Human Rights Act would not be of assistance to the respondent. In light of our findings otherwise, however, we do not see the need to elaborate further.

CONCLUSION

Accordingly, we find that the complainant has not made out a prima facie case. We find that sexual orientation was not a prohibited ground of discrimination under the Canadian Human Rights Act until it was included by implication by reason of the decision of Egan v. Canada, supra, in May of 1995.

Even at that point, however, Egan v. Canada, supra, brings sexual orientation into the Canadian Human Rights Act in a limited fashion in that discrimination on the basis of sexual orientation in the definition of a spouse for the purposes of pension benefits is permitted by the Supreme Court of Canada in such case and accordingly sexual orientation as a prohibited ground of discrimination in the Canadian Human Rights Act could not be extended beyond that point until the introduction and passage of Bill C- 33 in June of this year.

As such, the complainant, cannot establish that the actions taken by the respondent are discriminatory practices on a prohibited ground of discrimination under the Canadian Human Rights Act. It is further our view that the grounds of marital status and family status in this fact situation are inextricably related to the sexual orientation of the complainant and accordingly no discrimination exists unless discrimination on the basis of sexual orientation is found.

In our view, Haig v. Canada, supra, did not finally change the law of Canada by bringing about an amendment to the Canadian Human Rights Act. Haig v. Canada was a decision of a Provincial Court of Appeal and, as has been demonstrated by subsequent decisions of other Provincial Courts of Appeal, sexual orientation is not universally considered a prohibited ground. Further, as noted above, Haig may be distinguished from the case before us on its facts. In addition, the majority of the Supreme Court of Canada in Egan, supra, applied the analysis considered by Krever JA in such case and, in so doing, determined that a definition of spouse which excluded same sex spouses for the purposes of pension benefits was permitted. Egan v.

Canada, supra, brings about recognition that sexual orientation is an analogous ground of discrimination to Section 15(1) of the Canadian Charter of Rights and Freedoms. By implication Egan has added sexual orientation as a prohibited ground of discrimination under the Canadian Human Rights Act, but only to the extent permitted by the fact situation of Egan. In that Egan permitted a definition of spouse excluding same sex spouses for the purposes of pension benefits, a denial of pension benefits by reason of such a definition did not contravene the Canadian Human Rights Act.

As to the extension of benefits other than pension benefits to same sex spouses, we are of the view that the respondent acted quickly once the decision of the Supreme Court of Canada in Egan v. Canada, supra, was made, in providing benefits to same sex spouses to the extent required by law.

We are therefore of the view that the complaint should be dismissed for the reasons set out herein.

Although we have found that the complainant has failed to establish a prima facie case, we are of the view as well that in the event that the complainant were successful in establishing a prima facie case, the employer has established a sufficient justification for its actions. The benefit provided by an alternative plan would not be an equivalent benefit. We are of the view that the equivalence of outcome as required by Leshner, supra, would not be achieved given the application of the Pension Benefits Standards Act and the Income Tax Act to such benefits.

Insufficient evidence was provided to us to establish clearly what the cost to the employer would be of extending pension benefits and we are most reluctant to require the employer to embark upon a plan with no known estimate of the cost attributed to it. Finally, we are of the view that the employer is justified in not extending pension benefits to same sex spouses when it is prohibited from doing so in equal fashion by the provisions of federal legislation. It is the failure of the federal government to take swift action to amend the Income Tax Act and the Pension Benefits Standards Act that has resulted in the inability of the respondent to provide equal benefits to its gay and lesbian employees.

It is the intention of human rights legislation to alleviate the discrimination of the victim but not to punish the perpetrator. In our view, requiring Air Canada, at this date, to establish an alternative plan would be to punish the perpetrator but yet fail to alleviate the discrimination of the victim.

We do not believe that we should require the respondent in this case to establish a plan that may well leave the respondent open to further claims for discrimination or double payment of benefits.

Had this matter been a Charter challenge before us, specifically dealing with the impugned provisions of the Income Tax Act and the Pension Benefits Standards Act, then the result might well have been different.

Having taken the first step to amend the Canadian Human Rights Act to include sexual orientation as a prohibited ground of discrimination, we urge the federal government to act swiftly to amend the legislation that prevents employers such as Air Canada from extending pension benefits to same sex spouses. We acknowledge Air Canada's commitment to extend those benefits immediately upon the amendment to the Income Tax Act and the Pension Benefits Standards Act and we trust that such commitment will be fulfilled.

We acknowledge the hurt and disappointment experienced by Mr. Laessoe and do not by these reasons wish to, in any way, belittle same. However, until such time as the federal government takes action to amend the Income Tax Act and the Pension Benefits Standards Act, Mr. Laessoe and his partner will be in the same or similar position as many other couples residing together, who too have not been included in the overall pension and retirement benefit schemes contrived by the federal government of which Air Canada's pension plan forms part.

We would like to acknowledge the able assistance of counsel in this matter. Complaint dismissed. Dated this day of August, 1996.

_____ S. Jane F. Armstrong (Chairman)

_____ Oksana Kaluzny (Member)

_____ Julie Pitzel (Member)