T.D. 8/96
Decision rendered on June 13, 1996

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

HUMAN RIGHTS TRIBUNAL

BETWEEN:

Stanley Moore & Dale Akerstrom
Complainants

- and -

Canadian Human Rights Commission
Commission

- and -

Treasury Board
Department of Foreign Affairs & International Trade
Canada Employment and Immigration Commission
Public Service Alliance of Canada
Professional Association of Foreign Service Officers
Respondents

- and -

Professional Institute of the Public Service of Canada
Interested Party

TRIBUNAL DECISION

Tribunal: Keith C. Norton, Q.C., Chairperson
Janet Ellis, Member
J. Grant Sinclair, Q.C., Member

Appearance: Rosemary Morgan, Counsel for the Canadian Human Rights Commission
Brian Saunders and James Hendry, Counsel for the Treasury Board, the Department of Foreign Affairs and International Trade and Canada Employment and Immigration Commission
Andrew Raven, Counsel for the Public Service Alliance of Canada
Catherine MacLean, Counsel for the Professional Association of Foreign Service Officers and the Professional Institute of the Public Service of Canada

Dates and
Location of
Hearing: October 10 to 13 and October 23, 24 and 26, 1995 Ottawa, Ontario

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A. INTRODUCTION

This Tribunal heard the complaints of Stanley Moore and of Dale Akerstrom.

Stanley Moore's complaints are dated February 15, 1994. His complaints are filed as four separate complaint forms, two of which name both External Affairs and International Trade Canada as Respondent, one which names the Professional Association of Foreign Service Officers as Respondent, and the fourth which names the Treasury Board of Canada as Respondent. Each complaint pertains to discrimination on the grounds of sexual orientation and family status.

The complaints against External Affairs and International Trade Canada allege that the Respondent discriminated against Mr. Moore by treating him in an adverse differential manner contrary to section 7 of the Canadian Human Rights Act (the Act), and by pursuing a policy or practice that tends to deprive a class of individuals of employment opportunities contrary to section 10 of the Act. The complaint against the Treasury Board of Canada alleges that the Respondent pursues a policy or practice and has entered into an agreement that tends to deprive a class of individuals of employment opportunities contrary to section 10 of the Act.

The complaint against the Professional Association of Foreign Service Officers (PAFSO) is also pursuant to section 10 and refers to the Respondent entering into an agreement that tends to deprive a class of individuals (gay members) of employment opportunities.

Dale Akerstrom signed five complaint forms on February 3, 1993. One complaint names Canada Employment and Immigration Commission and alleges that the Respondent denied employment benefits under the Public Service Health Care Plan on the basis of marital status, family status and sexual orientation contrary to sections 7 and 10 of the Act. The two complaints against the Public Service Alliance of Canada refer to the Respondent making an agreement which denies employment benefits to same-sex spouses contrary to sections 9 and 10 of the Act. The two complaints against the Treasury Board refer to making an agreement which denies employment benefits to same-sex

couples contrary to section 10 of the Act and the denial of benefits contrary to section 7.

At the commencement of the hearing, the Professional Institute of the Public Service of Canada requested interested party status. The grounds for the request were that the Institute is the second largest union of employees in the Public Service and PIPSC has been involved in making requests on behalf of its members to Treasury Board for extension of benefits to same-sex spouses. There was consent to this request from all parties and interested party status was granted.

B. EVIDENCE

I. Evidence Presented by the Canadian Human Rights Commission

1. Stanley Moore

Mr. Stanley Moore is a Foreign Service Officer currently employed by CIDA. In April 1990, he began living with Mr. Pierre Soucy in a committed, spousal relationship. They have organized their economic and social affairs to reflect their commitment and in all respects are a couple. Also in 1990, Mr. Moore became aware that he would likely be posted for a two-year period to Jakarta, Indonesia. At that time, he was a Foreign Service Officer employed by the Department of External Affairs.

In February 1991, the posting cycle became official and in July 1991, Mr. Moore arrived in Jakarta. His diplomatic rank was Counsellor for Development and Counsellor for Economics and he acted as Deputy Director for the Development Program. He supervised local staff and filled in as Acting Director. He had ceremonial duties and interacted with other high level officials.

Mr. Moore applied for spousal benefits under the Foreign Service Directives in 1991. The Foreign Service Directives relate to a number of costs involved when relocation is required of an employee. Mr. Moore was not able

to obtain the usual relocation assistance provided for spouses. He testified that the Foreign Service Directives detail official benefits

but that there are also important informal services usually provided for spouses of employees, such as help obtaining a Visa.

Prior to leaving on his posting and again when in Jakarta, Mr. Moore requested spousal benefits and was refused. When he arrived in Jakarta he realized that the housing assigned to employees junior to him was superior to his both in the state of repair and furnishings. In terms of living space, the house assigned to Mr. Moore for him and Mr. Soucy was assigned as though Mr. Moore were single. Because rent is determined by salary, Mr. Moore was paying more for less.

Mr. Soucy was employed full time by the Employment and Immigration Commission and was able to obtain a leave of absence without pay from his employer for two years. He was able to keep his dental plan coverage for that period but not health plan coverage. He was able to obtain part-time employment in Jakarta. This part-time employment was on a professional fee basis involving no health or other benefits. A complete list of the benefits which are requested is contained in exhibit HR-1 and includes accommodation costs, post differential allowance, dental, health care, recreational hardship support program and other benefits.

Mr. Moore communicated with PAFSO a number of times and he found Peter Cenne helpful in terms of providing advice and keeping him informed. It was clear to the Tribunal that Mr. Moore felt emotionally hurt that his spouse was not recognized. Mr. Moore was embarrassed and humiliated and found the whole situation painful.

2. Pierre Soucy

Mr. Soucy described his relationship with Mr. Moore by April of 1990 as "very much talking in terms of a committed relationship and one of planning a future together." Mr. Soucy confirmed that as of that date he presented himself and Mr. Moore to everyone who knew them as a couple.

When Mr. Moore received confirmation that he would be posted abroad, Mr. Soucy began to make his plans to accompany his partner on the posting. As Mr. Moore became aware that there would not be financial assistance for Mr. Soucy to travel, Mr. Soucy described feeling stress because he knew that the posting was important to his partner's career but he also knew that Mr. Moore would be very concerned about Mr. Soucy's feelings if supportive assistance was not forthcoming

from Mr. Moore's employer. He described the overall situation as causing him a lot of anguish.

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Mr. Soucy confirmed that in Jakarta, he arrived to a home in a state of disrepair, yet unlike other spouses, he was not allowed to request any work orders and this was frustrating. Although many people were civil and tolerant and some even more than just civil and tolerant, Mr. Soucy remembers feeling like a "quasi non-entity" when the Embassy staff issued its list of local Canadians as well as their families and he was not on that list.

3. Dale Akerstrom

Dale Akerstrom has been employed by CEIC (now renamed as Citizenship and Immigration Canada) since April 1990. In November 1990, Dale Akerstrom commenced living with Mr. Alexander Dias in a spousal relationship. The two men jointly purchased a condominium and other possessions, participated in a ceremony officiated by a minister and attended by family and friends to celebrate their relationship, and have openly presented themselves as a couple ever since. Mr. Akerstrom and Mr. Dias have coverage as a same sex couple under the British Columbia Medical Health Care Plan.

In 1992, Mr. Akerstrom approached the Pay and Benefits Clerk at work to obtain the necessary forms to change his benefit status from single to family. He filled out a beneficiary form for supplementary death benefit naming Mr. Dias as his spouse and beneficiary and a Public Service Health Care Plan form indicating his dependent status had changed due to "spousal relationship

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(marriage)". He received a telephone call informing him that his application would not be processed and he sent a memo requesting the grounds for this refusal.

Mr. Akerstrom received a response to his memo which confirmed that the Public Service Health Care Plan did not include common-law same-sex spouse coverage and inviting him to make a submission to have the carrier's policy reviewed. He made that submission setting out details of his family status, offering documents relating to the ownership of the condominium and an invitation from his commitment ceremony and

explained that he felt discriminated against. He testified that he meant the forms and submission to change his coverage from single to family and to refer to dental care as well as all other benefits.

Mr. Akerstrom received a response from the Public Service Health Care Board of Management informing him that the Plan contains a definition which ties the definition of common-law to the opposite sex. It was suggested that he direct his concern to his bargaining representative. Mr. Akerstrom never contacted his union at any point because:

> "Well, I didn't feel that there would be much point in doing that because the Public Service Alliance I felt was kind of -- their hands were tied. They had signed an agreement which discriminated against me,

> so in one sense they had agreed to it, although in another sense I am sure that their reason for that is that it was either sign the agreement or lose the other parts of the agreement. So I did not think they could be of any help."
> (Transcript, Vol. 1, page 204)

Mr. Akerstrom described feeling a fair amount of embarrassment and a sense of disappointment in being denied employment benefits. He has also felt large frustration at the time and effort he has spent trying to obtain something he feels should be straightforward.

Mr. Akerstrom's list of benefits claimed is summarized in exhibit HR-5. The parties agreed that if the Tribunal found in favour of Mr. Akerstrom that the parties would discuss benefits claimed and attempt to come to an agreement respecting quantum.

4. Alexander Dias

Mr. Dias testified that he has been in a relationship with Dale Akerstrom since 1990. He described that relationship as: "a committed long-term spousal relationship." Mr. Dias stated that he is covered under the British Columbia Medical Health Care Plan as Mr. Akerstrom's spouse and that the premiums paid for this provincial plan are paid by Mr. Akerstrom's employer. Mr. Dias has no other dental or health care coverage because he is a full-time student not currently employed other than on a casual basis. He described feeling treated

differently and treated like a second class citizen when Mr. Akerstrom's request for spousal employment benefits was denied.

5. John Fisher

John Fisher testified on behalf of the Canadian Human Rights Commission. Mr. Fisher is a lawyer and the Executive Director of the federal lobby organization: Equality for Gays and Lesbians Everywhere (E.G.A.L.E.). Mr. Fisher provided the Tribunal with eighty-four documents which included correspondence, papers and news clippings representing some of the history of the extensive lobbying efforts of E.G.A.L.E. nationally on gay and lesbian issues. The members of E.G.A.L.E. have presented evidence before Parliamentary and Senate Committees and have intervened in cases before Canadian courts including the Supreme Court of Canada.

After Equality for All, the report of the Parliamentary Committee on Equality Rights, included a recommendation that the Canadian Human Rights Act be amended to add sexual orientation as a prohibited ground of discrimination, E.G.A.L.E. was formed in 1986 to lobby to ensure that this recommendation was followed. Mr. Fisher's evidence was that the gay and lesbian community had been lobbying for the past eighteen years for this and E.G.A.L.E. has now been lobbying for this for the past ten years.

Mr. Fisher testified that increasingly it has become clear to him that the issues of individual discrimination on the basis of sexual orientation is distinguishable in the minds of some from the recognition of same-sex relationships. Mr. Fisher explained that although E.G.A.L.E.'s early focus was on the inclusion of sexual orientation into the Act:

> " ... we did not see a distinction between inserting sexual orientation into the Act and the issue of relationship recognition." (Transcript, Vol. 4, page 675)

and in the special election issue 1993 of INFOEGALE in an article entitled: Relationship Recognition, We're Families too appears the following passage:

"It must be obvious to any reasonably intelligent person that being in same-sex relationships is by definition a fundamental part of being gay." (Exhibit HR-15, Tab. 31)

Mr. Fisher testified that there have been at least ten unsuccessful attempts to introduce legislation to amend the Act to include sexual orientation.

E.G.A.L.E. maintains a list of employers, municipalities, districts, universities, and provinces across Canada which have extended same-sex benefits and the evidence available as to cost is that nobody has indicated a substantial cost difficulty. Mr. Fisher testified that by and large his research on the issue of cost is that it is likely between .5 and 1.5 % of the cost of the benefits and a number of major employers have found basically no significant

increase. Mr. Fisher admitted that E.G.A.L.E. has performed no studies on costs involved in extending same-sex benefits but has drawn on the reported information that exists.

II. The Respondent Employer

The Treasury Board, The Department of Foreign Affairs and International Trade and Canada Employment and Immigration Just prior to the scheduled hearing dates for these complaints, the Treasury Board presented the following Memorandum of Understanding to the National Joint Council Executive Committee for the consideration of the fourteen bargaining agents represented at the National Joint Council:

MEMORANDUM OF UNDERSTANDING

The parties agree:

¨ to change the approach to the interpretation of the following provisions of collective agreements:

- Bereavement Leave

- Family-Related Responsibilities Leave

- Relocation Leave

- Foreign Service Directives

- Isolated Post Directives

- Relocation Directive

¨ that the benefits to which an employee who is a common-law spouse is entitled, pursuant to the above-cited provisions, shall be granted to an employee who is living in a same-sex partner relationship;

¨ that for the purpose of this Memorandum of Understanding, a "same-sex partner" relationship exists when , for a continuous period of at least one year, an employee has lived with a person of the same sex in a homosexual (or lesbian) relationship, publicly represented that person to be his/her partner and continues to live with that person as his/her partner;

¨ the provisions of this Memorandum of Understanding shall become effective on the date it is signed.

SIGNED AT OTTAWA, this..... day of the month of..... of 1995.
(Exhibit R-5, Tab. 1)

Steve Hindle, witness for PIPSC, testified that if signed, the Memorandum of Understanding would have the effect of providing the benefits listed and end the discrimination but would not change the definition of common-law in the collective agreements. The Memorandum refers to matters other than the Health Care Plan and Dental Plan and was at the time of the hearing not signed by the parties.

1. John Ambridge

Mr. Ambridge was the sole witness for the Respondent employers and his testimony was limited to questions and answers concerning the Public Service Health Care Plan and the Dental Care Plan. Mr. Ambridge has been employed by the Treasury Board for eighteen years and for the past two years holds the position of Director of the Benefit Plans Group.

Mr. Ambridge testified that the Public Service Health Care Plan is not part of the collective agreements but is managed by a Board of

Management under the National Joint Council. He said that the Treasury Board ultimately approves the terms and conditions of the Plan but that changes in conditions; are consulted upon with the Unions in a triennial review process within a sub-committee of the National Joint Council.

Mr. Ambridge testified that the issues of same-sex partner coverage has arisen and that National Revenue maintains that including same-sex partners in the definition of spouse would mean deregistration which means the employer contribution to the Plan would become a taxable benefit to the employees. Within the last year however, the Treasury Board has been informed that there might be a possible accommodation by providing coverage outside the established Plan.

Mr. Ambridge estimated that the cost to the Plan of adding benefits to same-sex spouses could be $1.2 million using a take-up rate of 1 % and $2.4 million using a take-up rate of 2% and this cost estimate was based on current rates.

The Dental Care Plan is 100 per cent financed by the Treasury Board and there is one Plan for the National Joint Council as well as a separate Plan

for employees represented by PSAC. Mr. Ambridge testified that the PSAC Plan was awarded in conciliation and the other Plan was developed in the National Joint Council process. According to Mr. Ambridge, the definition of spouse was not an issue during the development of either Plan.

Mr. Ambridge testified that the issue of extending Dental Care Plan benefits to same-sex partners has arisen and that the same factors are involved for the estimate of cost as arose in the Health Care Plan. The rough figures for the additional cost to the Plan to extend benefits is $650,000 per year using a 1% take-up rate and $1.3 million using a 2% take-up rate.

Mr. Ambridge agreed during cross-examination that "take-up rates" is an insurance term meant to describe numbers of people taking advantage of Plan benefits so that if 1% of the population changes from category of single to the category of family, the cost figure would be 1%. He went on to say that 1% or 2% figures were based on nothing reliable and were strictly a range used to estimate potential costs. He further testified that the cost of a 1% take-up rate would amount to about half of one percentage of the total cost of each Plan. Strangely,

the witness informed the Tribunal that although some inquiries had been made of other jurisdictions within Canada to obtain experience information about cost and take-up rates that no hard data was available.

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Mr. Ambridge agreed that the cost increases of extending benefits to same-sex spouses would be quite modest using these estimates in comparison to some of the other increases experienced by the Plans over the years.

Mr. Ambridge agreed on cross-examination that a purpose of a benefit plan is to attract and keep good employees. A benefit plan is part of the costs of the total compensation to an employee. Even though cost estimates were being worked on in 1994 and even though this issue was being raised by the Unions, Mr. Ambridge understood that the Government as employer could not easily be separated from the Government in other contexts such as social programs and that would present difficulties in making decisions concerning extending same-sex benefits to Government employees.

III. The Union Respondent in Dale Akerstrom's Complaint
The Public Service Alliance of Canada

1. Carole Brunt

Carole Brunt testified on behalf of PSAC. She is a Research Officer employed by PSAC since 1988. Ms. Brunt testified that her records show that PSAC began to make bargaining demands for Mr. Akerstrom's group being the PM group as early as 1980 for a non-discrimination clause in the collective agreement, which included no discrimination on the basis of sexual orientation.

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The First Master Agreement after binding conciliation in 1986 included a non-discrimination clause, with no discrimination on the basis of sexual orientation as proposed by the Union.

In the 1987-1988 round of bargaining, the definition of common-law spouse proposed by the Union specifically included same-sex spouses, and was eventually dropped. The Union continued to propose the same definition until collective bargaining ceased in 1991 due to

legislation. Ms. Brunt's testimony was that throughout this period, the Union took the position that the no discrimination clause should have had the effect of changing the definition of spouse to include same-sex spouses.

The Dental Plan is part of the collective agreement but under the Plan the appeal process is to a Board of Management. There was an application in June 1988 by a PSAC member to the Board for same-sex benefits which was ultimately unsuccessful. In the 1990's, four other cases came forward; two of which were denied and two which are on hold.

The Public Service Health Care Plan similarly operates by a Board of Management. To-date, there have been six same-sex benefits cases, one of which involved a PSAC member and all of which have been denied. The Health Care Plan is run through the National Joint Council. The National Joint Council

process deals with matters such as hours of work, travel, isolated posts, etc. outside of collective bargaining. Ms. Brunt testified that PSAC has repeatedly taken the position at the National Joint Council that there should be a revision to the NJC policies to provide entitlements of benefits to same-sex spouses.

2. Don Pease

Don Pease testified on behalf of PSAC. He is employed by PSAC and since 1987 has performed the role of research officer in the grievance and adjudication section. The grievance and adjudication section represents grievors before the Public Service Staff Relations Board amongst other Boards of Arbitration and generally becomes involved in a grievance at the stage where a grievance is referred to adjudication. Since August 1987, thirty grievances dealing with same-sex spousal rights came to the section for referral. The total number of thirty grievances involved approximately 22 or 23 grievors.

Of the total of thirty grievances, fourteen involving the Treasury Board were resolved by the Treasury Board granting the relief requested on a without prejudice, humanitarian basis although the collective agreement does not provide for leave entitlement on humanitarian grounds. Thirteen grievances were described as pending, two grievances were ruled on and lost by the grievor and the third grievance was successful.

Mr. Pease testified that the Union took the position that Article M-16 (the non discrimination clause) in the agreement rendered the opposite sex requirement in the definition of common-law spouse inoperative and took that position as of 1987.

Mr. Pease also testified that there are six regional gay and lesbian support groups across the country active within PSAC meaning recognized by PSAC as an equity group within the Union organization. These support groups were established beginning in 1989 to assist gay and lesbian members. These groups engage in organizing and speaking on gay and lesbian issues, developing position papers and other supportive activities including, leave without pay reimbursement. Additionally, within the Equal Opportunities Committee of the National Board of Directors of PSAC there are two seats reserved for gay or lesbian members.

IV. The Union Respondent in Stanley Moore's Complaint

The Professional Association of Foreign Service Officers

1. Peter Cenne

Peter Cenne testified on behalf of the Professional Association of Foreign Service Officers. Mr. Cenne is the Executive Director of PAFSO since 1990. PAFSO is a bargaining agent for approximately 1500 Foreign Service

Officers in two departments namely Foreign Affairs and Citizenship and Immigration. Foreign Service Officers in either department are employed by the Treasury Board.

There is a collective agreement between PAFSO and Treasury Board as well as a number of Foreign Service Directives. Negotiations pertaining to Foreign Service Directives were described as conducted under another process of consultation being through the National Joint Council process.

Mr. Cenne testified as to the history of PAFSO activities directed toward gay and lesbian rights generally. PAFSO established an advisory committee comprised of gay and lesbian members to advise PAFSO's

executive committee on issues in late 1991 or early 1992. In July 1991, PAFSO proposed a change in its collective agreement to change the definition of common-law spouse to delete the word "of opposite sex" in order to extend the definition of common-law spouse to gay and lesbian members. The proposal included an addition to the non-discrimination clause to add sexual orientation. The nondiscrimination clause was changed to include sexual orientation but the definition of common-law spouse was not changed. Mr. Cenne testified that there had been no other bargaining possible for PAFSO due to the Compensation Restraint Act.

PAFSO, along with other staff side members of the Foreign Service Directives Committee of the National Joint Council proposed the amendment of the Foreign Service Directives beginning in 1991 to include same-sex spouses in the definition of spouse.

V. The Interested Party

The Professional Institute of the Public Service of Canada

1. Steve Hindle

Mr. Hindle is employed by the Treasury Board and has been a federal public servant since 1981. He is the National Vice-President of PIPSC and has been for the past five years. He testified that PIPSC would like to see all discrimination against gays and lesbians eliminated from all collective agreements, National Joint Council, and all legislation. As early as 1988, PIPSC had members of a Group Advisory Council working to promote gay and lesbian rights and by 1992 had a sub-committee on sexual orientation.

Mr. Hindle testified that PIPSC's support for gays and lesbians in the workplace has taken many forms. He confirmed that PIPSC represents its members in grievances respecting benefits. PIEPSC has made presentations, prepared drafts for legislative changes, and has sponsored as well as participated in educational seminars on equal access to benefits. PIPSC has donated

$5,000.00 to E.G.A.L.E. to support its intervention costs in the case of Lug and Nesbitt and the CS group within PIPSC provided E.G.A.L.E. with an additional $3,700.00.

Eighteen of PIPSC's groups participated in Master Bargaining with the Treasury Board and in 1987 PIPSC proposed a definition of common-law spouse which would include same-sex spouses. This definition was not acceptable to the Treasury Board and the ultimate agreement signed by the parties did not reflect the proposal of PIPSC nor did the agreement signed in the 1990 round.

The CS group in PIPSC is not part of Master Bargaining and its current collective agreement was signed in 1988. In 1993. the CS group approached the Treasury Board to reopen the collective agreement to deal specifically with the definition of common-law spouse and to remove the words "of the opposite sex" from that definition. To reopen would require the consent of the Treasury Board and that consent was not forthcoming although there was correspondence from the Treasury Board negotiator that the matter is the subject of ongoing "review".

Mr. Hindle was aware of three grievances by PIPSC members with same-sex spouses: one concerning marriage leave, one concerning bereavement

leave, and one concerning family related responsibilities leave. In the bereavement leave case the employer ultimately granted the leave on humanitarian grounds.

C. THE ISSUES

There are several issues to be addressed in working toward a decision in this case.

1. Is sexual orientation a prohibited ground of discrimination under the Canadian Human Rights Act (the Act)?

2. Does the denial of spousal benefits to same-sex partners, who meet all aspects of the definition of common-law spouses except for being of the opposite sex, constitute discrimination on the ground of sexual orientation?

3. Have the Complainants established a prima facie case of discrimination?

4. If the answer to #3 is yes, has the Respondent answered the prima facie case?

D. ANALYSIS

1. The first issue is now very much settled in law since the decision of the Ontario Court of Appeal in Haig and Birch v. Canada 1992, 90.R. (3d) 495 (C.A.), (Haig) and the decision of the Supreme Court of Canada in Egan et al v. Canada (1995), 124 D.L.R. 609 (S.C.C.), (Egan). In fact, Respondents Counsel agreed at the outset that sexual orientation is now a prohibited ground of discrimination under the Art.

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The Ontario Court of Appeal found in Haig that sexual orientation was an analogous ground of discrimination under s. 15(1) of the Canadian Charter of Rights and Freedoms (the Charter), and thus, rather than striking down s. 3 of the Canadian Human Rights Act, as the lower court had done, elected to "read in" sexual orientation as a prohibited ground and declared that the ASA be interpreted, applied and administered as though it contains sexual orientation in s. 3. The Minister of Justice of the day, as the appeal period expired, publicly announced that the decision would not be appealed and would stand as the law of Canada.

In the Egan decision, the Supreme Court of Canada unanimously found that sexual orientation is an analogous prohibited ground of discrimination under s. 15(1) of the Charter. LaForest J., writing what was ultimately part of the majority decision, and even though the court for other reasons did not find in Egan's favour on the central claim, says at page 619:

> [5] The appellants' claim before this court is that the Act (ie. the Old Age Security Act, R.S.C. 1985, C.0-9) contravenes s. 15 of the Charter in that it discriminates on the basis of sexual orientation. To establish that claim, it must first be determined that s. 15's protection of equality without discrimination extends to sexual orientation as a ground analogous to those specifically mentioned in the section. This poses no great hurdle for the appellants; the respondent Attorney General of Canada conceded this point.

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He then continues to reinforce this point by stating:

> While I ordinarily have reservations about concessions of constitutional issues, I have no difficulty accepting the appellants' contention that whether or not sexual orientation is based on biological or physiological factors, which may be a matter of some controversy, it is a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs, and so falls within the ambit of s. 15 protection as being analogous to the enumerated grounds.

Later in this same decision, Iacobucci J., in citing cases which buttress his conclusion regarding "reading in" cites the Haig case at page 690, thus approvingly:

[224]...It is also interesting to note that in ... (Haig)... courts read "sexual orientation" into human rights legislation. In fact, in Haig the Ontario Court of Appeal remarked (at p. 14) that it was "inconceivable ... that Parliament would have preferred no Human Rights Act over one that included sexual orientation as a prohibited ground of discrimination. To believe otherwise would be a gratuitous insult to Parliament."

In the Federal Court of Canada decision in Neilsen v. Canada, No. T-2994-93, 20 June 1995 (Fed, T.D.), Joyal J. states at page 2:

> ... On August 6, 1992, in the matter of Haig and Birch v. Canada, [1992] 9 O.R. (3d) 495, the Ontario Court of Appeal substantially confirmed an earlier Trial Division judgment that sexual orientation could be read into Section 3 of the CHRA. That decision wrote finis to the longstanding debate as to whether discrimination on grounds of sexual orientation was or was not prohibited under the Act.
> (Emphasis added)

Based upon these decisions, it is clear that sexual orientation is a prohibited ground of discrimination both under s. 15 of the Charter and s. 3 of the CHRA.

NOTE: Following the conclusion of this hearing and while this decision was being written but before it was issued, Parliament amended s. 3 of the CHRA to expressly include sexual orientation as a prohibited ground of discrimination.

2. The next question to be addressed in the matter before us is whether the denial of spousal benefits to same-sex partners who meet all aspects of the definition of common-law spouse except for being "of the opposite sex" constitutes discrimination on the prohibited ground of sexual orientation.

In Egan (supra), a majority of the Court found that the Old Age Security Act does infringe s. 15(1) of the Charter. Sopinka J., however, found that in the particular circumstances of that case, the infringement was saved under s. 1. His decision in this respect was pivotal in determining the majority outcome which denied the appellants' claim.

Cory J. in his reasons writes at page 672:

> [168] In this case, there can be no doubt that the distinction is related to the personal characteristic of sexual orientation. It may be correct to say that being in a

> same-sex relationship is not necessarily the defining characteristic of being homosexual. Yet, only homosexual individuals will form a part of a same-sex common-law couple. It is the sexual orientation of the individuals involved which leads to the formation of the homosexual couple. The sexual orientation of the individual members cannot be divorced from the homosexual couple. To find otherwise would be as wrong as saying that being pregnant had nothing to do with being female.

He continues at page 675:

> [175]... Sexual orientation is more than simply a "status" that an individual possesses. It is something that is demonstrated in an individual's conduct by the choice of a partner... Sexual orientation is demonstrated in a person's choice of a life partner, whether heterosexual or homosexual.
> (Emphasis added)

> And, as he nears the conclusion of his reasons, he says on page 677:

> [180] In the present appeal, looking at the Act from the perspective of the appellants, it can be seen that the legislation denies homosexual couples equal benefit of the law. The Act does

> this not on the basis of merit or need, but solely on the basis of sexual orientation. The definition of "spouse" as someone of the opposite sex reinforces the stereotype that homosexuals cannot and do not form lasting, caring, mutually supportive relationships with economic interdependence in the same manner as heterosexual couples... The discriminatory impact can hardly be deemed to be trivial when the legislation reinforces prejudicial attitudes based on such faulty stereotypes. The effect of the impugned provision is clearly contrary to s. 15's aim of protecting human dignity, and therefore the distinction amounts to discrimination on the basis of sexual orientation.

The finding is concurred in by L'Heureux-Dubé, McLaughlin, Iacobucci and Sopinka J.J. thus making it a finding by a majority of the justices of the

Supreme Court of Canada that the definition of spouse offends s. 15 of the Charter and constitutes discrimination on the basis of sexual orientation.

In the case of Voizel v. Manitoba, [1995] 6 W.W.R. 513 (Man, C.A.), the Manitoba Court of Appeal heard an appeal dealing with issues similar to those in the case before us. It was a case of the denial of spousal benefits to the same-sex common-law spouse of a provincial employee. The complaint had originated under the Human Rights Code of Manitoba.

The court made a unanimous decision and Philp J.A. in giving his reasons stated at page 517:

> I agree ... that the questions that have been raised in this appeal have been answered by the Supreme Court's decision in Egan. Although couched in somewhat different words than those in the impugned provisions of the Act, this Court is bound to conclude that the denial of spousal benefits under Mr. Vogel's employment benefit plans to his same-sex partner is the result of their sexual orientation, and is, therefore, discriminatory treatment under the Code.

It is now crystal clear that the law is that denial of the extension of employment benefits to a same-sex partner which would otherwise be extended to opposite-sex common-law partners is discrimination on the prohibited ground of sexual orientation.

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It is equally clear from the reading of these cases that the inclusion of a definition of "spouse" which excludes same-sex partners in legislation or collective agreements or regulations by the government so as to deny such benefits offends the Charter and the Canadian Human Rights Act and constitutes discrimination prohibited by both.

3. The Tribunal has reviewed the facts of this case as presented in evidence and finds, without difficulty, that both the Complainant Mr. Moore and the Complainant Mr. Akerstrom have established a prima facie case of discrimination upon the prohibited ground of sexual orientation. We make this finding with respect to all complaints under s. 7, s. 9 and s. 10 of the Act.

4. In answer to the Complainants' case, the Counsel for the Respondents raised two particular arguments the Tribunal will here address.

The first was that, given the decision of Sopinka J. in Egan, in which, after finding with four other justices that the Old Age Security Act infringed the Charter, he then finds that the infringement is saved under s. 1, that this Tribunal should take a similar approach in the event of a finding that the complaints were substantiated. It was argued that the government should be given time to get its house in order.

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It is important that we understand the distinction between the role of government as the developer and implementor of social policy initiatives and the role of government as employer.

It is clear throughout the decision that Sopinka J. is, in addressing the Old Age Security Act, dealing with government in its role as initiator of social policy. At page 653 of Egan he states:

> [104] 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 proactive 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. A judicial approach on this basis would tend to make a government

reluctant to create any new social benefit schemes...
(Emphasis added)

He later writes:

[105] This court has recognized that it is legitimate for the government to make choices between disadvantaged groups and that it must be provided with some leeway to do so.

He is speaking of government's role in extending social benefits and targeting assistance to disadvantaged groups.

The facts in the present case before the Tribunal are clearly distinguishable. Here, we are dealing with an employer who happens to be the government. The government as employer can no more rely upon s. 1 of the

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Charter to justify discrimination on a ground prohibited under this Act than can a private employer who is federally regulated.

Here we are dealing with Employment Benefits - part of the remuneration package of employees - designed to attract, compensate and keep employees.

Here we are not dealing with discretionary social benefits - these are earned benefits.

This case is not a Charter case. The defences available to the Respondent are the defences provided in the Act. S. 1 of the Charter is not one of those defences. The second argument raised by Respondent Counsel related to remedy.

Relying upon the decision in Neilson v. Canada (Attorney General), No. T-2994-93, 20 June 1995 (Fed. T.D.), Counsel argued that in the event of a finding that the complaints of Mr. Moore were substantiated, the Tribunal could not in determining a remedy, look back beyond August 6, 1992, and the decision in Haig, since that was when sexual orientation became a prohibited ground.

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In Neilsen, a federal government employee filed a complaint on September 29, 1989, on grounds of sex, marital status and family status and later, sexual orientation. She had been denied dental coverage for her same-sex partner and the partner's child. Her complaint along with several others, was held in abeyance by the Canadian Human Rights Commission pending the court's determination in the case of Mossop v. Canada (Secretary of State), [1993] 1 S.C.R. 554.

Prior to the Supreme Court decision in Mossop, the decision of the Ontario Court of Appeal in Haig was rendered and ultimately Mossop did not succeed on the ground of family status.

The CHRC took the position that it would not proceed with those complaints held in abeyance where the complaint was based on sexual orientation and the discriminating conduct predated the decision in Haig.

Consequently, Neilsen's complaint was dismissed and she sought a judicial review which culminated in a dismissal on June 20, 1995. The Federal Court ruled on the basis of the presumption against retroactivity in the application of the law.

In Neilsen, the complaint in 1989 clearly pre-dated Haig. Furthermore, she left the employ of the Federal Government in 1991, also before the decision in Haig.

Therefore, at no time, while she was employed by the Federal Govermnent, did the law provide her with a ground for a complaint based upon sexual orientation.

In the case of Mr. Moore, the complaints were filed in 1994 at which time sexual orientation was a prohibited ground of discrimination. There is no attempt here to apply the law retroactively to provide the ground for complaint. The discrimination was a continuing discrimination at the time of the complaint.

In Miron v. Trudel, 1995, File No. 2274, S.C.C., the court was dealing with a fact situation in which the Appellants were common-law spouses. Miron was rendered unable to work as a result of an automobile accident in 1987 while a passenger in a vehicle driven by Trudel. Neither Trudel nor the owner of the vehicle was insured.

Miron, therefore, made a claim for accident benefits for loss of income and damages against the insurance policy of his common-law wife. The policy did extend benefits to the spouse of the policy holder.

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The insurance company denied the claim on the ground that he was not legally married and thus not a "spouse".

In 1987, the benefits were governed by the 1980 insurance legislation which the court found did not include common-law couples in the provisions; for spouses. In 1990, the legislation was amended, so as to define spouse as including a common-law spouse.

In fashioning a remedy, the court "read up" the 1980 statute in conformity with the terms legislated in 1990, thus giving Miron a cause of action. In effect the court applied the 1990 amendment retroactively to provide a cause of action and a remedy.

In the case before the Tribunal, as stated above, Mr. Moore had a ground for his complaint when it was filed and if the Tribunal were to find the complaint substantiated, it would by a ludicrous injustice to say that he has been discriminated against at considerable personal emotional and financial cost but not provide as complete a remedy as possible.

Thus, in the event of a finding that the complaint has been substantiated, the Tribunal would, using a similar rationale as in the Trudel case, provide a remedy covering the whole of the continuing discriminatory practice.

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E. FINDING

The Tribunal finds that each complaint by both Complainant Stanley Moore and Complainant Dale Akerstrom has been substantiated against all Respondents. However, in the case of the Public Service Alliance of Canada and the Professional Association of Foreign Service Officers, the finding is mitigated by the evidence that they had made considerable efforts over the years in negotiations with the employer and through the grievance process to seek changes which would have eliminated the discrimination. Having found a discriminatory practice on the ground of sexual orientation, the Tribunal

finds it unnecessary to examine further the matter of discrimination on the basis of family status or marital status.

F. REMEDY

The Canadian Human Rights Act sets out in section 2 the purpose Parliament had in mind in passing this quasi-constitutional legislation into law. It identifies the following central principle:

> ... 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...

This is a noble principle which this Tribunal is bound to bear in mind when weighing

the evidence before it and, where a complaint is substantiated, when fashioning a remedy to redress the discrimination.

In the case before us, we are dealing with two established same-sex partnerships which the courts have now described as same-sex common-law relationships.

If we can draw a distinction between traditional family structures and traditional family values, it becomes evident that we are looking at couples who by virtue of their sexual orientation cannot form a traditional family structure in terms of gender composition but nevertheless wish to affirm and uphold traditional family values by forming a loving, nurturing union in which they share all aspects of their lives and assume responsibility for each others well-being.

If they are to be afforded the equal opportunity as contemplated in s. 2 of the Act to assume this responsibility, then changes must be made to remove the existing obstacles.

The Tribunal particularly wants to emphasize that there is nothing in the Canadian Human Rights Act or in this decision which confers any special or exceptional status upon anyone. We are dealing only with the equality of opportunity to live one's life free from discrimination on any of the

prohibited grounds enumerated in the Act as expressed so eloquently by Parliament in section 2 - a protection extended equally to every individual.

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At the conclusion of the hearing, Counsel requested that, in the event of a finding that the complaints were substantiated, they be given general direction in an order from the Tribunal and an opportunity to work out the details while the Tribunal retains jurisdiction.

The Tribunal accepts this proposal and makes the following order:

a) With respect to Stanley Moore, Treasury Board and the Department of Foreign Affairs and International Trade shall:

(1) pay an amount equal to all the spousal related entitlements and expenses to which he and Mr. Soucy would have been entitled but for the discrimination commencing as of the beginning of his posting to Jakarta in July 1991.

(2) pay the amount of $5,000.- in respect of hurt feelings and self-respect pursuant to s. 53(3) (b) of the Act.

(3) pay any receipted costs incurred, as a result of the discriminatory practice, in pursuing these complaints.

(4) pay interest on the above amounts.

b) With respect to Dale Akerstrom, Treasury Board and Canada Employment and Immigration shall:

(1) pay all additional costs incurred by him and Mr. Dias in obtaining alternative services as a result of the discriminatory practice.

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(2) pay the sum of $500.- for hurt feelings and self-respect pursuant to S. 53(3) (b) of the Act.

(3) pay any receipted costs incurred, as a result of the discriminatory practice, in pursuing these complaints.

(4) pay interest on the above amounts.

The Tribunal orders that, within sixty days following the date this decision is issued, the parties agree upon the amounts to be calculated in a) (1), (3) and (4) and in b) (1), (3) and (4) above. If they fail to achieve this within sixty days, they shall notify the Tribunal Registry and the Tribunal will reconvene to resolve the matter.

c) The Tribunal further orders, pursuant to s. 5 3 (2) (a) of the Act that the Respondents cease and desist in the application of any definition of spouse or any other provisions of the Foreign Service Directives, the Collective Agreements, National Joint Council policies, the Public Service Health Care Plan or the Dental Care Plan which operate so as to continue the discriminatory practice and interpret any such definition or provision to be in compliance with the Act (and the Charter) so as to include same-sex common-law spouses.

This order is to take effect immediately.

d) The Tribunal further orders that, within sixty days of the issuance of this decision, the Respondents in consultation with and in cooperation with the Commission, prepare:

(1) an inventory of all legislation, regulations, directives, etc. which either contain definitions of common-law spouse which discriminate against same-sex common-law couples or in some other way operate, when applied, to continue the discriminatory practice based upon sexual orientation in the provision of employment-related benefits and present such inventory in writing to the Tribunal within the sixty-day period. This inventory shall exclude, at the request of the parties, any legislation providing for pension benefits, but shall include any provisions of the Income Tax Act which would treat any employment related benefits paid to same-sex common-law couples differently for taxation purposes from the way they would be treated if paid to an opposite-sex common-law couple.

(2) a proposal for the elimination of all such discriminatory provisions to be presented to the Tribunal within the sixty-day period.

If the parties are unable to complete this within the prescribed time, they shall notify the Tribunal Registry and the Tribunal shall reconvene.

In any event, the Tribunal shall reconvene after receipt of the written material to consider with the parties incorporation of such material in this order.

The time restrictions in this order shall not be extended by the initiation of an Appeal or a Judicial Review by any party unless expressly provided for in the Federal Court Rules or by order of the Federal Court.

The Tribunal retains jurisdiction as requested.

Dated at Ottawa this 24th day of May, 1996.

Keith C. Norton Q.C., Chairperson

Janet Ellis, Member

J. Grant Sinclair, Q.C., Member