Employment Benefits for Same Sex Couples: The Expanding Entitlement

DONALD D. CARTER
Faculty of Law
Queen's University
Kingston, Ontario

The past decade in Canada has seen a growing amount of litigation arising from the claims of same sex couples to employment benefits that opposite sex couples, including those living in common law relationships, can claim as of right. Some of this litigation has been initiated before human rights tribunals and arbitration boards, but it has been primarily the courts that have led the way in expanding the entitlement of same sex couples to employment benefits. This paper analyses this recent jurisprudence and explores its implications for human resource managers in both the public sector and the private sector.

What is somewhat surprising about this recent litigation is that much of it has occurred well after most Canadian jurisdictions had amended their human rights statutes by expressly including sexual orientation as one of the prohibited grounds of discrimination. Why has it been necessary to litigate extensively the entitlement of same sex couples to employment benefits in the face of these clear
statutory prohibitions against discrimination based on sexual orientation? I would suggest that the reason for this litigation is the ambivalence of Canadian society toward homosexuality. Many Canadians, while now prepared to accept that gays and lesbians should be protected from workplace conduct that is openly intolerant of their sexual orientation, are much less willing to affirm homosexuality by regarding same sex relationships as analogous to opposite sex relationships. This ambivalence may explain the fact that, while from the outset it was clear that the prohibition against discrimination based on sexual orientation protected gays and lesbians from improper interference in the workplace, it was much less clear whether it also created an entitlement for same sex couples to certain employment benefits that in the past had been reserved for traditional spousal relationships.

The fact that it has been necessary to resort to extensive litigation to clarify the scope of the prohibition against discrimination based on sexual orientation reflects a division within Canadian society over the issue of whether same sex couples should be entitled to the same treatment as heterosexual couples. Clearly there has been a reluctance in certain parts of Canadian society to take the prohibition against discrimination based on sexual orientation to its logical conclusion. While many Canadians appear prepared to tolerate homosexuality by recognizing that gays and lesbians as individuals should not be subject to harassment in the workplace, they appear much less prepared to affirm homosexuality by acknowledging that long-standing same sex relationships should be recognized as a type of family relationship that would entitle gay and lesbian couples to employment benefits already provided to more traditional families. Indeed this ambivalence is still reflected in many public statutes, including human rights legislation in some jurisdictions, that expressly define marital status as being confined to conjugal relationships involving persons of the opposite sex.¹

Canadian legislators have been less than eager to resolve this ambivalence and have preferred to remain silent rather than to expand the statutory definition of family arrangements by means of legislative amendment. Recent federal legislation, for example, amended the Canadian Human Rights Act by adding sexual orientation as a prohibited ground of discrimination but still left the term “marital status” undefined.² The cautious approach of our politicians to such a contentious issue has left the field open to our judges to do by judicial interpretation what our legislators are unwilling to do by legislative amendment.

Only a few years ago Canadian courts appeared to be just as reluctant as our politicians to resolve the contradiction between the express prohibition against discrimination based on sexual orientation set out in human rights legislation and the discriminatory treatment of same sex couples when it came to the provision of employment benefits.³ This initial reluctance to affirm long-standing same sex relationships has now largely disappeared as Canadian courts have begun to give clear judicial recognition to the claims of same sex couples to be treated in the same manner as more traditional family units in the application of employment benefits. Indeed the courts are now beginning to look to the guarantee of equality set out in the Canadian Charter of Rights and Freedoms⁴ in order to resolve the legislative contradiction between statutory prohibitions against discrimination based on sexual orientation and other statutory provisions that confine family status to arrangements between members of the opposite sex. What the courts have said is that the right to be protected against discrimination based on sexual orientation is more than just the product of human rights legislation and now must be considered as a fundamental right that arises by implication from the Charter’s guarantee of equal treatment under the law. By giving constitutional status to the right to be protected against discrimination based on sexual orientation is more than just the product of human rights legislation and now must be considered as a fundamental right that arises by implication from the Charter’s guarantee of equal treatment under the law. By giving constitutional status to the right to be protected against discrimination based on sexual orientation, and including within the ambit of that right protection for same sex relationships, the courts have signalled that in some cases at least this right will trump any legislated definition of marital status.
Egan and Nesbit and Its Aftermath

This overriding effect of the right to be protected against discrimination based on sexual orientation has now been recognized in the Supreme Court of Canada’s landmark decision in the Egan and Nesbit case. In Egan and Nesbit the Supreme Court of Canada faced squarely the issue of whether same sex couples were entitled to the benefit of equal treatment under the law provided by section 15 of the Canadian Charter of Rights and Freedoms. Egan and Nesbit had lived together as a same sex couple since 1948 in a relationship that had the degree of commitment and interdependence that one would find in a traditional heterosexual marriage. Nevertheless Nesbit was denied the spousal allowance under the federal Old Age Security Act because his relationship with Egan did not fit within the definition of spouse set out in that statute. This definition had been amended to include persons living in a common law relationship but the amended definition expressly referred to such persons as being of the opposite sex — the clear effect being to provide less advantageous treatment for same sex couples.

Egan and Nesbit were not successful in asserting their particular claim but they did succeed in obtaining Charter protection for same sex relationships. Five of the nine justices of the Supreme Court of Canada were prepared to find that the definition of spouse set out in the Old Age Security Act was inconsistent with the Charter’s guarantee of equal treatment. One of these justices, however, did hold that the definition, at least at the time of the decision, constituted a reasonable limit under s.1 of the Charter since it was intended to provide financial assistance to those in greatest need. This latter finding was fatal to the particular claim before the Court since the four remaining justices were not prepared to find any infringement of the Charter’s guarantee of equality, viewing preferred treatment for heterosexual couples as relevant given what they considered to be the much larger role that such couples play in child rearing.

Despite the failure of Egan and Nesbit’s particular claim, the case has important implications for future claims from same sex couples. For the first time a majority of the Supreme Court of Canada was prepared to find that sexual orientation was a personal characteristic that brought same sex relationships under the umbrella of the Charter’s guarantee of equality of treatment. This finding that same sex relationships are now afforded constitutional protection has particular significance for future claims from same sex couples asking to be treated in the same way as heterosexual couples. Future claims, because they can now be Charter based, could even prevail in the face of express statutory language that confines family status to opposite sex couples, leaving the way open to an expanding entitlement to employment benefits for same sex couples.

The impact of the Egan and Nesbit case can already be seen. In Vogel v. Manitoba the Manitoba Court of Appeal considered the claim of a Manitoba government employee, who had been living in a same sex relationship since 1972, to employment benefits already provided to employees living in a common law relationship with a person of the opposite sex. Such benefits included a dental plan, a pension plan, an extended health care plan, and a group life insurance plan. The Court, in the light of the Egan and Nesbit case, had no difficulty concluding that the different treatment of same sex and opposite sex couples where they both held themselves out as common law couples, could only be discrimination based on sexual orientation. On that basis the matter was referred back to the human rights adjudicator who had initially dismissed the claim in order to be reconsidered in accordance with the decision of the Court. It would appear that the only matter left open to the adjudicator by this decision was whether the qualification of “bona fide or reasonable cause” set out in Manitoba’s human rights legislation might be a defence to what was, on its face, improper discrimination based on sexual orientation.

What is interesting about the Vogel case is that the Manitoba Court of Appeal clearly recognized
the full implications of the Supreme Court of Canada’s decision in Egan and Nesbit. Once same sex couples are recognized as being entitled to equal treatment under the Charter, it then becomes much more difficult to justify treating such couples in a manner different from opposite sex couples in more traditional spousal arrangements, especially now that these benefits are generally extended to opposite sex couples living in common law arrangements where formal marital status is no longer regarded as a condition of receiving spousal benefits. Clearly employers in Manitoba are now likely to face a high hurdle when faced with the task of establishing “bona fide or reasonable cause” for providing a less favourable package of employment benefits to same sex couples than to opposite sex couples living in a common law arrangement. As will be discussed later, however, in the area of pension benefits federal income tax legislation may still provide employers with a sufficient justification to clear that hurdle.

The Egan and Nesbit decision has made it clear that the Charter’s guarantee of equal treatment under the law extends as far as same sex couples, but it also has another important effect in those few Canadian jurisdictions which still have not expressly included sexual orientation as a prohibited ground of discrimination in their human rights legislation. Human rights legislation itself is subject to the Charter and its provisions must be consistent with the Charter’s guarantees of equal treatment under the law. Now that the Supreme Court of Canada has recognized that sexual orientation falls within the Charter’s guarantee of equality as being analogous to the grounds expressly enumerated in that provision, human rights legislation that omits this ground has become constitutionally suspect.

What is important to understand is that the Charter’s impact reaches beyond its direct application to government, either as legislator or employer. Employers in the broader public sector and in the private sector, while not subject to the direct application of the Charter, are still regulated by human rights laws that do fall within the direct reach of the Charter. Human rights laws, either at the federal or provincial level, must be read in a manner consistent with the Charter and, as a result, have been reshaped by Charter imperatives. This indirect impact of the Charter, as will be seen, now has important implications for employers in the private sector and the broader public sector.

This reshaping of human rights laws through application of the Charter was occurring even before the Supreme Court of Canada’s decision in Egan and Nesbit. In the Haig case the Ontario Court of Appeal was faced with the issue of whether there was any legal basis for complaints made by former members of the Canadian Armed Forces that they had been the victims of employment discrimination because of their sexual orientation. At that time sexual orientation was not included as a ground of prohibited discrimination in the Canadian Human Rights Act. The federal government, however, conceded that by analogy sexual orientation fell within the guarantee of equal protection under the law set out in s. 15 of the Charter. In the face of this concession the Court had no difficulty finding a legal basis for the claim, holding that the failure of the federal human rights legislation to include sexual orientation as a prohibited ground of discrimination was inconsistent with s.15 of the Charter. This improper omission was remedied by the Court reading this prohibition into the legislation by interpreting and applying the statute as though it actually did contain an express prohibition against discrimination based on sexual orientation.

Now that the Supreme Court of Canada, in Egan and Nesbit, has clearly recognized sexual orientation as a ground analogous to those expressly set out in s.15, the argument that human rights legislation must be brought in line with the Charter would appear to have even more force. In Nolan and Barry, Justice Barry of the Newfoundland Supreme Court interpreted Egan and Nesbit as clear recognition by the Supreme Court of Canada that homosexuals had been historically disadvantaged and were entitled to protection from discrimination. In his view the
omission of this group from the protection of Newfoundland’s human rights legislation was a “glaring omission” which itself was discriminatory. The appropriate remedy, according to Justice Barry, was to read sexual orientation into the legislation as a prohibited ground of discrimination.

The Alberta Court of Appeal in the Vriend case, however, took a much different view of the omission from Alberta’s human rights legislation of sexual orientation as a prohibited ground of discrimination. Vriend had been dismissed from his employment because of his homosexuality. His complaint to the Alberta Human Rights Commission was rejected because discrimination on the ground of sexual orientation was not expressly prohibited by Alberta’s Individual Rights Protection Act. The matter then moved on to the courts. The Alberta Court of Queen’s Bench differed with the Alberta Human Rights Commission and took the same approach as the Ontario Court of Appeal did in the Haig case, reading into the human rights statute sexual orientation as a prohibited ground of discrimination and finding a breach of that prohibition. This approach, however, was rejected by a majority of the Alberta Court of Appeal.

The majority of the appeal court held that legislative silence on the matter of sexual orientation must be construed as a legislative choice not to deal with the issue rather than as a legislative choice to create a distinction based on sexual orientation. Given this characterization of the legislative omission, the majority held that Alberta’s human rights legislation was not inconsistent with the Charter’s guarantee to homosexuals of equal treatment under the law. The dissenting justice, on the other hand, held that legislative silence on the matter did amount to discrimination by the Alberta legislature since it had clearly drawn a distinction between homosexuals who were omitted from the legislation and other victims of discrimination who had been expressly brought within its scope. This distinction constituted a denial of equal benefit and protection of the law contrary to s.15 of the Charter. Despite this conclusion, the dissenting judge was not prepared to go so far as to read into the Alberta statute sexual orientation as a prohibited ground of discrimination because of a concern about the potential impact of this remedy on the entitlement of homosexuals to employment benefits. Instead she temporarily suspended the declaration of the invalidity of certain sections of the legislation in order to give the Alberta legislature the opportunity to bring its legislation into conformity with the Charter.

The majority decision in Vriend is a departure from both the Haig and Nolan and Barry decisions. Its impact appears to be restricted to Alberta and Newfoundland since human rights legislation in all other Canadian jurisdictions now expressly prohibits discrimination based on sexual orientation. Moreover, in light of the Supreme Court of Canada’s clear recognition in Egan and Nesbit that the Charter’s guarantee of equal protection under the law embraces sexual orientation, it is debatable whether the majority decision in Vriend can withstand the test of an appeal to the Supreme Court of Canada.

It should be made clear that Vriend has little impact in those Canadian jurisdictions that expressly prohibit discrimination on the basis of sexual orientation in their human rights legislation. The implication of Egan and Nesbit for these jurisdictions is that a denial of employment benefits to same sex couples might very well constitute improper discrimination in violation of the express prohibition against discrimination found in their human rights legislation. As we will now see, the practical impact of Egan and Nesbit may only have been to give retroactive judicial approval to an approach that had already been accepted by human rights tribunals and arbitration boards.

Recent Decisions of Human Rights Tribunals

Even before the Supreme Court of Canada spoke in the Egan and Nesbit case, human rights tribunals
were beginning to grapple with claims for employment benefits from same sex couples. Of particular interest is the Leshner case, a 1992 decision of a board of inquiry appointed under the Ontario Human Rights Code. The complainant, Leshner, alleged discrimination based on sexual orientation because his employer, the Ontario government, had failed to provide certain employment benefits to his partner with whom he had lived for ten years. By the time the hearing began, however, the Ontario government had changed its policy by extending employment benefits to same sex couples except for survivor benefits under the Ontario government pension plan. The apparent reason for this exception was a restriction in the federal Income Tax Act that prevented the extension of spousal benefits in pension plans to same sex couples. At issue before the board of inquiry was whether the Ontario government’s reliance on this restriction amounted to improper discrimination under the provincial human rights legislation.

The problem facing the board of inquiry was that the provincial human rights legislation was itself internally inconsistent. Even though the Ontario Human Rights Code expressly prohibited discrimination based on sexual orientation, that statute’s own definition of marital status was restricted to a conjugal relationship involving two persons of the opposite sex. As well the Code also provided that pension plans in conformity with the requirements of Ontario’s Employment Standards Act were not considered to infringe the right to be protected from discrimination based on marital status. A majority of the board of inquiry held that, given the restricted definition of marital status in Ontario’s human rights legislation, the refusal to provide the pension benefits to Leshner’s partner was not because of his sexual orientation but because he was considered to be single, a distinction that was permitted by the exemption of pension plans from the prohibition against discrimination based on marital status. Using this analysis the majority of the board concluded that the refusal to extend pension benefits was not in conflict with Ontario’s human rights statute.

At this point, however, the majority proceeded to address the larger issue of whether the Human Rights Code might itself be inconsistent with the Charter. It held that the effect of the Code was to deny pension benefits to same sex couples and this denial amounted to discrimination on the basis of sexual orientation contrary to the Charter’s guarantee of equal treatment under the law. Since there was no sound policy reason for this difference of treatment, the distinction created by the Code could not be considered as a reasonable limit. As a remedy the majority of the board directed that the definition of marital status in the Code be read down by omitting the words of “opposite sex” so that marital status could be read as including the status of living with any person in a conjugal relationship outside marriage. By broadening the definition of marital status in this way, the denial of spousal pension benefits to a same sex partner could only be characterized as improper discrimination based on sexual orientation, rather than marital status, since Leshner’s partner could no longer be considered as being single under this broader definition of marital status.

To remedy this unlawful discrimination the board of inquiry directed the employer to create a funded, or unfunded, arrangement outside the registered pension plan to provide survivor benefits and pension eligibility to same sex partners at a level equivalent to that already enjoyed by unmarried opposite sex partners. The board further provided that, if the Income Tax Act were to be amended to allow survivor benefits in the case of a same sex conjugal relationship, the employer was required to amend its plan accordingly. If this amendment did not occur within three years of the decision, the employer was obligated to provide a new and separate funded pension arrangement for employees in same sex relationships.

Following the Egan and Nesbit decision human rights tribunals had even more legal support for finding an entitlement of same sex couples to employment benefits. In Moore v. Treasury Board of Canada the Canadian Human Rights Tribunal dealt
with two complaints against the federal government based on a denial of employment benefits to a same sex partner. In both cases there existed a committed long-term relationship analogous to a spousal relationship. It was not disputed that, because of the earlier Haig decision, sexual orientation was a prohibited ground of discrimination under the Canadian Human Rights Act. The tribunal concluded that the denial of employment benefits to a same sex partner that were being provided to opposite sex partners amounted to improper discrimination based on sexual orientation. This discriminatory action, moreover, could not be justified by the fact that the employer was the federal government. Unlike in the Egan and Nesbit case the government in this case was not wearing its hat as developer and implementor of social policy but only its hat as employer. In its role as employer, according to the tribunal, the government had no stronger justification for its discriminatory actions than would a private employer.

The significance of this decision is not in the result, which was hardly surprising in light of the previous jurisprudence, but in the remedy ordered by the tribunal. Not only did the tribunal provide a remedy to the two individual complainants but it ordered the federal government to desist from continuing the discriminatory practice in the administration of its employment policies. In addition it required the federal government to prepare both an inventory of all legislation, regulations, and directives that contained a definition of common law spouse that discriminated against same sex couples and a proposal for eliminating this discrimination. Pension benefit legislation could be excluded from this inventory at the request of the parties but not provisions of the Income Tax Act that treat employment benefits for same sex couples in a manner that discriminates on the ground of sexual orientation. It has been reported that the federal government has now agreed to extend medical and dental benefits to same sex partners of their employees but is seeking judicial review of the broader remedial order requiring it to eliminate discriminatory treatment of same sex couples in its laws and policies.

RECENT ARBITRATION AWARDS

Recent arbitration awards have provided further legal support for the claims of same sex couples to employment benefits similar to those already provided to opposite sex couples. Many collective agreements contain non-discrimination provisions that include sexual orientation as a prohibited ground of discrimination. These provisions are the product of collective bargaining rather than legislation and may even provide more comprehensive protection than human rights legislation. What is interesting is that in recent decisions arbitrators have given a broad interpretation to these contractual non-discrimination provisions, affirming the claims of same sex couples for equal treatment in the provision of employment benefits.

A landmark arbitration award dealing with the entitlement of same sex couples to employment benefits is the Bell Canada case. The grievance brought by two homosexual employees alleged that the employer had violated the collective agreement by failing to provide certain spousal benefits to their same sex partners. The employer provided such benefits to employees in common law relationships with persons of the opposite sex but, as a matter of company policy, did not make these benefits available to employees in long-standing same sex relationships. The union argued that the policy was discriminatory and contrary to both the Canadian Human Rights Act and the terms of the collective agreement. At that time the Canadian Human Rights Act did not expressly prohibit discrimination based on sexual orientation, but the collective agreement itself contained a non-discrimination provision under which the employer agreed not to discriminate unlawfully against an employee on certain specified grounds, one of which was sexual orientation.

The arbitrator looked first to the human rights legislation, following the reasoning in Haig that the Charter required that sexual orientation be read into the Canadian Human Rights Act as a prohibited ground of discrimination. He then concluded that,
if denial of employment benefits to same sex couples constituted discrimination on the basis of sexual orientation, it would be contrary to this implied provision in the Canadian Human Rights Act. This breach of the statute would then constitute a violation of the collective agreement provision prohibiting “unlawful discrimination.”

The union argued that there had been discrimination based on sexual orientation because the grievors had been denied benefits that had been made available to opposite sex couples living in otherwise identical relationships. The arbitrator accepted this argument, finding that the denial of spousal benefits to employees living in same sex relationships did amount to unlawful discrimination based on sexual orientation contrary to the non-discrimination provision in the collective agreement. In making this finding the arbitrator rejected the employer’s argument that the non-discrimination provision in the collective agreement applied only to employee rights addressed expressly by the terms of the collective agreement, and not to the benefit plans which had not been incorporated by reference into the collective agreement.

The arbitrator viewed the non-discrimination provision as “an independent obligation on each party to deal with employees in a non-discriminatory fashion, whether or not the subject-matter of the discriminatory behaviour is addressed in specific terms of the collective agreement.” This obligation extended to the terms of the benefit plans even though these plans did not form part of the collective agreement. The arbitrator allowed the grievance but confined his remedy to a general declaration that there had been a breach of the collective agreement, leaving it to the parties to amend the benefit plans to bring them into compliance with the collective agreement’s non-discrimination provision.

The reasoning in the Bell Canada award was directly challenged in a subsequent arbitration also arising within federal labour relations jurisdiction. In Canadian Broadcasting Corp., the employer submitted that Bell Canada was wrongly decided, arguing that a denial of spousal benefits to employees in a same sex relationship was simply based on their lack of spousal status. The employer argued that an employee in a same sex relationship did not enjoy legal status as a spouse either under statute law or at common law. The denial of the benefit, therefore, was the result of the application of the general law rather than any discriminatory treatment by the employer. The arbitrator rejected this argument, observing that it was the employee plans themselves that drew the distinction between same sex relationships and opposite sex relationships.

In the arbitrator’s view this distinction amounted to discrimination based on sexual orientation in contravention of the non-discrimination clause in the collective agreement. The arbitrator saw the denial of benefits as relating directly to the grievor’s sexual orientation rather than to his status as an unmarried employee. Because single heterosexual employees, unlike homosexual employees, were eligible for spousal benefits once they entered into a settled relationship, the arbitrator concluded that the only reason for this distinction was sexual orientation.

As in the Bell Canada case, the arbitrator also rejected the employer’s further argument that the non-discrimination provision did not apply to the administration of benefit plans which were not themselves part of the collective agreement. The arbitrator held the scope of the non-discrimination clause was not confined to the “proscribed discriminatory conduct being evident on the face of the collective agreement or in the administration or application of the collective agreement.” The arbitrator was equally unimpressed with the employer’s argument that the union was estopped from raising the issue of the entitlement of same sex couples to spousal benefits because of its failure to grieve on earlier occasions. The grievance was allowed and the arbitrator retained jurisdiction to supervise the implementation of the award.
In response to this award the employer did extend the health care plan, the dental care plan, and the life insurance plan to employees in settled same sex relationships. As for the pension plan, the employer took the position that in light of the Supreme Court of Canada’s decision in the *Egan and Nesbit* case it was not required to extend pension benefits to same sex couples. This issue was considered in a supplementary award.14 The arbitrator held in this award that *Egan and Nesbit* did not create any barrier to the extension of the pension plan to same sex couples in a settled relationship and directed the employer to take the necessary steps to bring its pension plan in line with the collective agreement’s prohibition against discrimination based on sexual orientation.

An Alberta arbitrator has given a similarly broad interpretation to an express prohibition against discrimination based on sexual orientation set out in a collective agreement. In his words:

Sexual orientation encompasses the natural inclination of a homosexual person to favour a spousal relationship with a person of the same sex. Sexual orientation, in my opinion, is not to be viewed as relevant only where the alleged discrimination is directed toward the personal characteristics of an individual homosexual person. One of the direct consequences of such a person’s sexual preference is that conjugal relationships, if established, are likely to be with persons of the same sex. This is a matter of sexual orientation. Consequently, discrimination related to such same-sex conjugal relationships is discrimination on the basis of sexual orientation, just as discrimination against a woman on the basis if her pregnancy is discrimination on the basis of sex.15

The arbitral jurisprudence now leaves little doubt that collective agreement provisions that proscribe discrimination based on sexual orientation will be given an interpretation broad enough to embrace an entitlement of same sex couples to employment benefits provided to other couples. This arbitral jurisprudence is only one part of a larger trend that has seen a growing recognition of this entitlement by courts and human rights tribunals as well as arbitrators. Now that the Supreme Court of Canada has recognized that same sex relationships enjoy constitutional protection there would appear to be no turning back.

**Impact on the Workplace**

Clearly the *Egan and Nesbit* case represents a watershed in the increasing litigation involving the claims of same sex couples to benefits already provided to opposite sex couples. The majority decision in this case has recognized that same sex relationships enjoy constitutional protection under the Charter’s guarantee of equality of treatment. This constitutional status given to these relationships makes it increasingly likely that human rights legislation and other statutes will have to be brought into line to protect and recognize these relationships. If this does occur, then collective agreements and workplace practices will have to conform to this change in the law and employers will no longer be able to deny to same sex couples the employment benefits they already provide to opposite sex couples. Indeed some of the larger employers in both the public and private sectors have already anticipated this change and have extended a full range of employment benefits to same sex couples.

There is no question that this extension of employment benefits to same sex couples will carry some cost implications. The cost of the recent decision of the federal government to extend medical and dental benefits to same sex couples has been estimated to be between $1.80 million and $3.7 million annually, assuming that somewhere between 1 or 2 percent of the workforce would apply. This cost, however, does not appear to be particularly large given the size of the federal government payroll.
A more difficult issue for employers will be the extension of pension plans to same sex couples. At the present time the express wording of the federal *Income Tax Act* disallows their extension to same sex couples. An Ontario judge has held that this restriction can be justified as a reasonable limit on the Charter’s protection of same sex couples. She concluded that this provision was just one part of "an overall federal retirement income system" and, as such, was indistinguishable from a similar restriction in the *Old Age Security Act* that the Supreme Court of Canada in the *Egan* case held to be a reasonable limit. It has been reported that this decision is under appeal.

This restriction in the *Income Tax Act* is the last legal barrier to the full extension of employment benefits to same sex couples. Even though it may be possible to establish separate pension plans for same sex couples it may be both difficult and costly for employers to establish a pension benefit equivalent to that already provided to opposite sex couples. The difficulties of extending full pension benefits to same sex couples was considered in a recent decision of a federal human rights tribunal, *Laessoe v. Air Canada*. The tribunal concluded that the cost and difficulty of providing an equivalent benefit under the present provisions of the *Income Tax Act* and the *Pension Benefits Standards Act* justified the employer’s refusal. The answer, according to the tribunal was for the federal government to amend these two statutes rather than to require private sector employers to devise pension arrangements that do not conflict with the present legislation.

It appears that the issue of the provision of pension benefits may be the last remaining hurdle for same sex couples to clear before they receive the same treatment as opposite sex couples in the workplace. An easy solution would be for the federal Parliament to remove that barrier through legislative amendment, but whether our politicians would expressly affirm same sex relationships is still problematical. It appears more likely that this issue of the entitlement of same sex couples to pension benefits, like all the other claims of same sex couples, will be resolved through the litigation process rather than legislative action. Canadian legislators have clearly avoided dealing with these issues and have left the field open to the courts to resolve them on a case by case basis. The difficulty with this abdication by our legislators is that litigation is a slower process that often creates uncertainty until a case is authoritatively resolved.

It may still take some time before this process of litigation is completed with a clear affirmation of the right of same sex couples to all of the employment benefits now provided to opposite sex couples. Nevertheless employers, whether in the public or private sector, should realize that the present pattern of litigation suggests a trend toward recognizing the claims of same sex couples. The present pattern of litigation, aimed primarily at government and other large employers, has already produced some important gains. There is every indication that this trend will continue, encouraged by the increasing receptivity of the courts and other adjudicators to the argument that the prohibition against discrimination based on sexual orientation includes within its ambit discriminatory treatment directed at same sex couples. The direction of this trend suggests that employers should now be looking at how their employee benefit plans might be adjusted to ensure equal treatment for same sex couples.

**Notes**

An earlier version of this paper was presented at the Employment Law ’97 conference held in Vancouver, British Columbia on 25 April 1997. The proceedings of this conference, “Employment Law — 1997 Update” have been published by The Continuing Legal Education Society of British Columbia.
1 See Human Rights Code, R.S.O. 1990, c. H-19 as am., s. 10(1).

2 S.C. 1996, c.14, s. 2.


4 S. 15(1) of the Canadian Charter of Rights and Freedoms.


