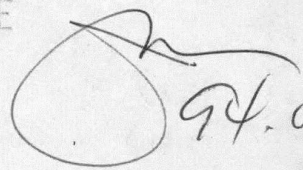


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**EXTENSION OF BENEFITS TO PUBLIC SERVICE**

**SAME-SEX PARTNERS**

**REPORT OF THE TBS COMMITTEE ON HUMAN**

**RIGHTS AND SEXUAL ORIENTATION**

**December 24, 1993**

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## EXTENSION OF BENEFITS TO SAME-SEX PARTNERS

### A. MANDATE

As a result of Human Rights complaints lodged with the Canadian Human Rights Commission (CHRC) against the Treasury Board to the effect that the denial of benefits to same-sex partners is discriminatory, the Committee on Human Rights and Sexual Orientation was set up in the Secretariat to take a comprehensive "inventory" of all the Public Service benefits (Public Staff Relations Act 1, 1) to be impacted by recognition of same-sex relationships - and the broader notion of family - including the cost implications. However, it should be noted that the present report deals strictly with the extension of benefits to same-sex partners. The question of the extension of benefits to a "redefined family" will be looked into at a later stage. In addition to the above-mentioned, the Committee has been looking at the purpose of the programs or policies i.e. the reasons behind the granting of such benefits to certain classes of persons, as judicial decisions have made the goals and objectives of such programs and policies the most important aspect of their decisions.

The Committee is composed of representatives from all the Secretariat's branches (except Corporate Services). The study is being conducted in consultation with the Department of Justice which initiated some years ago the Marital and Family Status Initiative in order to develop a rational and comprehensive approach to the treatment of marital and family status in federal statutes. Therefore, a legal counsel from the Secretariat's Legal Services also sits on the Committee.

### B. BACKGROUND

Since 1985, twenty-one (21) complaints concerning the issue of "sexual orientation" were lodged with the Canadian Human Rights Commission (CHRC) against the Treasury Board. The first complaint was lodged by Brian Mossop on the basis that he had been denied bereavement leave. For six years the Secretariat indicated to the CHRC that its position towards the incoming complaints dealing with the issue of "sexual orientation" was identical to the position expressed in Mossop, i.e. that the provision of the collective agreement which did not recognize rights for same-sex partners was not discriminatory on grounds of "family status" under the **Canadian Human Rights Act (CHRA)**.

On February 25, 1993, the Supreme Court of Canada confirmed in Mossop that the relationship between same-sex partners was not protected by the **Canadian Human Rights Act** on the grounds of "family status", as it stood in 1983. However, three of the seven judges in the majority said that the failure to provide bereavement benefits in respect of a same-sex partner was sexual



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orientation discrimination based on the simple view that the kinds of relationships an individual forms are based on his or her sexual orientation. The three dissenting justices held that this was a case of discrimination on the basis of "family status". Even La Forest J, who avoided committing himself on the relationship issue, acknowledged that there were humanitarian reasons for allowing Mossop his bereavement leave, though it was a matter for Parliament to decide. The Court also implied that, had this case been a **Charter** case, i.e. examined under the **Canadian Charter of Rights and Freedoms** rather than the **Canadian Human Rights Act**, the outcome could have been different, as the Court could have used the **Charter** as an interpretative tool. The Court also indicated that if "sexual orientation" had been listed as a prohibited grounds of discrimination in the **CHRA** when the denial of the benefit took place, the interpretation of the phrase "family status" might have been entirely different and the Court might have concluded that Mr. Mossop's situation included both his sexual orientation and his "family status". The grounds of "sexual orientation" was added to the **CHRA** by the **Haig and Birch v the Queen** decision, on August 6, 1992.

There remain nine (9) relevant complaints before the CHRC (see attached list); all those having been filed before the **Haig and Birch v the Queen** decision were dismissed in November 1993 by the CHRC in view of the outcome in Mossop. The remaining complaints touch the following Plans and Collective Agreement clauses: Dental and Public Service Health Care Plans, Relocation and Foreign Service Directives; and Collective Agreement clauses dealing with family related responsibilities leave.

For the above reason, the Bereavement Leave clause is no longer the object of a complaint under the **CHRA**. However, on September 29, 1993, the **David F. Lorenzen vs Treasury Board** decision by the Public Service Staff Relations Board brought it back into the fore. In that decision, the adjudicator concluded that the denial of bereavement leave constituted a violation of the collective agreement and was not in keeping with the **CHRA**. The Attorney General of Canada filed for judicial review by the Federal Court on October 29, 1993. The Crown has until January 13 to present its factum.

The decision to maintain or withdraw the request for judicial review has not yet been made; however, the guiding principles of this government were expressed by Jean Chrétien when he indicated on October 13, 1993, to the President of the Economists', Sociologists' and Statisticians' Association "...that the Conservative government has made no progress on sexual orientation matters beyond what was required by the courts. The Liberal caucus will be studying the New Brunswick government's recently announced policy in regard to spousal benefits for same-sex couples within the provincial public service." As of

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now, the New Brunswick government has extended all insured benefits, i.e. Dependent Life, Voluntary Accidental Death and Dismemberment Insurance, Health Plan and Dental Plan, to all common-law spouses, whether they are of the opposite sex or of the same sex.

C. **PURPOSE BY POLICY AREA**

The major policy areas impacted upon by the extension of benefits to same-sex partners are as follows: Collective Agreements clauses pertaining to Bereavement and Family Related Responsibilities Leave, Unpaid Leave for Relocation of a Spouse, Isolated Post and Relocation Directives, Foreign Service Directives, Dental and Health Care Plans and the Pension Plan.

The purpose of each of the above policy areas reads as such:

1. **Collective Agreements Provisions**

**Bereavement Leave**

The purpose of the leave is to provide an employee with paid time away from work in recognition of the emotional needs related to the death of an immediate family member.

**Family Related Responsibilities Leave**

The purpose is to provide up to 5 days' paid leave a year to assist employees in taking care of specified short term family responsibilities which include illness in the immediate family, medical and dental appointments for dependant family members, and birth and adoption leave.

**Unpaid Leave for Relocation of a Spouse**

The purpose of the leave is to enable employees to move with their spouse, when the spouse is relocated, and at the same time to assist them in continuing their careers in the Public Service at the new location or, in cases of temporary relocation, returning to a job at the current location.

2. **National Joint Council Directives and Plans**

a) **Directives**

**Isolated Post Directives**

The purpose of the Directive is to provide for allowances and travel benefits which will offset the higher costs incurred by



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the employee as a result of working and living at locations in Canada which qualify as isolated posts.

#### Relocation Directive

The purpose of the Directive is to relocate the employee in the most efficient fashion at the most reasonable cost to the public yet having a minimal detrimental effect on the transferred employee and family.

#### Foreign Service Directives

The purpose of the Directives is to provide a system of emoluments and conditions of employment that, in combination with salary, will enable departments and agencies to recruit, retain and employ qualified employees to devise, execute and support effectively and economically the various departmental programs outside Canada.

#### b a) Plans

#### Public Service Health Care Plan

The purpose is to provide participants and their eligible dependants with coverage, up to reasonable limits, for unexpected expenses for specified medically required services and products.

#### Public Service Dental Care Plan

The purpose is to provide employees and their eligible dependants with coverage, up to certain limits, for required dental services and supplies.

### 3- Statutory Benefits

#### Pension Plan

The Pension Plan is a vehicle which assists in the management of human resources (recruitment, orderly retirements, etc. It provides post-retirement financial security for employees and their eligible survivors.

#### COSTS IMPLICATIONS OF GRANTING BENEFITS

For the purpose of establishing the costs linked to granting benefits to same-sex partners, it was necessary to establish some figures regarding the prevalence of homosexuality in the Public Service. As a result of an extensive literature search and

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research project, the Analysis and Research Group of the Human Resources Development Division made the following conclusions (full document attached as Annex B):

1. If we assume that the sexual mores and orientation of the Canadian population are similar to those in the U.S.A., France or Britain, then it would be safe to say that the percentage of the population that is gay is somewhere in the 4% to 6% range. This figure was arrived at by taking the results of recent surveys and, as suggested by some of the experts in the literature, increasing the percentage prevalence.
2. If a stable relationship is any such partnership that exists for one year or longer, we can probably take the above range and lower it to the 3% to 5% interval.
3. Few of the quoted studies investigated both male and female homosexuality. For lack of any other supporting documentation, we should be able to assume that the prevalence of homosexuality in the two sexes is the same.
4. It is probably safe to assume that the percentage of the Canadian population that is gay can serve as a proxy for the federal Public Service.

The Committee has decided to assume that 2% of the Public Service is gay and in a stable relationship that has lasted for one year or longer for the purpose of establishing the estimated annual cost of according benefits to same-sex partners. This is based on the above assumptions and the fact that some unknown portion of this group is in a same-sex partnership with another public servant which would have the consequence of reducing certain costs to the employer. In addition to this, one can assume that in a fairly high percentage of cases, the partner in these relationships is a fully-employed individual with his/her own leave and benefits entitlements. It is also assumed that some portion of the gay Public Service population in stable relationships will not self-identify themselves as such.

The costs of extending the benefits linked to the major policy areas are as follows:

The estimated costs are for all active Public Service employees for whom Treasury Board is the Employer (i.e. PSSRA 1,1), not only employees covered by collective agreements. **The costs to other federal employers, i.e. Crown Corporations, Separate**

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Employers, RCMP and the Armed Forces have not been included in the above figures as the mandate of the Committee was to look at the Public Service portion for which the Treasury Board is the employer.

In examining the costs of extending leave (under collective agreements) and directives (under NJC) benefits, it is important to note the following:

The costs are based on past usage of benefits. There are different assumed increases in usage for the various and very different benefits. This is based on two things; first, the fact that employees in a homosexual relationship already have access to all the costed benefits to the same extent as all other employees who are neither married nor in a common-law spousal relationship; and secondly, there does not exist a fine breakdown of many of usage costs.

2. Costs linked to collective agreements provisions

(\$424,000)\*

- Bereavement and Family Related Responsibilities Leave
- Unpaid Leave for Relocation of a Spouse

\* This figure is a replacement cost which would be the maximum estimated cost incurred by the employer if it was decided by the employer to replace an employee while on leave. It essentially implies that there could be a period with double payment of salary. This cost is also subject to caution since the employer is on record to have offered paid special to Mr. Mossop to compensate for not granting him bereavement and family related responsibilities leaves in order to avoid going to the Courts.

3. Costs linked to NJC benefits

a) Directives

Foreign Service Directives*	\$2,097,800
Other NJC Directives* (i.e. relocation and others)	<u>\$ 976,600</u> \$3,074,400

\*(Although negotiated/consulted at NJC form part of Collective Agreements)



b) Plans

It must be noted that the calculations of the costs of extending the Dental and Health Care Plans benefits are based on the following assumptions:

1. calculations for Supplementary Health Care Plan coverage (inside Canada) only; (99% of the membership have Supplementary coverage);
2. calculations are based on only employees who are members of the plan, and therefore they would only be increasing their coverage from single to family; (77% of the Public Service population participate under the Public Service Health Care Plan);
3. does not include Executive Group because the Treasury Board pays one premium for all members of the Executive Group (i.e. there is one rate for single and family coverage, and it is 100 per cent employer-paid), therefore there will only be a minimal increase to the overall cost as a result of increased claims.
4. the number of single employees under the Public Service Dental Care Plan was based on the percentage of single employees under the Public Service Health Care Plan.

Public Service Health Care Plan	\$516,000
Public Service Dental Care Plan*	\$236,000
Provincial Health Insurance Plan	<u>\$ 50,000</u>
	\$802,000

The total estimated annual cost of extending benefits to same-sex partners (excluding pension) is about \$4,300,400.

\*(Although negotiated/consulted at NJC form part of Collective Agreements)



4. Costs of extending statutory benefits<sup>1</sup>

Public Service Pension Plan

Increase in plan liabilities	\$100M
Increase in current service cost	<u>\$5M</u> \$105M

It is important to quantify the additional past service liability incurred if the **Act** were to provide spousal benefits to same sex partners. This may or may not mean an additional employer contribution; this would be a decision made when and if statutory amendments are being developed. As far as any increase in the current service cost of the plan is concerned, the present funding arrangements would mean that this would be covered by an increase in the employer contribution. This could be addressed at the time of any change, but of course any decision on allocation of the cost would have implications beyond this context.

The above figures are very rough estimates of the cost effect of extending the present survivor benefit provisions to "same-sex partners."

2. **RISK ANALYSIS**

The major difficulty in allowing same-sex Public Service partners to be registered for the purposes of the Dental and Health Care Plans is that it recognizes financial dependency and might set a precedent for Public Service pensions. It must also be noted that the Plans would need to be de-registered for Income Tax purposes, and the cost will become a taxable benefit; this would also apply to the Pension Plan. Therefore, the question remains as to whether or not the government would want to do something that would result in de-registration of its plans for its own employees. As with the insured benefits, the issues associated with extending pension benefits are not primarily financial: they have more to do with the need to determine IF the benefits should

1. It should be noted that if pension benefits were extended to same sex partners employed by the RCMP and the Armed Forces there would be additional costs;

Increase in plan liabilities	CFSA	\$50M
	RCMPSA	\$10M
Increase in current service cost	CFSA	\$2M
	RCMPSA	\$0.4M



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be limited to surviving spouses and the ability to limit benefits to traditional-type spousal relationships. If benefits are extended to same-sex partners, it may be difficult to deny benefits to adult partners in any spousal or non-spousal relationship which involves a sufficient degree of economic or emotional interdependence.

The bereavement and family related responsibility leave as well as the benefits granted through the directives do not necessarily pose the same risk because it could be argued that they are granted mainly for compassionate and emotional support reasons and do not primarily recognize financial dependency.

Last, but not least, it is important to note that the Treasury Board will have to take into consideration the overall Government approach with regard to the extension of benefits to same-sex partners before it makes any change in its employer-sponsored benefit and pension policies or plans. Given that the extension of benefits to Public Service same-sex partners could set a precedent for the old age security programs, income tax treatment of registered pensions, as well as other areas which may be much more expensive, an approximation of the costs facing the federal government at large will be presented by the Secretariat's Program Branch in a separate document.

#### CONCLUSIONS

Having examined the major policy areas impacted upon by the extension of benefits to same-sex partners, both in terms of the purpose of the policy area and the costs associated with the extension of the benefits, the members of the Committee are of the opinion that the following course of action should be followed by the Treasury Board:

✓ First stage: the application for judicial review of the Lorenzen case should be withdrawn (it is acknowledged that the Minister of Justice is inclined to abandon Lorenzen. The issue here is not to have the Treasury Board be accused of being the agency wanting to "appeal" Lorenzen);

✓ Second stage: the benefits provided through collective agreements provisions, i.e. Bereavement and Family Related Responsibilities Leaves and Unpaid Leave for Relocation of a Spouse should be extended as it can be done on a compassionate and emotional support basis which would not imply any financial dependency (in any event we may not have very much choice in this matter since we already have strong indications by the courts that we could lose on these issues either under the CHRA or the Charter);

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✓ Third stage: the benefits provided through the National Joint Council with respect to Directives, e.g. the Isolated Post, Foreign Service and Relocation Directives should be extended as it can also be done on a compassionate and emotional support basis which would not imply any financial dependency;

✓ Fourth stage: the benefits provided through the NJC Plans e.g. the Dental and Health Care Plans could be extended, as a review of the above purposes leads one to believe that the employer might have difficulties justifying their denial on the basis of purpose. Moreover, the costs linked to the extension of these benefits are presently minimal (although the plan costs will only be increasing in the future).

✓ The benefits with respect to Pensions should not be extended because the judiciary in cases such as Egan and Nesbitt has found that the benefits presently conferred to heterosexual couples cannot in any reasonable way be deemed relevant to same-sex couples. Moreover the costs implications for the extension of such benefits would be greater than the benefits noted in stages 1 to 4. In addition, the whole issue of dependency as well as family and spousal relationship would be highlighted. (It should be noted that, in a statement reported on December 23, 1993 in the Globe and Mail, the Minister of Justice is on record as having stated that "the new Liberal government is committed to changing human-rights law to prohibit discrimination against homosexuals..." The article indicated that the government will also review entitlements for same-sex partners, such as pension benefits, to see if gay and lesbian partners should be treated the same as heterosexual couples).

The timeframe for the above actions, and the decision to extend Dental and Health Care Plans benefits as well as the Pension Plan to the Public Service same-sex partners would of course depend upon the overall approach taken by the Government. By taking a look at the separate document presented by Program Branch, it will be possible to evaluate whether the ripple effect on social policies is acceptable or not.

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