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Same Sex Spousal Benefits - Canadian Human Rights Act Complaints of Stanley Moore and Dale Akerstom

Introduction

On June 13, 1996, a Canadian Human Rights Tribunal (the Tribunal) held that two federal civil servants, Stanley Moore and Dale Akerstrom (the Complainants) had been discriminated against by their employer, the federal government, on the ground of sexual orientation, a prohibited ground of discrimination under the Canadian Human Rights Act (the Act). The employer had denied the Complainants spousal employee benefits. The decision of the Tribunal deals with employment benefits other than pension benefits. The Tribunal ordered the employer to stop applying any definition of spouse, in collective agreements and public service health and dental care plans, that discriminates against same sex spouses. The decision of the Tribunal has significant impact for federally regulated employers who do not provide employee benefits (other than pension benefits) to same sex spouses of their employees; such employers may now be vulnerable to successful human rights complaints.

The Tribunal also ordered the federal government (as the employer) to prepare an inventory of all legislation, regulations and directives which discriminate against same sex common-law couples, or which in some other way operate, when applied, to continue discriminatory practices based on sexual orientation in the provision of employment-related benefits. The inventory is to exclude, at the request of the parties to the case, any legislation providing for pension benefits for civil servants, but is to include any provision of the Income Tax Act (Canada) which would treat any employment-related benefits paid to same sex common-law couples differently for taxation purposes than if paid to opposite sex common-law couples. The government was also ordered to submit a proposal for the elimination of all the discriminatory provisions identified.

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Facts

Stanley Moore was a foreign service officer employed by External Affairs at the time of the complaint. In April 1990, he began living with Pierre Soucy in a spousal relationship. Mr. Moore was posted to Jakarta, Indonesia in 1991 and he applied for spousal benefits under the foreign service directives (relocation assistance for spouses, housing accommodation, dental and health care and other benefits). These benefits were denied to Mr. Moore because his spouse was not a person of the opposite sex.

Dale Akerstrom has been employed by Citizenship and Immigration since April 1990. In November, 1990, he began living with Alexander Dias in a spousal relationship. In 1992, Mr. Akerstrom approached his employer to change his benefit status from single to family for purposes of the Public Service Health Care Plan. After completing the necessary forms, he received a telephone call informing him that his application would not be processed. When he asked for reasons for the refusal, he was informed that the Public Service Health Care Plan did not include same sex spousal coverage.

Tribunal Decision

The Tribunal was asked to decide whether sexual orientation is a prohibited ground of discrimination under the Act. (The amendment to the Act to add "sexual orientation" as a prohibited ground of discrimination has not yet been proclaimed into law.) The Tribunal stated that this had already been decided in the 1992 Ontario Court of Appeal decision in *Haig and Birch v. Canada* which held that the Canadian Charter of Rights and Freedoms (the Charter) requires the "reading in" of sexual orientation as a prohibited ground of discrimination under the Act. The Tribunal also noted that the Supreme Court of Canada in *Egan et al v. Canada* confirmed that result in Charter cases.

The Tribunal found that the denial of spousal benefits to same sex partners who meet all aspects of the definition of common-law spouse, except for not being "of the opposite sex," constitutes discrimination on the prohibited ground of sexual orientation. It held that it is clear that the inclusion of a definition of "spouse," which excludes same sex partners in legislation or collective agreements so as to deny employment benefits, offends both the Act and the Charter.



Legal counsel for the federal government argued that the Tribunal should follow the result in *Egan*, and that the government's denial of same sex spousal benefits is justified under Section 1 of the Charter. Section 1 provides that the guarantees of rights and freedoms set out in the Charter are subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. This argument was rejected by the Tribunal, based on a distinction between the role of the government as an initiator of social programs and policy (in *Egan*, spousal *Old Age Security* benefits were at issue) and its role as an employer. The Tribunal pointed out that this case is not a Charter case and the government cannot rely on the "justifiable limit" feature of the Charter to justify discrimination on a prohibited ground under the Act. In that respect, the federal government is treated in the same manner as any private sector, federally regulated employer.

The proclamation of the amendment to the Act adding "sexual orientation" as a prohibited ground of discrimination will not affect this decision, although it may strengthen the position of complainants seeking same-sex spousal employment benefits.

The federal government has not indicated whether it will seek judicial review of the Tribunal decision.

