

CHAPTER 1

Human Rights Issues and Employee Benefit Plans

by Fiona Campbell

THE LEGISLATIVE FRAMEWORK

Canadians have human rights protections at both provincial and federal levels of government. At the federal level, the most important legislative enactments are the Canadian Charter of Rights and Freedoms (the "Charter") and the Canadian *Human Rights Act*. Provincially and territorially, human rights are legislatively safeguarded primarily by provincial human rights codes. Both federally and provincially, human rights may also be impacted by a variety of other statutes and regulations such as employment standards acts, workers' compensation acts, occupational health and safety acts, and pay equity legislation.

THE CHARTER

The Charter came into force on April 17, 1982 with the exception of the equality rights provision, Section 15, which came into force on April 17, 1985. Section 15 is most relevant for employment benefit purposes. Its equality rights provisions overlap with the protections afforded by federal and provincial human rights codes. However, there are important differences in the types of legal relationships that are governed by the Charter, on the one hand, and human rights legislation, on the other. Section 32(1) of the Charter states that it applies, to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and to the legislature and government of each province in

respect of all matters within the authority of the legislature of each province.¹

From the outset, it was clear that the Charter applied to the legislation of federal and provincial governments. If such legislation contravenes the Charter, it can be struck down. Thus, the Charter can clearly be used to protect individual rights from government legislation that purports to infringe them. The Charter also applies to government action taken pursuant to statute or common law. The term *government* includes not only direct government actors such as the Governor General in Council, Ministers and public servants within government departments, but also Crown Corporations and public agencies that are outside the formal departmental structure. The test is whether the agency is subject to a "substantial degree of government control."²

Initially, some argued that the Charter also applied to protect individuals from each other. That is, not only were individuals' legal relations with the state governed by its provisions, but individuals' legal relations with non-governmental entities, such as corporations or other individuals, were also subject to the Charter. However, the Supreme Court of Canada resolved this debate by restricting the Charter's reach to legal relations between individuals and governments.³

The Charter may reach private legal relations indirectly when it can be applied to government legislation that regulates private activity. For example, the provisions of provincial human rights legislation are subject to Charter scrutiny.⁴ However, for the most part, private persons who are discriminated against in the workplace

by private employers do not have recourse to the Charter. Rather, in a private employment context, it is necessary to rely on human rights and employment standards legislation and turn to the appropriate tribunals to redress discrimination.

Substantively, Section 15 of the Charter expressly prohibits discrimination based on "race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." Other "analogous" grounds of discrimination may also be prohibited under Section 15, but the courts have defined those potential additional grounds narrowly. In order to determine whether a ground is analogous to those listed in Section 15, it is necessary to consider the nature and situation of the group at issue and the social, political and legal history of the treatment of that group in Canadian society. The ground will only be considered analogous if it can be shown that differential treatment premised on the ground has the potential to bring into play human dignity. The recognition of the ground as analogous must advance the purpose of Section 15 of the Charter.⁵

The human rights protections in Section 15 are subject to Section 1 of the Charter. Section 1 provides as follows:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Thus, even if there has been a violation of Section 15 of the Charter, it is necessary to consider whether Section 1 of the Charter is applicable. In *R. v. Oakes*,⁶ the Supreme Court of Canada set out four criteria that must be satisfied under Section 1:

1. The law must have an objective that is sufficiently important to warrant limiting a right under the Charter.
2. The law must be rationally connected to the objective.
3. The law must impair the right that is at issue no more than is necessary to accomplish the objective and
4. The law must not have a disproportionate effect on the persons to whom it applies.⁷

HUMAN RIGHTS CODES

While Canadian human rights legislation is older than the Charter, it is still in its infancy. It was only in 1962 that Ontario gathered a rather eclectic mixture of anti-discrimination laws, which were directed toward specific practices and grounds of discrimination, and created the Ontario *Human Rights Code*, which was administered by the Ontario Human Rights Commission, created one year earlier. By 1975, all Canadian

provinces had also established human rights commissions to administer their respective human rights codes. A commission was established at the federal level, under the Canadian *Human Rights Act*, in 1977.

Human rights legislation is expressly designed to regulate in the sphere of private relations. Unlike the Charter, its application is not restricted to government actions. Rather, it governs the conduct of private persons, including corporations, trade unions and individuals.

Although human rights legislation applies to private relations, it may also be used to challenge governments and their legislation. The Supreme Court of Canada has held that human rights legislation has a quasi-constitutional status and can be used to override other pieces of legislation. In *The Winnipeg School Division v. Craton*, Mr. Justice McIntyre writing for a unanimous Supreme Court stated:

[H]uman rights legislation is public and fundamental law of general application. If there is a conflict between this fundamental law and other specific legislation, unless an exception is created, the human rights legislation must govern.⁸

The Supreme Court of Canada reiterated the special status of human rights legislation in *Ontario Human Rights Commission and O'Malley v. Simpson-Sears*,⁹ indicating that such legislation must be liberally interpreted to give effect to its broad purposes, and that "[l]egislation of this type is of a special nature, not quite constitutional but certainly more than the ordinary."

The courts have also held that private parties may not contract out of human rights codes provisions. This notion was first articulated by the Supreme Court of Canada in *Ontario Human Rights Commission v. Etobicoke*,¹⁰ where an employer argued that the union had voluntarily agreed in the collective agreement to mandatory retirement age of 60 for firefighters and was therefore precluded from relying on the Code. This argument was rejected on the basis that public statutes constituted public policy that could not be waived or varied by private contract.

DISCRIMINATION

A number of different types of discrimination have been recognized in the legislation and the case law. The most commonly known form is *direct discrimination*. Discrimination is difficult to define. However, an example of *direct discrimination* would be an employer refusing to hire someone because he or she is black. Another less obvious example is a situation in which an employer does not actually say that he is firing an employee because she is pregnant, but there is sufficient evidence from which a conclusion can be drawn that the employee's pregnancy was one of the factors that led to her dismissal.

The second type is *constructive discrimination*, also commonly referred to as *indirect* or *adverse effect discrimination*. The concept of constructive discrimination was first formally recognized by the Supreme Court of Canada in the *Simpson-Sears* case. Constructive discrimination is well illustrated by the facts of the *Simpson-Sears* case where the complainant was required to work periodically on Friday evenings and Saturdays as a condition of her employment. Her religion required a strict observance of the Sabbath from sundown Friday to sundown Saturday. Simpson-Sears refused to give the complainant a full-time position because she was unable to work on Saturdays. The Supreme Court of Canada held that the actions of Simpson-Sears constituted discrimination even though Simpson-Sears had legitimate business reasons for requiring employees to work on Saturday. Thus, constructive discrimination was defined by the court as follows:

It [constructive discrimination] arises when an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties or restrictive conditions not imposed on other members of the work force.¹¹

It was also in the *Simpson-Sears* case that the Supreme Court of Canada recognized the concept of the duty of accommodation short of undue hardship. That is, the court stated that if it can be established that there is a seemingly neutral rule that has an adverse impact on a person or group that is protected by the Code, the onus shifts to the employer to show that reasonable measures have been taken to accommodate the employee or group, short of undue hardship. The concepts of constructive discrimination and the resulting duty to accommodate have been codified in some provincial human rights codes. For example, Section 11 of the Ontario Code provides as follows:

- (1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,
 - (a) the requirement, qualification or factor is reasonable and *bona fide* in the circumstances; or
 - (b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right.
- (2) The Commission, a Board of Inquiry or a court shall not find that a requirement, qualifica-

tion or factor is reasonable and *bona fide* in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.¹²

Another type of discrimination is systemic discrimination. The following definition of *systemic discrimination* was adopted by the Supreme Court of Canada in the case of *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*:¹³

Discrimination . . . means practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities available because of attributed rather than actual characteristics. It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the accidental by-product of innocently motivated practices or systems. If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory. This is why it is important to look at the results of the system.

The facts of the *Canadian National* case also provide a good illustration of systemic discrimination. In that case, the evidence showed that many of the male employees believed that women simply could not do the heavier jobs and were not afraid to share these opinions with the female employees. In addition, there was testimony that women who applied to C.N. were channeled into secretarial positions in which there was little chance for advancement. Another problem was that qualifications such as welding that were unrelated to the job were required for entry level positions and had the effect of excluding women.

DISCRIMINATION AND EMPLOYEE BENEFITS

Although employers are generally not required to provide employee benefits, once an employer has made employee benefits part of the compensation package, the benefits must be provided to all employees in a non-discriminatory manner. As Mr. Justice Dickson stated in *Brooks v. Canada Safeway Ltd.*, a case involving sex/pregnancy discrimination:

Increasingly, employee benefit plans have become part of the terms and conditions of employment. Once an employer decides to provide an employee benefit package, exclusions from such schemes may not be made in a discriminatory

fashion. Selective compensation of this nature would clearly amount to sex discrimination. Benefits available through employment must be disbursed in a non-discriminatory manner.¹⁴

To date, many of the discrimination cases that have arisen in the employee benefits area relate to three issues. First, courts and tribunals have examined whether employee benefit plans can provide different coverage to pregnant women. Second, there have been a number of recent cases that have considered discrimination arguments in the context of the provision of benefits to disabled employees. The third issue dealt with in the case law is whether there is an obligation to cover same-sex spouses under employee benefit plans on the same basis as opposite-sex spouses. More recently, there have also been some cases concerning age discrimination in the employee benefits area.

Sex and Pregnancy Discrimination

Most of the cases in this area involve allegations that pregnant women or women who have recently given birth are subject to discriminatory treatment under disability benefit policies.

The Supreme Court of Canada dealt with this issue in 1989 in *Brooks v. Canada Safeway Ltd.* *Brooks* involved the validity of Canada Safeway's employee disability benefit plan, insofar as it excluded pregnant women from coverage during a 17-week period commencing 11 weeks before the anticipated birth date and ending six weeks after the birth. Even if pregnant employees were disabled for non-pregnancy-related reasons, they could not receive benefits under the plan for that 17-week period. Instead, the employees were required to rely upon the much less generous pregnancy benefit provisions pursuant to the *Unemployment Insurance Act* (now the *Employment Insurance Act*).

This provision was challenged by three women employees who were denied benefits in accordance with the plan. The employer argued that pregnancy is not a sickness or an accident and, therefore, it need not treat pregnant employees the same as employees who are unable to work because of sickness or an accident. The Supreme Court of Canada rejected this argument and held that, while pregnancy is not properly characterised as sickness or an accident, it is a valid health-related reason for absence from work and should not have been excluded from the employer's plan. The Supreme Court found that the defect in the Safeway plan was not only its exclusion of non-pregnancy-related illnesses and accidents during the period prior to birth when maternity leave was generally available but, "it is enough that the plan excludes compensation for pregnancy."

There have been a number of subsequent human rights decisions that have clarified and expanded upon

Brooks. In *Alberta Hospital Association v. Parcels*,¹⁵ a complaint was made by a nurse under the Alberta *Individual's Rights Protection Act* about a provision in the collective agreement that obliged an employee going on maternity leave to pre-pay 100% of the premiums for benefits in order to ensure the availability of those benefits during her maternity leave. Employees taking regular sick leave were only required to pay 25% of the premiums during their leave. The Alberta Court of Queen's Bench held that this requirement was directly discriminatory, at least with respect to the portion of maternity leave that is health related.

For that part of the maternity leave that is health-related, the sub-article is clearly directly discriminatory as it does not treat maternity leaves in the same manner as other health-related leaves, for example, leaves for illness or accident.

In *Stagg v. Intercontinental Packers Limited*,¹⁶ a Saskatchewan Board of Inquiry decided that the denial of weekly and long-term sickness benefits to persons on pregnancy leave violated Section 16(1) of the Saskatchewan *Human Rights Code*. In that case, the complainant became pregnant after two years with the employer and, when complications arose, she was given medical advice to stay home from work. She received weekly sick benefits for several weeks, but these were terminated when the employer made the assumption that she had commenced maternity leave. Under the company's benefit plan, women on maternity leave were not eligible for weekly sick benefits. After receiving no benefits for a month, Ms. Stagg applied for and received the maximum 15-week payment for unemployment insurance maternity leave benefits.

The Board of Inquiry determined that the employer's weekly benefit plan's exclusion of women on maternity leave from receiving benefits solely on the basis of their pregnancy was discriminatory. The Board also found that, because of the employer's actions, Ms. Stagg did not apply for long-term disability benefits, which would otherwise have been available to her until two weeks after childbirth, and awarded her damages with interest for this amount.

In *Ontario Secondary School Teachers' Federation, District 34 v. Essex County Board of Education*,¹⁷ the Ontario Divisional Court held that an arbitration board erred by failing to find that an employer had discriminated on the basis of pregnancy in refusing a woman access to the sick leave plan under the collective agreement for that period after childbirth that was related to the recovery of her health. Although the employee was on maternity leave pursuant to the *Employment Standards Act*, the court held that the arbitration board erred in that it did not interpret sick leave provisions consistently with the *Human Rights Code*. The sick leave plan included physical disability, and the court

found that the term could include pregnancy-related conditions.

The Ontario Divisional Court also dealt with a similar issue recently in *Ontario Cancer Treatment & Research Foundation v. Ontario Human Rights Commission*.¹⁸ There, an oncologist, Dr. Crook, filed a human rights complaint when she was denied the use of sick leave benefits during a period after she had given birth. Dr. Crook chose not to take maternity leave, but rather used vacation days for the period immediately after the birth. She then made a request for sick leave benefits when she was unable to return to work for medical reasons, including a stress-related condition, which had commenced before the birth, and postpartum depression. The employer denied her the sick benefits because she was considered to be on maternity leave, and the employer did not provide benefits to employees who were on an unpaid leave of absence. The complaint was upheld before the Board of Inquiry. Although Dr. Crook then settled her case with the employer, the employer appealed the Board's order that it apply the terms of the sick leave plan so as not to exclude women oncologists from benefits for the period after birth that they are unable to work for health-related reasons.

The Divisional Court agreed with the decision of the Board of Inquiry and found that denying a woman access to the use of sick leave around the time of childbirth when she is unable to work for health-related reasons, including the recovery from normal childbirth, amounts to discrimination on the basis of pregnancy. The court also held that Section 25(2) of the Code was not applicable in that case. Section 25(2) protects "an employee superannuation or pension plan or fund or a contract of group insurance between an insurer and an employer" that complies with the provisions of the *Employment Standards Act* and its regulations. The *Employment Standards Act* and the regulations permit discrimination against pregnant women by denying access to disability plans during maternity leave. However, the court found that Section 25(2) did not apply in the case before it because the employer's sick leave plan was self-funded and was not a group insurance contract.

Although Section 25(2) of the Code was found not to be applicable on the facts of Dr. Crook's case, the court's reasoning indicates that Section 25(2) would likely provide a defense in the case of group insurance contracts.

In another decision on a different but related issue, *Anderson v. Saskatchewan Teachers' Superannuation Commission*,¹⁹ the Saskatchewan Court of Appeal dealt with the impact of maternity leave on pension entitlement. The case involved two women who had been teachers in Saskatchewan for 28 years who became pregnant during the 1950s and early 1960s, before maternity leave was available. Therefore, they were forced

to resign from their employment in order to take pregnancy leave and later were rehired. In 1990, they applied to the Superannuation Commission to purchase one year of contributory service for the period of maternity leave. The Saskatchewan *Teachers' Superannuation Act* provided that, in order to purchase the credit, the teachers must have been granted leave by the Board of Education. Their requests were denied because they had resigned rather than take a leave. The Saskatchewan Court of Appeal held that this was not discrimination on the basis of sex or pregnancy as male teachers and adoptive parents who took parental leave prior to board-approved leaves being instituted were also denied the option to buy back lost pension benefits.

Discrimination on the Basis of Disability

Many of the cases in this area have arisen in the labour arbitration context and have considered whether employers must continue to make benefit contributions for employees who are on disability leave. Another issue that often arises at the same time is whether employees on disability benefits continue to accrue service and/or seniority.

Recently, the Ontario Court of Appeal considered these issues in *O.N.A. v. Orillia Soldiers Memorial Hospital*.²⁰ That case involved a policy grievance of a scheme under a collective agreement where, after certain periods, nurses on unpaid leave of absence due to disability did not accumulate seniority or service and were required to pay 100% of premiums to their benefit plans. With respect to the benefit plan premiums, the court found that the provision in the collective agreement was not directly discriminatory. The relevant comparator group was other employees who were not working, and the disabled employees who were not working were treated more generously than the other employees in this group. If the provision amounted to adverse effect discrimination, the court found that requiring work in exchange for compensation was a bona fide occupational requirement. There was no way to accommodate the needs of the group so that they could perform the work. The court applied the same reasoning to service accrual, which was used to fix employee compensation levels. However, the court held that provision in the collective agreement regarding the accrual of seniority was discriminatory. The court found that seniority was not directly related to compensation and accrued only through the passage of time but directly affected the ability of employees to access, remain in and thrive in the workplace.

The Supreme Court of Canada dealt with a somewhat different disability-related question in *Battlefords and District Co-operative Ltd. v. Gibbs*.²¹ The issue in that case was whether the provisions of a disability insurance policy amounted to discrimination under Sec-

tion 16 of the Saskatchewan *Human Rights Code*. Under the policy, disabled employees who were off work were entitled to benefits. However, if the disability in question was mental illness, the policy provided that the benefit would terminate after two years, unless the person with the mental disability was in an institution. The Court held that the purpose of the insurance plan was to insure employees against the income-related consequences of disability. Therefore, the appropriate comparator group was those receiving disability benefits generally. In the circumstances, the Court found that the differential treatment of employees with mental disabilities was discriminatory. In a partial dissent, Madame Justice McLachlin expressed concerns about the “purpose test” formulated by the majority in that it only functions if the purpose is formulated broadly with reference to the need, which the plan seeks to address. However, if the purpose is defined in terms of specified injuries or target groups, the result may be to condone the exclusion of many valid claims.

Discrimination on the Basis of Sexual Orientation

In the past decade, the courts and tribunals have dealt with numerous cases in which employees have been denied requests to have their benefits extended to their same-sex spouses. The issue typically arose because of definitions of the term *spouse* in private benefit plans, collective agreements or legislation that exclude same-sex spouses. In the past, there has been considerable confusion as to whether benefits must be provided to same-sex spouses and the legal consequences if such benefits are not provided. However, as a result of the recent decisions of the Supreme Court of Canada in *M. v. H.*²² and the Ontario Court of Appeal in *Rosenberg v. Canada (Attorney General)*,²³ the law has become much clearer. As a result of these cases, legislation has been passed and introduced in many Canadian jurisdictions replacing opposite-sex definitions of *spouse* with definitions that include same-sex spouses. There are, however, some remaining areas of uncertainty.

Charter Cases

There has been rapid development in the approach of the courts toward same-sex benefits and discrimination on the basis of sexual orientation under the Charter in the past several years. As sexual orientation is not listed as a ground in Section 15 of the Charter, the first step was for the courts to recognize it as an analogous ground under Section 15. The Supreme Court of Canada did so in 1995 in *Egan v. Canada*.²⁴ *Egan* involved a challenge to the opposite-sex definition of *spouse* under the *Old Age Security Act*, as a result of which Egan’s same-sex spouse did not qualify for a spousal allowance that is available to the opposite-sex

spouse of pensioners if the couple’s income falls below a certain level. There, the court held that sexual orientation is “. . . a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs” and that gays, lesbians and bisexuals, “. . . whether as individuals or couples, form an identifiable minority who have suffered and continue to suffer serious social, political and economic disadvantage. . . .”²⁵

In *Egan*, the majority of the Court also held that the denial of benefits to same-sex spouses amounted to a violation of Section 15 of the Charter by discriminating on the basis of sexual orientation. However, a differently constituted majority held that the violation of Section 15 could be justified under Section 1 of the Charter.

In *Rosenberg*, the Ontario Court of Appeal considered a challenge to the opposite-sex definition of *spouse* in the *Income Tax Act*. This prevented the Canadian Union of Public Employees from registering a pension plan that provided survivor benefits to same-sex spouses with Revenue Canada. In accordance with *Egan*, the court held that the definition of *spouse* in Section 252(4) of the *Income Tax Act* violated Section 15 of the Charter. The court went on to find that the infringement of Section 15 was not justified under Section 1 of the Charter. The court relied on a decision of the Supreme Court of Canada in *Vriend v. Alberta*,²⁶ which was released after *Egan*, and took a different approach than *Egan* to the analysis of Section 1 of the Charter. The court ordered that the definition of *spouse* in Section 252(4) of the *Income Tax Act* must be read to include same-sex spouses. The federal government decided not to seek leave to appeal *Rosenberg* to the Supreme Court of Canada.

The effect of *Rosenberg* is that pension plans that provide survivor benefits to same-sex spouses may now be registered with Revenue Canada. However, Revenue Canada has taken the position that it will not register amendments to pension plans that provide same-sex benefits retroactively for the period before April 23, 1998, the date of the *Rosenberg* decision. Revenue Canada has stated that it will consider claims for same-sex benefits that arose prior to April 23, 1998 on a case-by-case basis.

Relying on *Rosenberg*, in *O.P.S.E.U. Pension Plan Trust Fund (Trustees of) v. Ontario (Management Board of Cabinet)*,²⁷ the Ontario Court (General Division) held that the opposite-sex definition of *spouse* in the Ontario *Pension Benefits Act* was contrary to Section 15 of the Charter and was not justified by Section 1. As a result, the court ordered that the definition of *spouse* in the *Pension Benefits Act* must be read to include same-sex spouses. This means that pension plans in Ontario are required to provide survivor benefits to same-sex spouses as a minimum standard pursuant to the *Pension Benefits Act*. The Financial Services Commission of

Ontario recently released a policy in the wake of the *OPSEU Pension Trust* case effective December 8, 1998.²⁸ The policy states that pension plans are not required to be amended to provide same-sex benefits, although it is good practice to do so. However, the policy further states that pension plan administrators must provide same-sex benefits as pension plans are required to be administered in accordance with the *Pension Benefits Act*.

The most recent case in which the constitutionality of an opposite-sex definition of *spouse* was at issue was *M. v. H.*, where the Supreme Court of Canada considered the support obligations of same-sex spouses under the Ontario *Family Law Act*. The Court held that the opposite-sex definition of *spouse* in Section 29 of the *Family Law Act* was contrary to Section 15 of the Charter and was not justified under Section 1 of the Charter. The Court severed Section 29 of the *Family Law Act*, with a six-month suspended declaration of invalidity. Although the case did not deal directly with same-sex benefits, it has provided an impetus to Parliament and the legislatures across the country to amend the definition of *spouse* in various statutes to include same-sex spouses.

Human Rights Cases

In the early-to-mid 1990s, many human rights complaints regarding the denial of same-sex benefits were upheld by tribunals and the courts. During this period, in *Leshner v. Ontario*,²⁹ an Ontario Board of Inquiry held that Section 25(2) of the Ontario *Human Rights Code* provided a defense to complaints regarding the denial of survivor benefits to same-sex spouses under pension plans. Section 25(2) permits discrimination on the basis of marital status and thus allows pension plans to provide different benefits to single members than to married members. The Board of Inquiry reasoned that since the Code contains an opposite-sex definition of *spouse*, the complainant was single for the purposes of the Code, and Section 25(2) provided a full defense. However, the Board went on to find that the definition of *spouse* in the Code was contrary to Section 15 of the Charter and that the definition of *spouse* should be read to include same-sex spouses. Therefore, the Board held that the denial of same-sex survivor benefits was contrary to the Code as modified by the Charter. The Board of Inquiry's approach in *Leshner* was later approved by the Ontario Divisional Court in *Ontario Blue Cross v. Ontario (Human Rights Comm.)*.³⁰

The major stumbling block at that time, particularly with respect to pension plans, was that Revenue Canada was not willing to register pension plans that provided survivor benefits to same-sex spouses. Therefore, the issue in many cases was whether the court or tribunal should order pension plans to provide survivor benefits

to same-sex spouses in arrangements outside of the registered pension plan. In some cases, such as *Leshner*, tribunals ordered respondents to set up "off-side" arrangements and, in other cases, they did not.³¹

Having regard to the decision of the Ontario Court of Appeal in *Rosenberg*, pension plans providing same-sex benefits may be registered with Revenue Canada, and it is no longer necessary for tribunals to consider the issues surrounding whether employers should be ordered to set up off-side pension plans as a remedy. In most Canadian jurisdictions, this means that tribunals are likely to uphold human rights complaints regarding same-sex benefits and simply order benefit or pension plans to provide benefits to same-sex spouses.

However, in Ontario, the Human Rights Commission has taken the position that it cannot refer same-sex benefits complaints to Boards of Inquiry because of the decision of the Supreme Court of Canada in *Cooper v. Canada (Human Rights Commission)*.³² In that case, the Court held that human rights commissions do not have the power to apply the Charter to the provisions of their own legislation. As noted above, in *Leshner*, the Board of Inquiry held that Section 25(2) of the Code provided a full defense to same-sex benefits complaints and only upheld the complaint when the Charter was applied to modify the definition of *spouse* in the Code. This approach was approved by the Ontario Divisional Court in *Ontario Blue Cross v. Ontario (Human Rights Comm.)* and is therefore binding on the Commission. As the Ontario Commission no longer has the power to apply the Charter to its enabling legislation, it was left with the conclusion that Section 25(2) of the Code provides a defense to same-sex benefits complaints. However, as a result of the *M.v.H.* decision, the Ontario *Human Rights Code* was amended by Bill 5 to recognize "same-sex partner status" as a prohibited ground of discrimination.³³

Legislative Initiatives

A number of Canadian jurisdictions have now passed or introduced legislation to amend definitions of *spouse* to include same-sex spouses.

On June 16, 1999, the Quebec government gave Royal Assent to Bill 32, *An Act to amend various legislative provisions concerning de facto spouses*.³⁴ Bill 32 amends 28 statutes and 11 regulations in Quebec to recognize same-sex spouses. Most significantly for these purposes, Bill 32 amends the provisions of the *Supplemental Pensions Plan Act* with respect to death benefits and division of pensions upon separation. Employers must comply with these requirements within 90 days.

In British Columbia legislation recognizing same-sex spousal relationships has been passed. Bill 58, the *Pension Benefits Standards Amendment Act, 1999*³⁵ amends the definition of *spouse* in the *Pension Benefits Stan-*

dards Act to include same-sex spouses. However, under the bill, a married spouse will have priority over a common law spouse for two years after the married spouses began living separate and apart.

Federally, Bill C-78, the *Public Sector Pension Investment Board Act*, was assented to September 14, 1999. Bill C-78 amends the definition of *spouse* in various federal public sector pension plans to include same-sex spouses. The federal government also amended several other statutes with Bill C-23, which introduced the concept of *common law partner* to confer "spousal" benefits, rights, and responsibilities to same-sex partners who have cohabited for at least one year.³⁶

Age Discrimination

The Supreme Court of Canada recently **considered** the issue of age discrimination in the benefits area in *Law v. Canada (Minister of Employment and Immigration)*.³⁷ In that case a 30-year-old woman challenged the provisions of the Canada Pension Plan that gradually reduce survivor pensions for able-bodied spouses between the ages of 35 and 45 so that the threshold to receive benefits is age 35. The Court held that these provisions did not violate Section 15 of the Charter even though they clearly result in differential treatment based on age. The Court found that the differential treatment of younger people in these circumstances did not reflect or promote the notion that they were less worthy of concern or respect nor did it violate their human dignity. Another factor taken into account by the Court was that Parliament's intent in providing limited survivor benefits to those under 45 appears to have been to allocate funds to older spouses whose ability to overcome need was the weakest.

ENDNOTES

1. *Constitution Act*, 1982, R.S.C. 1985, Appendix II, No. 44, Part I, s.32(1).
2. *Douglas/Channel Faculty Assn. v. Douglas College*, [1991] 2 S.C.R. 570.
3. *Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573.
4. *Vriend v. Alberta*, [1998] 1 S.C.R. 493 and *Re Blainey* (1986), 54 O.R. (2d) 513 (C.A.) leave to appeal to S.C.C. refused (1986), 58 O.R. (2d) 274 (S.C.C.).
5. *Law v. Canada (Minister of Employment and Immigration)* (1999), 170 D.L.R. (4th) 1 (S.C.C.).
6. *R. v. Oaks*, [1986] 1 S.C.R. 103.
7. Hog, Peter W. *Constitutional Law of Canada* (Looseleaf Edition) (Toronto: Carswell, 1992).
8. *The Winnipeg School Division v. Craton* (1985), 21 D.L.R. (4th) 1 at (S.C.C.) at p. 26.
9. *Ontario Human Rights Commission and O'Malley v. Simpson-Sears*, [1985] 2 S.C.R. 53.

10. *Ontario Human Rights Commission v. Etobicoke* (1982), 132 D.L.R. (3d) 14 (S.C.C.).
11. *Ontario Human Rights Commission v. Simpson-Sears Ltd.*, *supra* note 9.
12. *Ontario Human Rights Code*, R.S.O. 1990, c. H.19, as am.
13. *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)* (1987), 8 C.H.R.R. D/4210 (S.C.C.).
14. *Brooks v. Canada Safeway Ltd.* (1989), 59 D.L.R. (4th) 321 (S.C.C.) at pp. 336-7.
15. *Alberta Hospital Association v. Parcels* (1992), 90 D.L.R. (4th) 703 (Alta. Q.B.).
16. *Stagg v. Intercontinental Packers Limited* (1992), 92 C.L.L.C. ¶16, 236 (Sask. Bd. Inq.).
17. *Ontario Secondary School Teachers' Federation, District 34 v. Essex County Board of Education* (1996), 136 D.L.R. (4th) 34 (Ont. Div. Ct.).
18. *Ontario Cancer Treatment & Research Foundation v. Ontario Human Rights Commission* (1998), 38 O.R. (3d) 72 (Div. Ct.).
19. *Anderson v. Saskatchewan Teachers' Superannuation Commission* (1995), 130 D.L.R. (4th) 602 (Sask. C.A.).
20. *O.N.A. v. Orillia Soldiers Memorial Hospital* (1999), 169 D.L.R. (4th) 489 (O.C.A.), application for leave to appeal to the Supreme Court of Canada dismissed [1999] S.C.C.A. No. 118.
21. *Battlefords and District Co-operative Ltd.*, [1996] 3 S.C.R. 566.
22. *M. v. H.* (1999), 171 D.L.R. (4th) 577 (S.C.C.).
23. *Rosenberg v. Canada (Attorney General)* (1998), 38 O.R. (3d) 577 (C.A.).
24. *Egan v. Canada* (1995), 124 D.L.R. (4th) 609 (S.C.C.).
25. *Ibid.*, at paragraph 5.
26. *Vriend v. Alberta*, *supra* note 4.
27. *O.P.S.E.U. Pension Plan Trust Fund (Trustees of) v. Ontario (Management Board of Cabinet)* (1998), 20 C.C.P.B. (O.C.(G.D.)).
28. Financial Services Commission of Ontario, Bulletin 7/1, dated April 1999.
29. *Leshner v. Ontario* (1992), 16 C.H.R.R. D/184 (Ont. Bd. Inq.).
30. *Ontario Blue Cross v. Ontario (Human Rights Comm.)* (1994), 21 C.H.R.R. D/342 (Ont. Div. Ct.).
31. See for example *Dwyer v. Toronto (Metro) (No. 3)* (1996), 27 C.H.R.R. D/108 (Ont. Bd. Inq.) and *Laessoe v. Air Canada* (1996), 27 C.H.R.R. D/1 (C.H.R.T.).
32. *Cooper v. Canada (Human Rights Commission)* (1997), 140 D.L.R. (4th) 193 (S.C.C.).
33. *An Act to amend certain Statutes because of the Supreme Court of Canada decision in M. v. H.*, S.O. 1999, c.6, s. 28.
34. *An Act to amend various legislative provisions concerning de facto spouses*, S.Q. 1999, c. 14.
35. *Pension Benefits Standards Amendment Act*, 1999, S.B.C. 1999, c. 29.
36. *Public Sector Pension Investment Board Act*, S.C. 1999, c. 34.
37. *Law*, *supra* note 5.