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## EMPLOYMENT BENEFITS FOR "SAME SEX PARTNERS" IN CANADA

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### 1. Introduction

Many employee benefit plans in Canada provide certain benefits to the spouses of employees. This paper deals with the extension of these benefits to "same sex partners". The benefits discussed are survivor benefits under pension plans and spousal coverage under group health benefit plans.

The author is a consulting actuary practicing in the pension and benefits area. In addition to advising benefit plan sponsors on these issues, he has provided advice to a provincial Human Rights Commission in relation to a number of complaints laid by employees against their employers related to the non-provision of employment benefits to the partners of homosexual employees, and has given expert evidence related to such complaints.

The paper deals with technical and actuarial issues related to the provision of these benefits. It steers clear of the social and moral questions that are often raised with regard to them. Although the paper is written from a Canadian perspective and based on the Canadian regulatory system, no doubt some of the issues discussed have relevance in other countries.

### 2. Regulatory Framework

Pension plans in Canada are subject to two major sets of legislation. Provincial pension benefits legislation (and comparable federal legislation governing federally regulated employers) establishes minimum standards for pension plan benefits and for the funding of those benefits. The federal Income Tax Act ("ITA") provides favourable tax treatment to registered pension plans, but restricts the nature and amount of benefits that can be provided under such plans.

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Pension benefits legislation generally requires that certain lump sum benefits be provided on the death of a pension plan member prior to retirement and that, if the member has a spouse at the time of death, those benefits be paid to the spouse. It also requires that, where a member has a spouse at the time of retirement, the pension be paid on a joint and survivor basis with not less than a specified percentage (usually 60%) continuing to the spouse. "Spouse" for these purposes is defined as a person of the opposite sex who is either married to the member or who has cohabited with the member in a conjugal relationship for at least a specified period (I will refer to the latter category as a "common law spouse"). This legislation does not preclude providing survivor benefits to persons other than spouses as defined. It is not uncommon for Canadian pension plans to provide survivor benefits exceeding the minimum requirements of the legislation, including survivor pensions on a member's death prior to as well as after retirement.

The ITA permits a registered pension plan to provide only specified benefits on the death of a member. The permissible benefits include survivor pensions payable to the spouse and dependent children of the deceased member. The ITA contains a definition of "spouse" similar to that used in provincial pension benefits legislation, capturing legal spouses and common law spouses but not same sex partners. Accordingly a pension plan which provided survivor pensions to same sex partners would not be acceptable for registration under the ITA, and would forego the major tax advantages enjoyed by registered plans.

The ITA also extends favourable tax treatment to "private health services plans" ("PHSPs"), which include insured and non-insured employment-related programs such as dental plans, prescription drug plans, vision care plans and "extended health" plans covering expenses such as semi-private and private hospital room charges, ambulance costs and emergency medical expenses incurred while travelling outside Canada. Payments made by employers to a PHSP are tax-deductible by the employer, while neither the employer payments nor the benefits paid by the plan are taxable to the employee. A PHSP may cover employees, their dependent children and opposite sex spouses (including common law spouses). Health benefits provided by an employer for same sex partners of homosexual employees do not qualify for the favourable tax treatment accorded to a PHSP.

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### **3. The Leshner Case**

An important decision with regard to benefits for same sex partners was rendered by the Ontario Human Rights Commission in 1992 in the case of *Leshner v. The Queen in Right of Ontario*. The complainant was a civil servant who asserted that the failure of the Ontario government to provide survivor pension benefits to same sex partners of homosexual employees was in breach of applicable employment standards and human rights legislation, which prohibit employers from discriminating among employees on the basis of marital status.

The Commission found in favour of the complainant, and ordered the Ontario government to create an arrangement outside of its registered pension plan to provide survivor pension benefits for same sex partners of homosexual employees.

The Commission found that the inability of registered pension plans to provide same sex survivor benefits did not relieve the employer of the responsibility to provide equivalent benefits. The decision was not appealed, and the Ontario government established an arrangement as required by the decision.

There have been a number of other court and Human Rights Commission decisions dealing with complaints of this kind, with somewhat inconsistent decisions. The trend appears to be in the direction of requiring employers to extend employment benefits to same sex partners, where a complaint is made by an employee. However no Canadian jurisdiction has as yet enacted legislation specifically requiring employers generally to extend benefits in this manner.

### **4. Practical and Cost Issues - Survivor Pension Benefits**

As noted above, registered pension plans in Canada are at present prohibited by the Income Tax Act from providing survivor benefits to same sex partners of deceased members. Accordingly if such benefits are provided, this must be done through a separate non-registered arrangement.

Where such an arrangement is pre-funded, the employer's contributions are tax-deductible. However the arrangement is subject to special income tax treatment, the practical effect of which is to charge a 50% tax on investment earnings. Given the long duration from the time contributions are paid in until the time

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survivor income benefits are paid out, the contributions required to finance survivor income benefits through such an arrangement are typically about 3 to 4 times higher than they would be under a registered pension plan (assuming a pre-tax investment return in the range of 7% to 8%).

In addition to the tax inefficiency of such a separate arrangement, the costs of setting up and administering such arrangements would deter employers (and particularly small and medium sized private sector employers) from implementing them. There are also difficulties in integrating the death benefits under the registered pension plan (which must comply with pension benefits legislation) with those provided under the separate arrangement. Partly because of these difficulties, very few Canadian employers have undertaken to provide survivor pension benefits to same sex partners, except where ordered to do so as the result of a successful complaint of discrimination. It is likely that Canadian employers would be more receptive to providing these benefits if the Income Tax legislation were amended to allow them to be provided through a registered pension plan.

The author has carried out costings of providing such benefits through a registered plan, in connection with a complaint against a major municipality. The pension plan covering its employees provides a pension of 2% of final average earnings per year of service, less an offset to integrate with Canada Pension Plan benefits. It has good early retirement benefits and provides contractual inflation protection. It provides a 60% survivor pension on a member's death after retirement. This is typical of the large public sector pension plans in Canada.

The author's analysis showed the level percentages of earnings required to fund retirement pensions and survivor pensions over a typical working lifetime for male and female employees in different domestic situations to be as follows.

single male	15.2%
single female	16.6%
male with female partner	17.1%
female with male partner	17.4%
male with male partner	16.6%
female with female partner	17.8%

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These costings were based on the assumptions used in the latest actuarial valuation of the plan, and ignored the fact that the plan did not (and currently could not) provide survivor benefits to same sex partners. They assume that the partner has the same age as the employee and that partners of each sex are subject to the same mortality as employees of the same sex.

The most difficult part of the costing exercise is to estimate the percentage of employees who would have an eligible same sex partner at the time of retirement or of death prior to retirement, if survivor pensions were extended to such persons. It is quite often asserted by advocates for gay and lesbian rights that 10% of the adult population of North America is homosexual, but without any sound statistical basis.

Reliable statistics are very elusive, and no relevant Canadian data were available. In my analysis I made use of United States data contained in the 1993 *Janus Report on Sexual Behaviour*. This was based on an anonymous survey of a sample population planned to conform to the U.S. population distribution by sex, age, region, income, education and marital status. Respondents were asked to classify themselves either as heterosexual, homosexual or bisexual. Of 1,633 men surveyed, 4% classified themselves as homosexual. Of 638 "career women" surveyed, 4% classified themselves as homosexual (the percentage of female "homemakers" classifying themselves as homosexual was only 1%).

Based on that survey, it was assumed as a starting point that 4% of both male and female pension plan members were homosexual (although it should be recognized that the actual percentages may vary to some extent by occupation and from one employer to another).

The next question was the portion of homosexual members who would have an "eligible" same sex partner at the time of retirement or of death prior to retirement, taking into account the period of cohabitation required in order for a common law spouse to qualify for survivor benefits (the pension plan in question required three years of continuous cohabitation). It is possible that the portion of homosexual employees meeting this requirement is much less than 100%, but the author was unable to find any data to assist in arriving at an assumption. In the type of hearing for which this study was conducted, it is unacceptable to place any reliance on commonly held perceptions about the behaviour of particular

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classes of population, such as a perception that homosexuals change partners more frequently than heterosexuals.

As a purely arbitrary measure, costings were based on the assumption that 50% of homosexual plan members (i.e. 2% of all members), both male and female, would have an eligible same sex partner at the time of retirement or of death prior to retirement.

Based on these assumptions, it was estimated that the average cost of funding retirement and survivor pensions over typical members' working lifetimes would increase from 14.025% to 14.049% of salary if survivor benefits under the registered pension plan were extended to same sex partners (an increase of about 0.2% of the existing cost). This does not take into account any "catch-up" cost for benefits in respect of past service, which would roughly double the additional cost if amortized over 15 years. As noted above, the cost of funding such benefits outside the registered pension plan would be 3 to 4 times higher than that of providing the benefits through a registered plan.

A question that arises in respect of such costings is the impact of the higher incidence of AIDS among male homosexuals than in the total population. The above cost analysis was based on the assumption that all male employees (homosexual and heterosexual) and male partners are subject to the same mortality rates. The effect of assuming significantly higher rates of mortality for homosexual male employees and their partners would be to increase the incremental cost of the survivor benefits, but the total cost of pension and survivor benefits for homosexual male employees would then be lower than for other categories of employee. In the type of hearing for which the study was conducted, it is unacceptable for employers to oppose granting benefits to homosexual employees for reasons related to the incidence of AIDS.

The author's conclusion is that, although the cost of extending survivor pension benefits to same sex partners is difficult to estimate with precision (due to the difficulty of estimating the number of employees with eligible partners), the order of magnitude of the additional cost is so small that cost is not normally a significant issue. The principal difficulty in providing these benefits is their unacceptability in pension plans registered under the Canadian Income Tax Act.

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## **5. Practical and Cost Issues - Health Benefits**

As noted in the final paragraph of section 2 of this paper, health benefits provided by an employer for same sex partners of employees do not qualify for the favourable tax treatment accorded to a PHSP. Revenue Canada (the agency responsible for the administration of the Income Tax Act) takes the position that an employer wishing to provide such benefits must account for them separately from the benefits provided for employees, opposite sex partners and dependent children and arrange for different tax reporting.

As a practical matter, however, many Canadian employers do extend health benefits to same sex partners of their employees. While some follow the different tax reporting which Revenue Canada states is required, it is the author's understanding that many do not.

Revenue Canada has not taken any action against employers providing such benefits without the different tax reporting. This may be because the argument used by Revenue Canada to justify its position would also lead to the conclusion that the coverage of opposite sex common law spouses (a common practice for many years) was improper prior to 1993, when the Income Tax Act was amended to treat common law spouses in a similar manner to legal spouses.

The percentage of employers providing health benefits for same sex partners of employees is quite difficult to establish, as many employers do not wish to "advertise" the fact that they provide such coverage (particularly those employers which do not account for such benefits separately). It is the author's perception that practices vary by type of employer, with most universities and many other public sector employers providing such benefits but only a minority of private sector employers providing them. A number of labour unions have been active and successful in negotiating such benefits.

A privacy issue arises if employees are asked, when enrolling in group benefit plans, to indicate the sex of their "spouse". This can be avoided by asking the employee to indicate only the last name and initials of the spouse.

Many employers provide health benefits through insurance policies. Most insurance companies active in the group insurance business are prepared to issue policies covering same sex partners (either explicitly or through a definition of

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"spouse" which does not include an "opposite sex" stipulation), at least where the policy is subject to experience rating. Small employers may experience difficulty in obtaining such coverage, as policies for such employers are usually not experience rated and insurers may find it difficult to price the coverage.

Where health benefits are self-insured (which is common for larger Canadian employers), it is of course unnecessary to negotiate appropriate policy wording with an insurance carrier.

The costing of health benefit coverage for same sex partners presents an employer or insurance carrier which is contemplating providing them with the same difficulty as in costing survivor pension benefits - i.e. it is difficult or impossible to determine the percentage of employees having an eligible partner.

If it is assumed that the average annual cost of benefits for a same sex partner is the same as for an opposite sex partner, that roughly one-third of the cost of a typical health benefit plan is in respect of coverage of spouses, and that typically about 3% of employees might have an eligible same sex partner, the cost of such a plan would increase by about 1% as a result of extending benefits to same sex partners. The 3% assumption used in this illustration is higher than the 2% assumption used in costing survivor pension benefits, as health benefit plans usually require only a relatively short period of cohabitation to qualify as an eligible spouse.

To the extent that more same sex partners than opposite sex partners may have comparable health benefit coverage through their own employment, this illustrative cost may be overstated. The additional cost for any particular employer would also, of course, ultimately depend on the number of additional partners being enrolled for coverage.

The assumption that the average annual cost of benefits for a same sex partner is the same as for an opposite sex partner is open to question, specifically in view of the possible effect of the relatively high incidence of HIV and AIDS among male homosexuals. To the extent that victims of these diseases may become covered by health plans as a result of extending coverage to same sex partners, claims costs could be significantly increased for prescription drugs, semi-private and private hospital accommodation and other covered services.

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In the absence of reliable data with respect to such additional costs, insurance companies may be expected to price prescription drug and extended health benefits for same sex partners on a conservative basis. However the cost implications should not be exaggerated, since these costs also arise for employees who incur these diseases, and in these cases there may well be disability income and group life insurance claims in addition to health benefits.

In conclusion, the provision of health benefits to same sex partners of employees has become quite common in *Canada*, particularly in certain types of employment. The additional costs may normally be expected to be only minor, although there may be a concern in relation to AIDS-related costs for groups which include a relatively high percentage of male homosexual employees.