

s.19(1)

Canadian Human Rights Commission  
 Commission canadienne des droits de la personne

**INVESTIGATION REPORT  
 RAPPORT D'ENQUÊTE**

	<b>7 &amp; 10</b>	<b>17/6/93</b>
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File No. / Numéro du dossier: [redacted]      Section(s) of the Act / Article(s) de la Loi: 7 & 10      Complaint date (D/M/Y) / Date de la plainte (J/M/A): 17/6/93

sexual orientation	[redacted]	The Canadian Armed Forces
	[redacted]	Ottawa
	[redacted]	Ontario

Grounds/Motifs: sexual orientation      Complainant's Name & City / Nom et ville du (de la) plaignant(e): [redacted]      Respondent's Name and City / Nom et ville du (de la) mis(e) en cause: The Canadian Armed Forces, Ottawa, Ontario

**Position of complainant/Position du (de la) plaignant(e)**

1. The complainant alleges that the respondent limits benefit coverage to heterosexual married and common-law couples. As a result, his request to have his same sex partner recognized for the purposes of benefits was denied because of his sexual orientation.

**Position of respondent/Position du (de la) mis(e) en cause**

2. The respondent denies that it discriminated against the complainant.

**Investigation Findings/Résultats de l'enquête**

3. The evidence shows that the Canadian Armed Forces provides for benefits to be extended to the opposite sex partners of employees but not to their same sex partners. The evidence also shows that in accordance with this policy, the Canadian Armed Forces refused to recognize the complainant's relationship with his same sex partner as a common-law relationship for the purposes of benefits. The evidence shows that the complainant and his partner are qualified for the benefits but for the fact that they are both of the same sex.

4. The evidence shows that the restrictive requirements of the Income Tax Act present obstacles to providing medical benefits to all employees through a private health services plan, and pension benefits to all employees through a pension plan regardless of the sex of their partners. However, it is neither unlawful nor impossible to provide similar benefits outside of a private health services plan and a pension plan, albeit without the tax and cost advantages offered by conformity to the Income Tax Act.

**Recommendation/Recommandation**

5. It is recommended that a conciliator be appointed to attempt to bring about a settlement of the complaint.

<p><i>B. Adams-Farrell</i> <u>Nov 7/95</u>                  Buelah Adams-Farrell      Date                  Policy Complaint Analyst /                  Analiste des politiques</p> <p><i>A.M. Roche</i> <u>7-11-97</u>                  A/Director      Date                  Policy Complaint Unit / Service des plaintes relatives aux politiques</p>	<p>_____                  Director, Compliance      Date                  Anti-Discrimination Programs Branch                  Directeur(trice), Mise en oeuvre                  Direction générale des programmes                  d'antidiscrimination</p>
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**PROPOSED RESOLUTION/RÉSOLUTION PROPOSÉE**

<p>The Commission resolves:</p> <p>pursuant to section 47 of the Canadian Human Rights Act, to appoint a conciliator to attempt to bring about a settlement of the complaint [redacted] of [redacted] of Gatineau, Quebec, against the Canadian Armed Forces dated June 17, 1993, alleging discrimination in the provision of services on the grounds of sexual orientation and family status.</p>	<p>La Commission déclare:</p> <p>en vertu de l'article 47 de la Loi canadienne sur les droits de la personne, qu'elle nommera un conciliateur chargé d'essayer d'en arriver à un règlement de la plainte [redacted] de [redacted] de Gatineau (Québec) contre les Forces armées canadiennes en date du 17 juin 1993, selon laquelle il y a eu discrimination fondée sur l'orientation sexuelle et la situation de famille lors de la prestation de services.</p>
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**COMMISSION DECISION/DÉCISION DE LA COMMISSION**

Date of decision Date de la décision _____	
<input type="checkbox"/> Resolution approved Résolution approuvée	<input type="checkbox"/> Resolution not approved Résolution rejetée
<b>DECISION/DÉCISION</b>	
_____ Secretary to the Commission Secrétaire de la Commission	_____ Date

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**THE PRIMA FACIE COMPLAINT**

6. The complainant states that he has been a member of the Canadian Armed Forces since [REDACTED], and that he and his partner, with whom he has co-habited since October 1988, are recognized by family and friends as a couple.

7. The complainant states that on May 31, 1993, he filed the required affidavit requesting that his relationship with his same sex partner be recognized as a common-law relationship. Such recognition is a prerequisite for the extension of employment benefits to his same sex partner. The complainant states that in a letter dated June 4, 1993, he was advised that under the current policy, a common-law spouse is defined as a person of the opposite sex, and therefore the complainant's partner was not eligible for benefit coverage.

8. Therefore, the complainant alleges that the respondent discriminates against him and other individuals with same sex partners because of their sexual orientation.

**RESPONDENT'S DEFENCE AND RELATED EVIDENCE**

5. The respondent's representative, the Human Rights Coordinator, denies that the Canadian Forces discriminated against the complainant. He states that on October 27, 1992 the Federal Court of Canada issued a declaratory judgement that policies restricting homosexuals serving in the Canadian Forces are contrary to the Canadian Charter of Rights and Freedoms. As a result, all such policies were cancelled and there are no longer restrictions on homosexuals serving in the Canadian Forces. He states that the complainant has not been deprived of any employment opportunities as a result of his sexual orientation. He also states that one of the conditions which must be satisfied before a common law relationship can be recognized in accordance with current Canadian Forces regulations, is that the two applicants must be of opposite sex. This policy is consistent with policies and definitions set by the federal government.

9. The criteria for the recognition of marital relationships in the Canadian Forces are set out in Queen's Regulations and Orders (QR&O) 1.075 which states in part that:

A commanding officer may, upon application by a member... recognize the member's common-law relationship where the member establishes by affidavit or statutory declaration signed by both persons in the relationship that they:

- (a) are of opposite sexes....
- (c) have resided together as husband and wife continuously for at least one year immediately preceding the application...

10. Documentation provided by the complainant confirms that in May, 1993 he applied to the respondent for recognition of his relationship with his partner in accordance with the respondent's regulations and provided the required statutory declaration. By letter dated June 4, 1993, the respondent advised the complainant that since he did not meet one of the conditions which must be satisfied before a common-law relationship can be recognized (i.e. the two applicants must be of opposite sexes), his relationship with his same sex partner is therefore not recognized. The complainant states that as a result of this decision, he and his same sex partner did not get any benefits to which opposite sex couples are entitled.

11. The complainant grieved the respondent's decision. In December, 1994 the respondent decided to hold the complainant's grievance in abeyance pending a decision by the Commission in the complainant's case.

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### **Benefit Plans**

12. The respondent states that the Canadian Forces provides employment benefits to which opposite sex couples but not same sex couples are entitled including: travel benefits, relocation benefits, allowances (both common and foreign) and health and pension benefits.

#### Travel Benefits

These benefits are:

- Weekend travel
- Transportation on compassionate leave
- Transportation by reason of critical illness of immediate family of the member for the member and his spouse when serving at an isolated post.
- Transportation costs to accompany member from place (sic) of duty to place of burial of dependant.
- Transportation and travelling expenses for the period next of kin remains with hospitalized member at that location.

#### Relocation Benefits

These benefits are:

- Interim lodgings, meals and incidentals
- Transportation and travel
- Return trip assistance
- House hunting trips
- Separation expense
- Additional living expense
- Commuting assistance

#### Allowances (Common)

These benefits are:

- Accommodation assistance allowance
- Posting allowance
- Leave transportation assistance allowance
- Foreign service premium

#### Allowances (Foreign)

These benefits are:

- Shelter allowance
- Utilities
- Family reunion travel

#### Health Benefits

Public Service Health Care Plan (PSHCP)

13. The PSHCP (formerly the Group Surgical-Medical Insurance Plan - GSMIP) is a private health care plan sponsored by the Government of Canada. It applies to federal public service employees, members of the Canadian Forces, RCMP, Members of Parliament, federal judges, employees of a number of designated agencies and corporations and persons receiving pensions based on service in one of these capacities. The entire operations of the PSHCP, including the payment of benefits, are financed by the monthly contributions of Plan members and the federal government.

Eligible dependents include:

- a) the plan member's spouse (including a common-law spouse). Spouse is defined in the Plan Document which governs the administration of the plan as

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"the person who is legally married to the member, except that a person of the opposite sex who is living with the member and is publicly represented as the member's wife or husband may be considered to be the member's spouse to the exclusion of the legal spouse".

b) unmarried children (including an adopted child, step-child or foster child) who are under 21 years of age, between 21 and 25 years of age and in full-time attendance at school;

c) unmarried children 21 years of age or over who are wholly dependent upon the individual because of physical or mental impairment, if such impairment existed prior to the child's reaching age 21 or commenced while the child was covered as a student over age 21.

Therefore, same sex partners of plan members are not eligible dependents.

14. The PSHCP provides Supplementary Coverage which includes the Extended Health Care Benefit and the Hospital Benefit and is for eligible persons who are Canadian residents. It supplements coverage provided under provincial health care plans.

15. The Extended Health Care Benefit is comprised of the drug benefit, the vision care benefit, the health practitioners benefit, the dental benefit, the miscellaneous expense benefit and the out of province benefit. The Hospital Benefit provides coverage for the cost of hospital room and board charges other than standard ward charges (e.g. semi-private or private accommodation) whether the member is residing in Canada or abroad.

#### Canadian Forces Dental Plan

16. The Dental Plan covers all employees and their eligible spouses and children. The same sex partners of plan members are not eligible for benefits under the Plan. The Plan provides coverage for specific services dental services and supplies.

#### Pension Benefits

17. The Canadian Forces Superannuation Act, the Supplementary Retirement Benefits Act and the Gratuity Regulations govern pension benefits for members of the Canadian Armed Forces.

#### The Canadian Forces Superannuation Act (CFSA)

18. The CFSA provides for the payment of certain benefits to a member because of retirement, disability and other reasons specified in the Act. Upon retirement, benefits are paid to the contributor in one of the following forms: an immediate annuity, a deferred annuity; a cash termination allowance; and return of contributions. The form of benefit received depends on the number of years of service in the Forces and the reason for retirement. The Act also allows a contributor to elect a joint and survivor benefit for his/her opposite sex partner.

19. If a contributor dies while he/she is a member of the Forces, the CFSA provides for benefits to be paid to a surviving widow(er) or children under 18 years of age. These benefits include: an annual allowance; a return of contributions; or payment of "an amount" calculated in a prescribed form. The type and amount of benefit the survivors get depend on the number of years the contributor was a member of the Forces. If the contributor has 5 or more years of service an allowance may be extended to a child who is 19 years or more but less than 25 years, provided certain conditions are met.

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20. If the contributor does not have a surviving widow(er), or children under 18 years of age, or a child who would qualify for the extended allowance, an amount is paid to his/her surviving named beneficiary (i.e. estate or another named beneficiary under the Supplementary Death Benefit Plan (see paragraph 25)). If the contributor is not survived by a named beneficiary the amount is paid to the service estate of the contributor. The service estate is the respondent's legal representative who would ensure the proper disbursements of the funds. A same sex partner can be a named beneficiary of the estate or the Supplementary Death Benefit Plan, and can receive funds from the service estate.

21. The amount paid to the surviving beneficiary would include: the return of contributions; the difference between the greater of the amount of a return of contributions and the annuity to which the contributor would have been entitled to in accordance with the CFSA, and the aggregate of all amounts paid to the contributor and other persons specified in the CFSA. The benefit paid to the beneficiary would depend on the contributor's number of years of service.

22. If a contributor who has had less than 10 years of service in the Forces dies after ceasing to be a member of the Forces, the return of contributions or cash termination allowance, if not previously paid, is paid to the named surviving beneficiary (estate or another named beneficiary under the Supplementary Death Benefits Plan), or in any other case to the estate of the contributor, or if less than \$1,000, as the Minister may direct.

23. If an annuitant who ceased to be a member of the Forces after December 20, 1975 dies, and the individual has had 10 or more years of service in the Forces, an annual allowance is paid to the surviving widow(er) and children under 18 years of age. Where there is no surviving spouse or eligible children, an amount is paid to his/her named surviving beneficiary (i.e. estate or another named beneficiary under the Supplementary Death Benefit Plan). If the contributor is not survived by the named beneficiary, the amount is paid to the estate of the contributor, or if less than \$1,000 as the Minister may direct.

24. If an annuitant who ceased to be a member of the Forces before December 20, 1975 dies and the individual has 10 or more years of service, the surviving widow and children under 18 years of age receive the annual allowance provided for under the CFSA. If there is no surviving widow or eligible children, then an amount is paid to the estate of the contributor, or, if the amount is less than \$1000 as the Minister may direct.

#### Supplementary Death Benefit

25. The CFSA provides for a Supplementary Death Benefit. It is a form of life insurance protection for the contributor. A named beneficiary under this plan can be the contributor's estate, including the individual's same sex partner.

#### Supplementary Retirement Benefits Act

26. This Act provides for an increase, in certain cases, to an annuity payable under the CFSA to an annuitant, based on age and years of pensionable service.

#### Gratuity Regulations

27. These regulations provide for a one-time lump sum benefit to be paid to certain officers who are serving in the Forces for a fixed period. In the event of death while serving, the gratuity is paid to their widows and children. If an individual does not have a widow or children, the benefit is paid to the service estate.

LEGISLATION AFFECTING PENSION PLANS

B) Relationship between the Canadian Forces Superannuation Act, the Supplementary Retirement Benefits Act the Gratuity Regulations and the Income Tax Act

28. Members of the Canadian Armed Forces are governed by the Canadian Forces Superannuation Act (CFSA), The Supplementary Retirement Benefits Act, the Gratuity Regulations and the Income Tax Act (ITA) for purposes of pension benefits. The goal of the ITA is to ensure that only certain benefits are provided on a tax assisted basis. The ITA does not impose types of benefits. It merely lists the benefits that can be provided on a tax assisted basis. Certain pension acts impose types of benefits. For example, the Superannuation Act imposes Survivor Benefits for spouses and former spouses which can be paid on a tax assisted basis if paid to persons qualifying as spouses or "extended spouses" under the ITA (refer to paragraph 31 below). It is up to the administrator of the plan to determine which "non imposed" benefits will be provided under the plan. If the benefits he/she chooses to provide are within the limits of the ITA, they can be provided on a tax assisted basis. The CFSA does not impose a joint and survivor benefit, but rather, it allows for a member to elect a joint and survivor benefit.

C) ITA and Implications for Registered Pension Plans (RPPs)

29. RPPs have special status under the ITA. Employer and employee contributions to these plans within limits, are deductible in determining taxable income. In addition, income earned on the investments made by an RPP are not taxed. Pension payments are taxed when received.

30. Revenue Canada officials state that a pension plan cannot obtain or maintain registered plan status without meeting all the requirements of the ITA, including those requirements regarding permissible survivor spouses.

31. Spouse is defined in the ITA Regulations as "a party to a void or voidable marriage to a taxpayer". The ITA provides an extended definition of the term "spouse" as being "the person of the opposite sex who cohabits at that time with the taxpayer in a conjugal relationship" and has so cohabited with the taxpayer throughout a 12-month period ending before that time".

32. Revenue Canada officials state that the ITA does not allow for any discretion with respect to the definition and extended definition of spouse. Plans which do not include the permissible definition of spouse become revokable. Such plans would revert to a Retirement Compensation Arrangement (RCA) and are subject to all the requirements of that arrangement as described below.

33. Revenue Canada officials state that an RCA, which is a pension vehicle defined in the ITA, is the most common arrangement used as an alternative to RPPs. The difference between RPPs and RCAs is that the ITA does not restrict the types of benefits payable under an RCA. Subject to a tax avoidance rule, any benefit is acceptable as long as it is paid from the RCA trust. This type of arrangement must be employer sponsored and is funded by employer and employee contributions. Contributions to the fund by the employer and employee are deductible, but the custodian of the plan must pay tax at a rate of 50% on all monies received either through contributions or returns on monies invested from the fund. When members are paid from the fund, the custodian is reimbursed 50% of that paid out. Because of the tax implications, there would be less money in the fund to benefit members.

34. Revenue Canada officials state that a plan member can designate anyone as the beneficiary of an RPP, unless provincial

legislation dictates otherwise. The Income Tax Regulations define the beneficiary of an individual as:

a person who has a right, by virtue of the participation of the individual in a pension plan, to receive benefits under the plan after the death of the individual.

If the applicable pension act does not impose a Survivor Benefit, the same sex partner of a plan member has two options, if he/she is a beneficiary of a pension plan:

- a) If a plan member dies before retirement, the same sex partner is entitled to the money in the plan, payable in a lump sum and taxable. However, the money cannot be rolled over into a registered plan.
- (b) If the plan text allows, the member could negotiate an option provided under the ITA with the plan administrator. For example, the plan member may choose a guaranteed benefit for 5 - 15 years, and he/she can decide that the remainder of the guaranteed period will be paid to his/her same-sex partner who then becomes the beneficiary.

35. The same sex partners of CFSA plan members can take advantage of the first option only, since the plan text does not allow for the second option.

#### LEGISLATION AFFECTING PRIVATE HEALTH SERVICES PLANS

36. The Public Service Health Care Plan is a Private Health Services Plan (PHSP) as defined in the ITA. The ITA states that contributions made by an employer to a PHSP on behalf of an employee are not taxable. Benefits paid out of the plan are tax-free but reduce the medical expenses that would otherwise qualify for the medical expense tax credit.

37. Premiums or other contributions paid by employees and other individuals qualify as medical expenses for the purpose of the medical expense tax credit provided under the ITA. The amount must be paid for the individual, his/her spouse, any member of his/her household "with whom the individual is connected by blood relationship, marriage or adoption". Other qualifying medical expenses for the credit are also restricted to those for "the individual, the individual's spouse or a dependent of the individual".

38. The definition of a PHSP in the ITA does not specify who may be covered under a PHSP. However, Revenue Canada's position is that, given the restrictions in the ITA, for the purpose of PHSPs, the term spouse includes only persons of the opposite sex.

39. An employer funded plan would not qualify as a PHSP if the benefits are extended to the same sex partners of employees. The plan would, in all likelihood, be considered by definition as an employee benefit plan. Under such a plan, generally, no taxable benefit would arise on contributions made by the employer to the plan but benefits paid out, either to cover medical expenses or as premiums would be taxable. Under an employee benefit plan, the employee would not be entitled to claim the medical expense tax credit in respect of a same-sex partner.

40. Revenue Canada has advised that where an employer wishes to extend to its employees non-qualifying benefits (e.g. benefits extended to the same sex partners of employees), as well as those which do qualify, Revenue Canada is prepared to accept 2 approaches. The employer can set up 2 separate plans, a PHSP for the qualifying benefits so that the tax free status of the benefits which do qualify for inclusion in a PHSP are preserved, and an employee benefit plan for the non-qualifying benefits. However, where it is not feasible for the employer to set up 2

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separate plans, Revenue Canada is prepared to treat the PHSP as 2 separate plans. This is contingent on the plan administrator accounting for the contributions, income and disbursements of the part of the plan which provides non-taxable benefits separately from that which provides taxable benefits.

#### OTHER RELATED EVIDENCE

41. The denial of benefits because of sexual orientation, including leave and benefits under the Public Service Health Care Plan, dental and pension plans, is the subject of complaints filed by Dale Akerstrom and Stanley Moore. Dale Akerstrom filed complaints against the Treasury Board of Canada, the Public Service Alliance of Canada and Employment and Immigration Canada and Stanley Moore filed complaints against External Affairs and International Trade, the Professional Association of Foreign Service Officers and the Treasury Board of Canada. The Akerstrom/Moore complaints are presently at Tribunal.

#### CONCLUSION AND RECOMMENDATION

42. The evidence shows that the Canadian Armed Forces provides for benefits to be extended to the opposite sex partners of employees but not to their same sex partners. The evidence also shows that in accordance with this policy, the Canadian Armed Forces refused to recognize the complainant's relationship with his same sex partner as a common-law relationship for the purposes of benefits. The evidence shows that the complainant and his partner are qualified for the benefits but for the fact that they are both of the same sex.

43. The evidence shows that the restrictive requirements of the Income Tax Act present obstacles to providing medical benefits to all employees through a private health services plan, and pension benefits to all employees through a pension plan regardless of the sex of their partners. However, it is neither unlawful nor impossible to provide similar benefits outside of a private health services plan and a pension plan, albeit without the tax and cost advantages offered by conformity to the Income Tax Act.

44. It is recommended that a conciliator be appointed to attempt to bring about a settlement of the complaint.

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