**IN THE MATTER OF:** The Human Rights Code (formerly the Human Rights Act) R.S.M. Cap H 175 and amendments thereto;

- and -

**IN THE MATTER OF:** A Complaint by Chris Vogel against the Government of Manitoba et al, alleging a breach of Section 14(1) and 15(1) of The Human Rights Code;

- and -

**IN THE MATTER OF:** A Complaint by Chris Vogel against the Government of Manitoba, and the Manitoba Government Employees' Association et al alleging a breach of Section 14(1) and 14(6) of The Human Rights Code;

- and -

**IN THE MATTER OF:** A Complaint by Richard North against the Government of Manitoba et al alleging a breach of Section 13(1) of The Human Rights Code.

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**BACKGROUND**

The complaints in this matter were brought by Chris Vogel ("Vogel") and his covivant Richard North ("North") who are homosexuals who have resided in a same-sex spousal relationship since 1972. At all material times, Vogel has been a regular full time employee of the Province of Manitoba.

In 1982, Vogel filed a complaint under The Human Rights Act, S.M. 1974 c.65 alleging that the Government contravened Section 6(1) of The Human Rights Act by discriminating against him on the basis of marital status and sex. The complaint was dismissed by Adjudicator Marshall Rothstein on August 23, 1983 (see *Vogel v. Manitoba (1983), 4 C.H.R.D. D/1654*).

The Human Rights Code ("the Code") replaced The Human Rights Act on December 10, 1987. By virtue of Section 9(2)(h) of the Code, sexual orientation was added as a form of prohibited discrimination. Subsequently, Vogel and North filed their complaints in this matter against the Province of Manitoba through the Minister responsible for the Civil Service Commission and the Civil Service Commission (collectively "the Government") and against the Manitoba Government Employees' Association (now "the M.G.E.U.") on February 23, 1988. Vogel alleged that as an employee of the Government, he and North, by virtue of being his same-sex spouse, were entitled to receive certain benefits. Vogel is eligible to receive benefits pursuant

to the following plans and legislative schemes:

(a) the Manitoba Government Employees' Dental Plan;

(b) the Civil Service Superannuation Plan;

(c) the Employees' Ambulance, Hospital and Semi-Private Plan;

(d) the Extended Health Care Plan;

(e) the group life insurance plan with Canada Life Assurance Co.

In due course, the complaints were heard by me and dismissed. My decision was reviewed and confirmed by Hirschfield, J. of the Manitoba Court of Queen's Bench (see *Vogel v. Manitoba 1992 (79 Man.R. (2d) 208 [[1992] 3 W.W.R. 131]*). The complainants appealed and by a judgment rendered June 14th, 1995, (*re Vogel and North (1995), 102 Man. R. (2d) 89; 93 W.A.C. 89*) the Manitoba Court of Appeal allowed the appeal, set aside my decision and directed that I continue the adjudication in accordance with the decision of the Court.

The Court of Appeal found the decision of the Supreme Court of Canada in *Egan and Nesbitt v. Canada (1995), 182 N.R. 161,* which was delivered subsequent to the hearing of the appeal, to be determinative of the issue of discrimination. In particular, Helper, J.A. (Scott, C.J.M. concurring) said as follows at page 102 of the report:

> "The hearing of this court predated the release of the Supreme Court's decision in *Egan v. Canada.* As a result of that decision, I find it unnecessary to review the arguments presented in this court. Cory, J.'s extensive analysis of the meaning of discrimination under s. 15(1) of the Charter is applicable to the interpretation of s. 9 of the Code. The challenged plans and legislation draw a clear distinction between opposite-sex couples and same-sex couples resulting in direct discrimination. The distinction amounts to a denial of an equal benefit of the law on the basis of sexual orientation, a personal characteristic."

I was directed by the Court of Appeal to continue the adjudication and, more particularly, to adjudicate upon the applicability of internal qualifying phrases in certain sections of the Code that have the effect of excusing discrimination where bona fide and reasonable cause exists. The Court of Appeal specifically referred to the following sections:

> **"Discrimination in service, accommodation, etc.**
> **"13(1)** No person shall discriminate with respect to any service, accommodation, facility, good, right, licence, benefit, program or privilege available or accessible to the public or to a section of the public, unless bona fide and reasonable cause exists for the discrimination."

> **"Discrimination in employment.**
> **"14(1)** No person shall discriminate with respect to any aspect of an employment or occupation, unless the discrimination is based upon bona fide and reasonable requirements or qualifications for the employment or occupation."

> **"Discrimination by organizations, etc.**
> **"14(6)** No trade union, employer, employers' organization, occupational association, professional association or trade association, and no member of any such union, organization or association shall
>
> (a) discriminate in respect of the right to membership or any other aspect of membership in the union, organization or association; or
>
> (b) negotiate on behalf of any other person in respect of, or agree on

behalf of any other person to, an agreement that discriminates;
unless bona fide and reasonable cause exists for the discrimination."

**"Discrimination in contracts.**

**"15(1)** No person shall discriminate with respect to

(a) entering into any contract that is offered or held out to the public generally or to a section of the public; or

(b) any term or condition of such a contract;

unless bona fide and reasonable cause exists for the discrimination."

The Court of Appeal, in accordance with the Code, left to my discretion the procedure to be used at the continued adjudication and the evidence, if any, that would be received. After the release of the decision of the Court of Appeal, the Government moved to adduce further evidence of bona fide and reasonable cause. Their motion was opposed. I ultimately found that to the extent the Government in their discretion determined that the evidentiary foundation of their position respecting internal qualifying phrases did not address the law as they now understood it to be, they should be given the opportunity to adduce such evidence as was relevant and otherwise admissible. I therefore ordered that the Government could adduce such further evidence and that the complainants and the M.G.E.U. who sided with the complainants would have an opportunity to cross-examine and adduce rebuttal evidence.

## ADDITIONAL EVIDENCE

At the continuation of the hearing before me, the Government recalled Robert William Armstrong who is the Director of Compensation and Classification Services for the Civil Service Commission. Armstrong is responsible for compensation schemes and plans for civil servants generally as well as job evaluation and classification systems. He is a member of the Government's Master Bargaining Committee that bargains the government employees' master agreement. I found Armstrong's testimony credible and I have therefore accepted his evidence as an accurate recitation of the facts as they were known to him. I later address certain deficiencies in Armstrong's testimony but those deficiencies do not relate to credibility.

Armstrong detailed the bargaining history of the Government and the M.G.E.U. with respect to the extension of benefits to same-sex spouses. In 1982 the M.G.E.U. endeavoured unsuccessfully to expand the definition of "spouse" in the collective agreement to include same-sex spouses. In 1983 the original complaint by Vogel was dismissed by Adjudicator Rothstein. After the Code was enacted in 1987, the M.G.E.U. asked that sexual orientation be added to the list of prohibited discrimination detailed in the collective agreement. The Government refused on the ground that to do so could result in "double tracking" whereby complaints of discrimination could be advanced under both the agreement and the Code. During negotiations

in 1988, the M.G.E.U. endeavoured to deal with Vogel's concerns directly by seeking to delete the words "of opposite sex" wherever spouse is defined in the benefit plans. The response of the Civil Service Commission was that such a deletion would not affect the meaning of spouse and the M.G.E.U. abandoned its request.

Armstrong then went on to describe the formal negotiating framework for the renewal of the Government employees' master agreement in September of 1994. Apparently, the Government was prepared to consider changes to any of the benefit provisions of the master agreement, subject to cost neutrality; that is to say, any improvement in one benefit would result in a downward adjustment of some other benefit or benefits so that the total compensation package would not increase. The negotiating framework included the Government's dental plan and ambulance/hospital/semi-private plan ("AHSP"), both of which are affected by these proceedings. It provided, inter alia, as follows:

> "The parties agree that all pay and benefit provisions in the Master Agreement and component sub-agreements have been negotiated in good faith with the specific understanding that the provisions and their administration contain no elements of discrimination. In the event that any provisions are deemed to be discriminatory, the parties will negotiate necessary adjustments to ensure that there is no increased cost to the Government."

This position was not negotiated into the collective agreement but remained the basis of the Government's negotiation stance. Various memoranda of agreement were ultimately entered and

were dated June 29, 1995.

The negotiation framework for the renewal of the master agreement in January of 1996 was similar to the previous framework. It contained the equivalent clause with respect to discrimination and also specifically set forth the cost neutrality position as one of its objectives:

> "The Province's fiscal objective is to maintain civil service compensation expenditure in the 1996/97 fiscal year at the same level as in 1995/95 fiscal year. This objective can be achieved by ... implementing any agreed increases to compensation expenditure on the basis of zero additional cost."

These negotiations between the Government and the M.G.E.U. gave rise to various memoranda of agreement, all dated June 27, 1996. Among other things, the memoranda addressed a reduced work week program for employees.

Armstrong was asked to endeavour to quantify the cost occasioned the Government by adding same-sex benefits to the dental and AHSP plans. He could not say how many employees would be affected. Rather, he estimated that the increased annual dental cost to the Government would vary between $20,777 and $207,771 depending upon whether 1% or 10% of Government employees are homosexual with same-sex spouses. An appropriate adjustment would be made if the actual figure fell somewhere in between. Similarly, Armstrong estimated that the annual increase in the cost of AHSP would vary between $1,144 and $11,448.

In purported justification of the 1% and 10% figures, counsel for the Government tendered into evidence, by agreement of counsel, newspaper articles quoting Vogel as saying that 1% of civil servants would qualify as living in gay relationships and quoting a Winnipeg guidance counsellor as saying that 10% of the student population in Winnipeg is gay or lesbian. Counsel for the Government then tendered a pamphlet and a magazine article that included estimates of the incidence of homosexuality in society and also various newspaper articles dealing with the experience of employers who have extended benefits to same-sex couples. I was asked to reserve my decision on whether these latter documents should be received into evidence and, if received, what weight they should be given.

Armstrong went on to detail some limited efforts he had taken to consult with other employers who have experience with respect to extension of employment benefits to same-sex couples but none had attempted to track the cost of doing so or separately identified the cost.

Armstrong addressed the position of Revenue Canada, both with regard to the group insurance plan and the pension. In the case of the group insurance plan, Revenue Canada in 1996 issued a ruling to the effect that same-sex partners can now be covered under group insurance plans where previously there had been a prohibition. The same is not true with regard to the pension plan provided under The Civil Service Superannuation Act. The extension of pension benefits to surviving same-sex spouses would result in the deregistration of the pension plan

under the Income Tax Act. Deregistration would have significant adverse consequences on the employees of the Government. In particular, the pension contributions of the employees would in that event become taxable in their hands. As an example, there would be an annual additional tax cost to an employee making $30,000 per year of $492.13 on a $1,530 annual contribution. In the case of an employee earning $50,000 per year, then the annual tax cost would be $1,252.53 on a $2,827.40 annual contribution. (These figures assumed no other income on the part of the employee and the 1996 tax year.) There would be an additional problem inasmuch as the income earned by the pension fund would be taxable whereas now it is not taxable. As I understand the evidence, there would accordingly be a negative impact on more than 35,000 union members and a potential negative impact on over 17,000 retirees. There is, however, a surplus in the pension fund of approximately $50 million which has resulted from accumulated employee contributions.

Counsel for the complainants called no further evidence. Counsel for the Government and counsel for the M.G.E.U. agreed to stipulate what the evidence of Robert S. Olien, Director, Negotiating Services, Manitoba Government Employees' Union, would be if called:

1. The M.G.E.U.'s intent in tabling the proposal to add sexual orientation as an enumerated ground of prohibited discrimination under the collective agreement was to solve the Vogel complaints;
2. The M.G.E.U. does not dispute that at the last round of bargaining, the M.G.E.U. or one

of its negotiators expressed a view that they did not know if their proposal would or would not solve the problem because of the proceedings now before me;

3. That Mr. Olien did not or does not know the legal consequences of the proposal that he was tabling on behalf of the M.G.E.U.;

4. Mr. Olien would acknowledge that an alternate approach may well have been to propose extension of coverage for benefits to same-sex partners but such a proposal was not made because he believed the existing proposal was adequate.

**SUBMISSION BY THE GOVERNMENT IN SUMMARY**

In a detailed and somewhat convoluted argument, counsel for the Government reviewed the state of the law with respect to both internal qualifying phrases and Section 1 limitations in cases of Charter of Rights cases. Among the cases referred to by counsel for the Government were:

> *Zurich Insurance* v. *Ontario Human Rights Commission* (1992), 93 D.L.R. (4th) 346 (S.C.C.)
>
> *Co-operators General Insurance* v. *Alberta Human Rights Commission* (1993), 107 D.L.R. (4th) 298 (Alta. C.A.)
>
> *Re Large and City of Stratford* (1995), 128 D.L.R. (4th) 193 (S.C.C.)
>
> *McKinney* v. *Board of Governors of the University of Guelph* (1990), 76 D.L.R. (4th) 545 (S.C.C.)
>
> *Dickason* v. *Governors of the University of Alberta* (1992), 95 D.L.R. (4th) 439 (S.C.C.)
>
> *Egan* v. *The Queen* (1995), 124 D.L.R. (4th) 609 (S.C.C.)
>
> *Re Rosenberg and Attorney-General of Canada* (1995), 127 D.L.R (4th) 738 (Ont. Ct. Gen. Div.)
>
> *Moore* v. *Treasury Board of Canada,* 96 CLLC 145, 390 (Canadian Human Rights Tribunal)
>
> *Laessoe* v. *Air Canada and Canadian Union of Public Employees,* 96 CLLC 145,500 (Canadian Human Rights Tribunal)

*Dwyer* v. *Toronto* 27 C.H.R.R. D/108 (Ontario Board of Inquiry)

*Leshner* v. *The Queen in Right of Ontario* (1992), 92 CLLC 16,329 (Ont. Human Rights Board of Inquiry)

*Etobicoke (Borough)* v. *Ontario (Human Rights Commission)* (1982), 132 D.L.R. (3d) 14, [1982] 1 S.C.R. 202

With respect to the concept of bona fide and reasonable cause, counsel acknowledged that effectively the test for bona fide cause is subjective and the test for reasonable cause is objective [see *Etobicoke (Borough)* v. *Ontario (Human Rights Commission)*, supra].

Counsel referred to the decision of Mr. Justice Cory in *Dickason* v. *Governors of the University of Alberta*, supra, in support of the proposition that I am entitled to consider cases dealing with the restriction set forth in Section 1 of the Charter of Rights in interpreting internal qualifying phrases under certain circumstances. Section 1 of the Charter of Rights reads as follows:

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

Counsel argued that benefit plans by their nature differentiate between groups and where they flow from a collective agreement negotiated in good faith by the Government and the M.G.E.U., the Government has passed both the subjective and objective tests. In making that argument, he

cited several decisions including *Re Large and City of Stratford*, supra, which was a human rights case and *Dickason v. Governors of the University of Alberta*, supra, which was a Section 1 Charter case.

Counsel also referred to the comments of Sopinka, J. in *Egan v. The Queen*, supra, and argued that I should adopt an incremental approach to expanding protection against discrimination which would take into account the additional costs and administrative burden of doing so and also that I should take into account the social, legal and political context of the benefit programs.

As I understand it, the Government believes that where a government fairly negotiates a collective agreement in respect to which a union acts as a check on the power of the government and where the resources of the government are limited, then I would be justified in finding the discriminatory denial of benefits to be bona fide and reasonable.

Counsel did point out the distinction between the dental and AHSP plans on the one hand and the pension plan on the other. In particular, he addressed the very substantial consequences to all employees that would result from deregistration of the plan or, alternatively, the setting up of an offside arrangement outside of the plan.

As for the matter of redress, counsel argued that if I find that the discrimination is not bona fide and reasonable, then I should direct that the agreement between the Government and the M.G.E.U. should be reopened to allow for negotiation aimed at addressing the discrimination within the Government's fiscal framework.

**SUBMISSION BY THE M.G.E.U. IN SUMMARY**

Counsel submitted that the power of the Government to act arbitrarily and by legislation means that there is not a free bargaining relationship between the Government and its employees. For example, the Government even now could amend the Code so that discrimination on the basis of sexual orientation would not affect Government employee benefits.

It is not sufficient, in the view of counsel for the M.G.E.U., that Armstrong and others bargaining on behalf of the Civil Service Commission say that they were negotiating in accordance with budgetary constraints imposed upon them by their political masters. In one of the most offensive comments I have heard in any judicial or quasi-judicial forum, let alone a human rights hearing, counsel said in support of that argument: "Mr. Armstrong simply says -- and, you know, I'd be tempted to say it with a German accent, 'Well, these are our orders. We have to follow them. The Government says that, you know, that we're not going to spend any more money.' End of discussion. You can't have any more, even if it may legally be required."

Counsel submitted that this was not the sort of case as in *Egan* v. *The Queen*, supra, where the Government is playing a role as developer of society which could have justified the

discrimination. In this case, the Government is an employer who has entered into a collective agreement and accordingly there is no such creative role.

With respect to the suggestion that the parties be directed back to the negotiating table in order to find a cost-neutral way of correcting the discrimination, counsel argued that the Government has no idea of what any additional cost would be and accordingly such an order would be meaningless. He argued that the Government could have taken greater steps to determine the cost impact of the extension of benefits but did not do so.

Counsel also submitted that the collective agreement is negotiated between the M.G.E.U. which expresses the voice of the majority of the employees and the employer which expresses the voice of the majority of the people of Manitoba. The agreement is what they think is fair. He argued that the purpose of the Code is to protect minorities from what the majority thinks is fair but is not.

## SUBMISSION BY THE COMPLAINANTS IN SUMMARY

Counsel for the complainants submitted that now that the discrimination has been found by the Court of Appeal of Manitoba then, by virtue of Section 52 of the Code, the onus is upon the employer to justify the discrimination as bona fide and reasonable.

He conceded that the Government has acted in good faith and therefore had bona fide cause. On the other hand, counsel contested whether there was reasonable cause for the discrimination. He submitted that if, for example, negotiations had produced an agreement between an employer and a union that, in order to meet budget targets, black or aboriginal employees were denied benefits, this would not justify the discrimination. The Code treats discrimination founded on sexual orientation no different than that founded on race.

Counsel did point out, however, that the Government has had the opportunity to exempt benefit plans from the operation of the Code by virtue of Section 14(7) of the Code but they have chosen not to do so. Section 14(7) reads as follows:

> **"Employee benefits.**
> **14(7)** Subject to subsection 21(6.4) of The Pension Benefits Act, the Lieutenant Governor in Council may make regulations prescribing distinctions, conditions, requirements or qualifications that, for the purposes of this section, shall be deemed to be bona fide and reasonable in respect of an employee benefit

plan, whether provided for by individual contract, collective agreement or otherwise."

Counsel acknowledged that in respect to the benefits other than pension benefits, there would be at least a small additional cost occasioned by an extension of such benefits to same-sex couples and submitted that the additional cost will be factored into the compensation budget of the Government during negotiations relating to the next collective agreement. He argued that cost could only justify discrimination if the Government can demonstrate that extending the benefit would give rise to a cost that it cannot bear [see *Canada Employment and Immigration Commission et al* v. *Tetrault-Gadoury* (1988) 53 D.L.R. (4th 384 (Fed. C.A.) and (1991) 81 D.L.R. (4th 358 (S.C.C.)]. No such evidence was advanced in this case. Counsel then relied upon the decision of the Saskatchewan Court of Appeal in *Saskatchewan (Human Rights Comm.)* v. *Saskatoon (City)* [1990] 5 W.W.R. 577 for the proposition that cost would constitute a bona fide and reasonable cause only if the cost would make the plan cease to be viable or cost effective. Again, there was no such evidence in this case.

Counsel acknowledged that the direct extension of pension benefits to employees involved in same-sex spousal relationships falls into a different category because of the very significant effect that would be occasioned in the event Revenue Canada deregistered the pension plan. He therefore did not propose such an order but rather asked that I consider the remedy imposed by an Ontario Human Rights Board of Inquiry in *Leshner* v. *The Queen in Right of Ontario*, supra.

In circumstances very similar to those before me, the tribunal ordered the Government to come up with an offside program that would give the affected persons a comparable benefit. He pointed to the $50 million pension surplus as a source to fund such a program. Counsel also pointed out that, if I was not inclined to direct the establishment of an offside program, I could declare an entitlement to equivalent benefits which will only take effect when the Income Tax is amended to permit it. He said, however, that in any event it is not open to me to direct that the parties return to the bargaining table in order to adjust the compensation package for employees. In support of that proposition, he referred to Section 14(12) of the Code.

**FINDINGS WITH RESPECT TO DISPUTED EVIDENCE**

First of all, I will address the question of whether the disputed documentary evidence should be received into evidence. The documents are as follows:

1. a pamphlet entitled "Your Questions Answered About Homosexuality" which was co-authored by Vogel and Ted Millward in 1985;
2. a series of articles addressing experience by employers who have extended same-sex benefits as well as an unidentified memorandum to similar effect;
3. a magazine article entitled "Marketers Come Out Of The Closet... Sort Of".

Counsel for the Government generally argued that these documents should be admitted into evidence because I ought to have as much public information as possible. Counsel for the M.G.E.U. and the complainants argued that there is nothing to substantiate the accuracy of this material and that it is in essence unqualified opinion evidence.

Section 39(2) of the Code sets forth my authority with respect to the receipt of evidence. It reads as follows:

> **"General procedures at hearing.**
> **39(2)** Subject to this Code and the regulations, the adjudicator may determine the procedures to be used at the hearing and may receive at the hearing such evidence or other information as the adjudicator considers relevant and appropriate, whether or not the evidence is given under oath or affirmation and whether or not it would be admissible in a court of law."

Accordingly, I have a very broad discretion in determining what evidence will be received at a hearing. I am of the view that it would not be appropriate to receive into evidence the material in question. With respect to the article co-authored by Vogel and Millward which was adduced because it includes an estimate that between 3% and 15% of the population is homosexual, I find this evidence deficient in the following respects:

1. Neither Vogel nor Millward have been qualified as experts;
2. The percentage of the population that is homosexual has no bearing upon the numbers of homosexuals involved in same-sex spousal relationships.

I make the same finding with respect to the article called "Marketers Come Out Of The Closet... Sort Of" which was also adduced because it includes reference to the incidence of homosexuality in society. I would also refer at this point to the article from the Winnipeg Sun in which Vogel estimated that 1% of civil servants are involved in same-sex relationships. Just because a person is an acknowledged homosexual does not render that person an expert on homosexuality. Accordingly, I give the article no weight even though it was tendered into

evidence by consent of counsel. I similarly give no weight to the article filed concurrently which included yet another unqualified estimate of the incidence of homosexuality.

I will deal next with the articles relating to the experience of employers who have extended same-sex benefits. This issue goes to the heart of the Government's justification for not granting same-sex benefits (other than the pension benefits). If this information is available through newspaper articles, then certainly viva voce evidence or some other form of direct and reliable evidence could have been advanced. These articles are, by their very nature, hearsay and hence unreliable. That is not to say that I would never receive into evidence newspaper articles. For example, change in society's attitudes is a relevent consideration in human rights cases and anecdotal evidence of such change can often be observed to some extent in the media. In this case, however, I am asked to rely upon newspaper reports of information that relates to a crucial element of the Government's case. The Government should have advanced more reliable evidence which would have been subject to proper assessment and, in the case of viva voce evidence, cross-examination.

**DECISION**

I note that no evidence was adduced with respect to the applicability of any internal qualifying phrases to the extended health plan and the group life insurance.

With respect to the extended health plan, the premiums are paid by the employees rather than by the Government. That being the case, the Government would incur no additional cost by extending this benefit to same-sex couples. Apparently for that reason they have not advanced an argument of bona fide and reasonable cause regarding this plan.

With respect to the group life insurance policy issued by Canada Life Assurance Company, this policy was not addressed in the complaints. Despite that fact, Madam Justice Helper in her reasons chose to address the policy but pointed out that it does not require a person represented as a common law spouse be a member of the opposite sex. One would assume, therefore, that the insurer will honour any claims made by a surviving same-sex spouse and has structured its premiums with that in mind. Accordingly, there would seem to be no discrimination to be addressed but, apparently in the interests of being thorough, counsel have jointly asked I adjudicate on this matter as well. The fact is that no argument regarding bona fide or reasonable cause was advanced by the Government regarding this issue.

In respect to the dental plan and the AHSP plan, the complainants acknowledged that the Government's actions were bona fide but the Government did not vigourously endeavour to justify the discrimination as being reasonable.

The Government's representative at the hearing had no personal knowledge as to the number of employees of the Government who are homosexual. He encountered no success in his limited efforts to determine directly the experience of other employers who offer same-sex benefits and prepared his own estimates of additional cost founded upon figures set forth in hearsay reports that I have either refused to receive into evidence or refused to give weight.

In the end, the position of the Government was simply that it had imposed upon itself an arbitrary limit regarding expenditures and any increase in expense would be a breach of that limit. There is no need to thoroughly review the case law with respect to what is sufficient to constitute reasonable cause in the case of the dental and AHSP plans because there is an absence of <u>any</u> reliable evidence that would allow the Government to discharge its onus under Section 52 of the Code. There is certainly no reason to believe that the extension of benefits as requested would give rise to a cost that the Government cannot bear or would render the affected plans not viable.

As for the Government's request that I direct the parties back to the bargaining table so that adjustments could be made regarding the collective agreement, such an order would be

contrary to Section 14(12) of the Code which reads as follows:

> **"No reduction of wages, etc.**
> **14(12)** An employer shall not, in order to comply with this section,
> (a) terminate the employment or occupation of any person; or
> (b) reduce the wage level or diminish any other benefit available to any person in an employment or occupation; or
> (c) change the customs, practices and conditions of an employment or occupation to the detriment of any person;
> if the person accepted the employment or occupation, the wage level or other benefit, or the customs, practices and conditions in good faith."

The most vexing issue before me is the pension plan. It should be understood first of all that the complainants allege that North should be entitled to survivor benefits under the pension plan and also division of pension credits in the event he and Vogel were to cease their same-sex spousal relationship. The decision of the Court of Appeal means there is no doubt that the pension plan is discriminatory. Similarly, however, there is no doubt that the extension of benefits to surviving same-sex spouses will result in the deregistration of the plan which, in turn, will have significant detrimental financial consequences on all affected civil servants and upon the pension fund itself. In this case, the Government of Canada is the author of a sort of discrimination prohibited by the Manitoba Human Rights Code. The Government of Canada, of course, is not subject to the Manitoba Code. I have been urged to order that an offside non-registered pension arrangement be established to provide benefits for same-sex spouses of homosexual civil servants as was done by an Ontario Human Rights Board of Inquiry in *Leshner* v. *The Queen in Right of Ontario*, supra. I have also been urged to order that the $50 million

surplus in the pension fund be dedicated to this purpose. I shall do neither.

In reaching this conclusion, I am inclined to the logic of Sopinka, J. in *Zurich Insurance Co.* v. *Ontario (Human Rights Commission)*, supra, where in considering discrimination in the setting of car insurance premiums, he says at page 376:

> "In my opinion, a discriminatory practice is 'reasonable' within the meaning of s. 21 ... of the Code, if (a) it is based on sound and accepted insurance practice; and (b) there is no practical alternative. Under (a), a practice is sound if it is one which it is desirable to adopt for the purpose of achieving a legitimate business objective of charging premiums that are commensurate with the risk. Under (b), the availability of a practical alternative is a question of fact to be determined having regard to all of the facts here.
>
> "In order to meet the test of bona fides, the practice must be one that was adopted honestly, in the interests of sound and accepted business practice and not for the purpose of defeating the rights protected under the Code."

That the Government has acted in a bona fide manner is not in dispute. I find that in this instance the Government has also acted reasonably. The establishment of a registered pension plan for the benefit of civil servants is a sound and accepted practice. It is reasonable that employees are able to retire in comfort, that their contributions to a pension plan be tax deductible and that those contributions grow in a tax-sheltered and stable environment.

I will not order the establishment of an offside program for homosexuals. I do not agree with the finding in *Leshner* v. *The Queen in Right of Ontario*, supra. I believe that any practical

alternative must be demonstrated to me in specific terms by those who claim that there is a practical alternative. In *Leshner* v. *The Queen in Right of Ontario*, supra, the Board of Inquiry simply ordered that the employer establish a funded or unfunded offside arrangement to provide equivalent survivor benefits and eligibility for same-sex spouses of homosexual employees. I am not satisfied that the Board of Inquiry had the evidentiary base to decide whether such an arrangement was practical. I am satisfied that there is no adequate evidentiary base for me to make such an order in respect to the complaints before me. In any event, it would be neither fair nor practical to use the employee-generated pension surplus for a purpose that the employees could never have anticipated.

## CONCLUSION

I conclude that with regard to the following plans the Government has not discharged its onus to establish that the discriminatory denial of benefits to homosexual civil servants involved in same-sex spousal relationships is reasonable and bona fide:

(a) the Manitoba Government Employees' Dental Plan;

(b) the Employees' Ambulance, Hospital and Semi-Private Plan;

(c) the Extended Health Care Plan;

(d) the group life insurance plan with Canada Life Assurance Co.

Accordingly, I order that benefits under those plans be extended accordingly. I would point out that with respect to the group life plan, benefits may have already been extended.

With respect to the Civil Service Superannuation Plan, I find that the Government has discharged its onus. I would reiterate that the reasonableness of the Government's position is founded upon the prospect of deregistration should benefits be extended to surviving same-sex spouses. Should the Income Tax Act be amended to cure its discriminatory aspect, I expect the Government would implement appropriate changes to the pension plan. I will not, however,

make a conditional order in that regard as I have neither the jurisdiction nor the inclination to adjudicate on circumstances that have not yet come to pass.

Finally, I would like to address the approaches of the respective respondents to these proceedings. There is, without a doubt, a certain irony to this case. During the course of his submission, counsel for the complainants referred to an article in a local newspaper where the Premier of Manitoba indicated that the Government does not believe that the extension of spousal benefits to same-sex couples is warranted. That having been said, the Government has never asked the Lieutenant-Governor in Council to issue a regulation exempting their arrangements with their employees from the operation of the Human Rights Code nor have they propounded legislation to the same effect. Rather, the Premier said in the same article that the Government will abide by the decision in the complaints before me.

The M.G.E.U., on the other hand, is mandated to bargain for and to protect all of the employees that it represents. The M.G.E.U. has been of the view for many years that spousal benefits should be extended to homosexual civil servants and their same-sex spouses. Despite that fact, the M.G.E.U. has never pressed the matter with vigor but, rather, effectively abandoned Vogel and other affected employees. The M.G.E.U. apparently decided that rather than taking a stand for its homosexual members, it would negotiate within the parameters established by the Government and then hope that I would order an extension of benefits with the cost to be over

and above the compensation budget that was used by the Government as a basis for negotiations.

In the end, it will be for the complainants and the civil servants of Manitoba to consider who acted in the more appropriate fashion.

November 21, 1997

Thomas A. Goodman, Q.C., Adjudicator