

Marmer Penner Newsletter

Edited by Steve Z. Ranot, CA, CBV, CFE and Michael S. Penner, BBA, CA, CBV, ASA, CFE

OUT OF THE CLOSET AND INTO THE FIRE

The recent decision in *M and H* recommends amendments to the *Family Law Act* which are expected to allow same sex spouses the same rights as common-law spouses of the opposite sex. Whether the *Income Tax Act* will follow suit is another matter. In 1993, the *Income Tax Act* changed its definition of spouse to include common-law spouses. However, the expanded definition did not recognize same-sex spouses. What has occurred subsequently appears to be an evolution that will soon see the definition include same sex couples.

In Volume 12, Issue 2 of *Money & Family Law*, our article entitled *The Income*

Tax Act Comes Out of the Closet dealt with the taxation of employee benefits. The *Income Tax Act* did not tax health benefits available to employees and their spouses. However, it did not offer the same income tax protection to same-sex spouses. Revenue Canada issued its administrative policy indicating that same-sex spouses would be accorded the same tax-free health benefits notwithstanding the definition of spouse in the *Income Tax Act* excludes same-sex couples. At the time, we speculated that this initial foray into acceptance of same-sex couples was a harbinger of things to come.

The next of Revenue Canada's steps into the 90's may occur as a result of the recent decision in *Rosenberg et al* (98 DTC 6286). The appellants, Nancy Rosenberg and Margaret Evans, were employed by the Canadian Union of Public Employees ("CUPE"). Each of them has lived with a female partner for well over a decade. In 1971, CUPE established a pension plan which is funded by both employer and employee contributions. All full-time CUPE employees are required to be members of this plan. Surviving spouses of members of the pension plan are entitled to two-thirds of the deceased member's benefit.

The CUPE pension plan is registered with Revenue Canada. Unless a pension plan is so registered, the considerable tax deferral advantages of the *Income Tax Act* are not available. A pension plan will not be accepted for registration by Revenue Canada unless the plan's terms comply with the *Income Tax Act*. Under the CUPE pension plan, the spouse of a plan member is eligible to receive survivor benefits. The definition of "spouse" in the pension plan was amended by CUPE in 1992 to include same-sex spouses.

The *Income Tax Act* permits the registration of a private pension plan with Revenue Canada only if the plan restricts survivor benefits to spouses of the opposite sex. Consequently, spousal survivor benefits under registered pension plans are not available to same-sex partners. If a plan provides survivor benefits to same-sex spouses, the plan cannot be registered and therefore cannot receive the significant tax benefits available when a plan is registered. As a result, in this case Revenue Canada

indicated it could not accept the CUPE pension plan as is. As a result, employer and employee contributions to the pension plan would not be permitted as deductions and payments from the pension plan would not be entitled to the pension credit.

The appellants sought a declaration that the definition of spouse in the *Income Tax Act*, limited to heterosexual couples, was contrary to Section 15 of the Charter of Rights and Freedoms on the grounds of sexual orientation. In defending its position, the Attorney-General of Canada conceded that the exclusion of benefits to same-sex couples violates the equality provision in the Charter of Rights and Freedoms. The court found this issue indistinguishable from the Supreme Court decision in *Egan and Nesbit v. Canada* (1995) where it dealt with the definition of spouse as it related to same-sex couples with respect to the *Old Age Security Act*. In finding for the appellants, the court stated the appropriate remedy is to read the words "or the same

sex" into the definition of "spouse" in the *Income Tax Act* for the purpose of registered pension plans.

It appears as if the *Income Tax Act* was heading towards greater recognition of same sex couples' rights even before the decision in *M and H*. That court decision and Revenue Canada's previous administrative decisions may lead to quicker progress in this area.

This newsletter is intended to highlight areas where professional assistance may be required. It is not intended to substitute for proper professional planning. The professionals at Marmer Penner will be pleased to assist you with any matters that arise.

94 Cumberland Street, Suite 200, Toronto, Ontario M5R 1A3
Telephone: (416) 961-5612 Fax: (416) 961-6158
e-mail: valuators@marmerpenner.com

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