

Same-sex benefits: making progress in the courts and at the negotiating table

The PSAC has long been strongly committed to the recognition of same-sex relationships and to entrenching this recognition through the collective bargaining process.

Across Canada, union negotiators are becoming increasingly successful at ensuring that all negotiated benefits are available to same-sex couples.

Activists, advocates and unions have helped pave the way in the streets and the courtroom. When it comes to moving forward in gaining access to benefits for lesbians and gays, the courts have had a tremendous influence in forcing Canadian federal and provincial governments to dismantle the roadblocks to change.

For example:

- In 2001, the Alberta Court of Queen's Bench ordered that province to rewrite its laws to allow same-sex partners to inherit property when a partner dies. On May 29 2002, the province amended the law to extend same-sex pension benefits to partners of deceased workers.
- On July 6, 2001, Saskatchewan passed omnibus legislation that amended the definition of "spouse" in 24 provincial statutes in areas including adoption, spousal support, inheritance rights, pensions, survivor benefits, and matrimonial property.
- Newfoundland eliminated a 50 year old statute on April 11, 2002 to finally enable the adoption of children by same-sex couples.
- In 2001, the BC Government started legal proceedings against the federal government, seeking the right to issue marriage licenses to same-sex couples. The NDP, in power at the time, claimed that the restriction of marriage to heterosexual couples violates Charter of Rights. When Gordon Campbell's Liberal Government took power it withdrew this legal action.

Same-sex benefits: making progress in the courts and at the negotiating table

- The provinces of Nova Scotia, Quebec (unanimously on June 7, 2002) and Manitoba have all passed variations of laws enabling same-sex partners (and heterosexual partners who don't wish to marry) to register their relationships. Registered Domestic Partnerships are legally binding contracts that have long existed in many European countries. They are also highly controversial. Are RDPs a step forward or a way for governments to continue to exclude lesbians and gays from marriage? The lesbian and gay communities are divided on this question. However the right to legally marry remains a priority.
- couples of opposite sex. The province has been given two years to change the laws to reflect this reality.
- On July 12, 2002, the Ontario Divisional court ruled in favour of the legality of same-sex marriages (for more on this ruling, see below).
- The government of Prince Edward Island announced on September 8, 2002 that provincial lawyers are reviewing 42 pieces of legislation which contain the word *spouse*. The decision to undertake this review was prompted by the Ontario Court decision.
- On September 6, 2002 the Quebec Superior Court ruled that it is discriminatory to limit marriage to

The implications for lesbian and gay PSAC members are practical as well as symbolic, as recognition of their relationships must also include access to such spousal benefits as health insurance, pension benefits, bereavement leave and a range of other benefits accorded to spouses of employees. Withholding these benefits amounts to significant financial discrimination.

The PSAC policy on sexual orientation, adopted at the Convention in 1994, reads, in part:

The Public Service Alliance of Canada deplores discrimination against lesbians, gay men and bisexuals, and urges all levels of government not only to prohibit discrimination on the basis of sexual orientation, but also to recognize and protect lesbian and gay relationships and families.

The Alliance has taken a leading role in negotiating collective agreement provisions which begin the process of providing protection on the basis of sexual orientation. As well, it has defended these rights at arbitrations and adjudications, and pursued these issues to the Courts. The Alliance is committed to achieving contractual recognition and protection of the relationships and the families of all members...

[The Alliance will] negotiate contractual protection for and recognition of members in same-sex spousal relationships and their families. If the federal government "as the state" continues to violate the Charter of Rights

and Freedoms, the Alliance will pursue such protection in the courts, as well as at the bargaining table with all employers for whom the PSAC is the bargaining agent.

We have made great strides forward since that policy was passed. The PSAC stands out as a leader among Canadian trade unions in the struggle to gain equal recognition for same-sex relationships.

Definition of “spouse”

The most effective way to ensure that all PSAC members have access to spousal benefits is to ensure that the definition of “spouse” in collective agreements is sufficiently broad as to include same-sex relationships. This ensures that wherever the issue of spousal benefits (medical or otherwise) arises, the same rights are accorded to same-sex spouses as to those of the employees in heterosexual relationships.

One way to achieve this is to specifically name same-sex relationships in the definition of spouse (the examples below are by way of illustration, several PSAC collective agreements contain the same or similar language):

Greater Toronto Airports Authority/PSAC

“spouse” includes “common-law spouse” and “same-sex spouse”

Hay River Community Health Board/PSAC

A “Common-Law Spouse” relationship is said to exist when, for a continuous period of at least one (1) year, an employee has lived with a person, including a person of the same-sex, publicly represented that person to be their spouse, and lives and intends to continue to live with that person as if that person were their spouse.

In our agreements with Treasury Board and other major separate employers such as CCRA, CFIA and Parks, it is not specified that a “spouse” could include a partner of the same-sex. However, the agreements state, under “definitions”:

Treasury Board of Canada/PSAC

“Common law spouse”: a common law spouse relationship exists when, for a continuous period of at least one (1) year, an employee has lived with a person, publicly represented that person to be his/her spouse and continues to live with the person as if that person were his/her spouse.

Since the words “of the opposite sex” (following person) were deleted (and this only after a series of rulings by the Canadian Human Rights Tribunal and subsequent unsuccessful appeals by the federal government), the word “spouse” has consistently been interpreted to include partners of the same sex. This success represents the outcome of years of persistent efforts on the part of the PSAC – making use of both the courts and the collective bargaining process to ensure our members’ rights are protected.

Spousal union leave

Worth particular mention is the success that the PSAC has achieved in the area of spousal union leave. In fact, the overwhelming majority of Canadian collective agreements with provisions for spousal union leave are between the PSAC and the employers with whom we negotiate.

Many collective agreements contain a provision for “marriage leave” – leave for an employee to take part in and celebrate a public commitment ceremony, whether civil, secular or religious. While only a small percentage of any workforce will avail themselves of this benefit in any given year, the importance of implementing spousal union leave (in lieu of marriage leave) is significant.

“Marriage leave” represents what is often the last negotiated benefit not available to gay and lesbian workers. In making the negotiation of provisions for spousal union leave a priority, we reiterate our commitment to equality for lesbian and gay members, and our fundamental belief that all committed relationships must be treated equally, regardless of the gender or sexual orientation of those involved.

So far, the PSAC has negotiated spousal union leave in several collective agreements, including those with the National Gallery, the Canada Science and Technology Museum, the Canadian Museum of Nature and the Airport Authorities of Regina, Charlottetown, Saskatoon, Saint John, Fredericton, Gander and Halifax.

Some examples of provisions for spousal union leave:

Regina Airport Authority/PSAC

After the completion of one (1) year’s continuous employment, and providing an employee gives the employer at least five (5) days’ notice, the Employee shall be granted five (5) days’ leave with pay for the purpose of declaring spousal union with another person in a public ceremony. This ceremony may be civil, secular or religious.

National Gallery of Canada/PSAC

After the completion of one (1) year's continuous employment and providing an employee gives the Gallery at least five (5) days' notice, the employee shall be granted five (5) days' leave with pay for the purpose of getting married or declaring spousal union.

The employee will provide either a marriage certificate or a sworn affidavit, certifying to the spousal union for the purpose of crediting the employee with five days' leave with pay.

In the case of Canada Post and the PSAC (Union of Postal Communications Employees), the marriage leave clause was amended in the last round of bargaining. While still called "marriage leave" the article stipulates that the benefit shall be made available to all eligible employees, regardless of sexual orientation:

Treasury Board – an ongoing challenge

The negotiation of spousal union leave was a priority for the PSAC in the last round of bargaining. We did not succeed. As with all measures having to do with according benefits to those

in same-sex relationships, the federal government is using every measure at its disposal (as well as countless tax payer dollars) to resist moving forward. However, with every court case, it becomes more and more evident that the law is on our side and that it is just a matter of time before the government will be forced by the courts to acknowledge the validity of same-sex unions.

On July 12, 2002 the Ontario Divisional Court (Halpern v. Canada) ruled that eight same-sex couples (who had been together in some cases for as long as twenty years) had the right to be issued marriage licenses. In addition, the court ruled that the two couples who had participated in formal marriage ceremonies were legally married.

**Canada Post/PSAC-UPCE
Marriage Leave with Pay**

After the completion of six (6) months continuous employment in the Canada Post Corporation, and providing an employee gives the Corporation at least (5) days' notice, she shall be granted five (5) days' leave with pay for the purpose of getting married. For greater clarity, such leave shall be available to same-sex couples.

(Note: Regarding, the use of the feminine pronoun in the above, this collective agreement states: ...words implying the female gender shall also include the male gender.)

Same-sex benefits: making progress in the courts and at the negotiating table

The court stated that a refusal to allow these marriage licences would be a violation of the Canadian Charter of Rights and Freedoms. In his comments, Judge J. Laforme explained, **“The denial of equal marriage violates Section 15 of the Charter by drawing a distinction on the basis of sex and sexual orientation which withholds the equal benefit of the law in a manner that offends the human dignity of gays, lesbians and bisexuals.”**

The PSAC followed up on this ruling with a letter to Treasury Board President Lucienne Robillard proposing to re-open talks for all four Treasury Board contracts, in order to include provisions for spousal union leave. Our request was refused.

Shortly thereafter, the federal government announced plans to appeal the Ontario Court ruling. The PSAC soundly condemned the government’s decision. PSAC President Nycole Turmel stated at the time *“We’re disappointed that the federal government has chosen to prolong the discrimination suffered by same-sex couples when they should be taking the lead in ensuring equality and fairness for all people in Canada. Nevertheless, we are going to continue to push for changes that will end this type of discrimination.”* (PSAC press release, July 30, 2002).

The PSAC remains committed to negotiating spousal union leave provisions in the next round of bargaining with Treasury Board, commencing July 2003.

Next steps to consider

What other issues should we be considering at the bargaining table?

- Several PSAC agreements still include references to “Paternity Leave” and many of those specify that such leave is to be made available to “a male employee.” Even in such cases where this language is an oversight (it is included in some collective agreements that contain inclusive definitions of “spouse”), it should be amended in favour of more gender neutral language - for example “Leave for birth or adoption of a child.”
- Many issues affecting our transgendered members have yet to be included in our collective agreements. Adding the words “gender identity” to anti-discrimination clauses would be a step forward in this regard.
- Should we be taking into consideration the safety concerns involved in having to be “out” in order to claim benefits when negotiating PSAC collective agreements?
- Our agreement with the National Joint Council restricts our ability to negotiate the details of member drug plans. However, we have more latitude when it comes to PSAC

Same-sex benefits: making progress in the courts and at the negotiating table

members not directly employed by the federal government. Are we giving enough consideration to such issues as coverage of drugs for in vitro fertilization, insemination,

HIV/AIDS, hormone therapy, etc? Should they be a priority in the next round of bargaining? Should we lobby the National Joint Council to take action on these issues?

Input from our members over the next few months will help provide direction on these and other issues that affect our gay and lesbian members as well as set priorities for the next round of bargaining.

Conclusion

While it is clear that there is still room for improvement in many PSAC agreements – including the use of more inclusive language and the addition of spousal union leave – it is equally clear that tremendous progress has been made since we passed the Policy on Sexual Orientation in 1994.

It has become increasingly obvious over the last decade that the law requires employers to provide the same benefits to all employees, regardless of sexual orientation. All employers will soon have to come to terms with this reality, or be forced to by the courts.

Until this goal has been achieved, however, the PSAC intends to continue to fight for the rights of all our members, in the workplace, at the bargaining table and, when necessary, through the legal system. All our members must be treated equally – with dignity and respect.

We hope that this information is useful. For any comments or suggestions, please communicate with Kate Rogers or Laurie Kingston - negotiations section of P.S.A.C. in Ottawa.

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