August 27, 1997

Via Courier

Royal Commission on
Workers’ Compensation in B.C.

Suite 1440 - 625 Howe Street
Vancouver, B.C. V6C 2T6
Dear Sirs/Mesdames:

Re: Charter Issues Pertaining to Survivor Benefits

PART I – INTRODUCTION

Issue

I have been asked to provide an opinion as to whether the current provisions for survivor benefits in the *Workers Compensation Act* infringe the equality provisions in s.15(1) of the *Charter of Rights and Freedoms* as a result of the various distinctions drawn between surviving spouses and partners of workers on the basis of age, marital status and sexual orientation. Further, if there are any such infringements, can these be justified under s.1 of the Charter?

I have also been asked to consider the decision in and settlement following *Grigg v. British Columbia*, infra, and to assess whether a provision for termination of spousal benefits upon the remarriage of a surviving spouse would infringe s.15 and, if so, be justified under s.1.

Preliminary comments and explanatory notes

This opinion is confined to a legal analysis of whether various aspects of the provisions for survivor benefits would be likely to withstand a Charter challenge under the s.15 equality provisions. I have not attempted to assess and offer no comment on matters such as the appropriate level of survivor benefits or whether different approaches to providing survivor benefits might be desirable from policy and/or cost, as opposed to legal perspectives.

All references in this opinion to the *Workers Compensation Act* are to the version of that legislation as it appears in the 1996 Consolidation of B.C. statutes at R.S.B.C. 1996, c. 492 (referred to throughout as the “Act”). Copies of the relevant provisions of the Act are attached at Tab 27. While the 1996 Consolidation does not itself change the substantive law, all statutes were re-written with a view to greater use of plain language and gender neutral terms. It should be noted that some of the wording in the provisions which I cite may differ from pre-Consolidation excerpts which have been cited to the Commission in other materials.

In an effort to reduce the volume of attachments to this opinion, I have, where noted, attached excerpts rather than full copies of some of the legal authorities referred to below. I would be happy to provide full copies of any of such authorities should the Commission prefer to review them in their entirety. Also, with a couple of exceptions as noted below, I have not attached copies of non-legal materials, such as briefing papers, reports and submissions to the Commission which are already available in the Commission’s library. Again, please let me know if the Commission would prefer that I compile and submit these as a supplemental book of attachments, as I would be happy to do so.
PART II – SUMMARY OF CONCLUSIONS

Predicting the outcome of s.15 challenges is very difficult. The jurisprudence on how to determine whether a legislative distinction constitutes discrimination within the meaning of s.15 is still in a relatively early stage of development and at this point there is a 4/4/1 split at the Supreme Court of Canada on the proper overall framework and guiding principles for a s.15 analysis.

In contrast to the state of the law on s.15, the proper framework for a s.1 analysis is quite well established. Section 1 is triggered upon proof of an infringement of s.15, and the onus is on the party seeking to uphold the legislation to prove that the infringement is justified. In assessing this, courts will look at whether the measures responsible for the infringement relate to a sufficiently important objective, are rationally connected to achieving the objective, and impair the Charter right as little as is practically possible. There must also be proportionality between the impact of the impairment and the objectives served.

One area of particular difficulty in the s.15 context is the overlap between the s.1 and s.15 analyses and particularly the extent to which one should consider the reasons for a given distinction at each stage. There are at present sharply differing views on this at the Supreme Court of Canada level, with four of the nine Justices expressing the view that if a distinction is based on grounds which are relevant to legitimate legislative objects, there is no discrimination. The remaining five members of that Court have disagreed with this view and held that a distinction’s relevance should be assessed primarily, although not exclusively at the s.1 stage. This leaves considerable uncertainty as to how much relevance matters to the question of discrimination under s.15. While one is essentially asking the same question, in can in some cases matter a great deal when the question is posed. This is because different parties bear the burdens of proof under s.15 and s.1, and because there is not the same sort of strict proportionality inquiry at the s.15 stage as there is under s.1.

Apart from the above issues, there does appear to be general agreement by the courts on some of the relevant tests and principles to be applied in identifying discrimination under s.15. Courts have held that distinctions are more likely to be discriminatory when they are based upon the grounds enumerated in s.15 or analogous grounds; when they target a historically disadvantaged groups; when they touch upon the dignity and self worth of individuals in the group affected; when they are clearly irrelevant to the legislation’s objects; and/or when they are based more on stereotypical presumed group characteristics than on individual merits and circumstances. No test is necessarily determinative on its own and in my view, the existing principles tend to define discrimination a good deal more effectively by its presence than its absence. That is, the fact that a distinction fails to pass one or more of these tests makes it more likely (although not certain) that the distinction is discriminatory, but the fact that a distinction passes any given test does not conversely mean that it is non-discriminatory. In many cases, the exercise of separating discriminatory and non-discriminatory distinctions appears to be a rather impressionistic one. In the absence of precedent directly on point for a given issue, this contributes to the uncertainty of predicting the outcome of s.15 challenges.

With these concerns in mind, I have attempted where possible to consider not just the likely outcome of particular Charter challenges, but whether possible modifications to a provision might
contribute to the likelihood that a given distinction would withstand a challenge under s.15. The Commission may also want to consider the likelihood that s.15 challenges to specific distinctions would ever be brought, as a practical matter.

The specific distinctions which I have considered are those based on marital status (both in terms of the different treatment currently accorded to legally married and common law spouses, and the possible reinstatement of a provision terminating benefits for surviving spouses who remarry); those based on sexual preference (as benefits do not appear to be available to same sex partners of workers); and those based on the age (as younger surviving spouses tend to receive a lower level of benefits).

**Distinctions Based on Marital Status:**

**Different Treatment of Legally Married and Common Law Spouses**

There appear to be two principal ways in which the legislation draws distinctions between legally married and common law spouses. First, it appears from the wording of the Act that payment of survivor benefits to dependent common law spouses is wholly discretionary, while payment of benefits to legally married surviving spouses is mandatory upon the latter’s proof of dependency. Second, dependency is deemed for legally married spouses who are contributing to a common household, while it appears that common law spouses must always prove actual dependency.

I am not certain whether the first distinction is intentional. If it is, I think that there is a good chance that it would infringe s.15 and would not be justifiable under s.1. There is some fairly strong precedent on this point from the Supreme Court of Canada, which recently struck down legislation which made automobile accident benefits available only to legally married spouses and not common law spouses of automobile policy holders. The distinction was found to be discriminatory by a majority of the Court and not justifiable under s.1. The legislative goal identified was alleviating the financial impact resulting from injury to the adult partner of a family unit. Marital status was not considered a reasonable indicator of who should receive accident benefits and the distinction was thus not rationally connected and was under inclusive of its purpose. I think it would be difficult to distinguish this case, and the same result is likely to be reached.

The same general considerations apply to the distinction connected with the deeming provision, but I think that runs a somewhat lesser risk of being struck down, largely because it does not have as drastic a potential effect as the first distinction. I note however as a practical matter, that internal Board materials suggest that removing this distinction might actually result in greater administrative ease at the same or even lower costs.

**Distinctions Based on Marital Status: Termination of Benefits upon Remarriage**

The Act was amended from a prior provision for blanket termination of benefits upon the remarriage of a surviving spouse to providing that this occurs only for survivors who remarried after the date on which s.15 came into effect. In *Grigg v. British Columbia*, the B.C. Supreme
Court found that the distinction between those who remarried prior to the specified date and those who remarried after constituted discrimination and infringed s.15. The Provincial government settled the case before it proceeded to the planned second stage of considering whether the infringement was justified under s.1, with the result that at this point, all surviving spouses retain their survivor benefits for life whether they remarry or not.

In my view, there is very little chance that the government could have succeeded in establishing that the infringement found in *Grigg* was justified under s.1. I can see no rational connection between the date of remarriage and entitlement to benefits. If the thinking was that a meaningful distinction could be drawn between the two groups of remarried survivors on the basis of whether or not each had Charter entitlements to retain benefits, the court has already ruled against this in the first stage of *Grigg*.

However, the court in *Grigg* had only to consider a distinction based on the date rather than the fact of remarriage. The court did not have occasion to consider whether termination of benefits upon remarriage would in itself be unconstitutional and I did not find any other authority considering this point. In my opinion, there is a good chance that a sweeping provision terminating benefits in every case of remarriage would infringe s.15 and would not be saved under s.1.

While the distinction would pass a number of established tests under s.15, the primary risk for a finding of discrimination is that a sweeping termination of benefits for remarried survivors makes assumptions about remarried survivors which are based on presumed group characteristics rather than actual circumstances. The object of survivor benefits is to compensate a surviving spouse for loss arising from the worker’s death, and a termination provision would be based on a presumption that such loss is offset by financial support provided by the new spouse. In the tort context, it is a question of fact whether remarriage has such an effect, which acknowledges that in some cases it will not. I think that the primary risk at the s.1 stage is that the provision would fail the least restrictive means test because a similar end (i.e. ending benefits when the underlying loss ends) could be achieved with other measures which would not impair Charter rights to such an extent, such as, for example, including a rebuttable presumption which gives remarried spouses the opportunity to retain benefits if they can show that remarriage has not affected their loss. The more such a provision takes account of a surviving spouse’s particular circumstances, the less likely it becomes that it would be found unconstitutional, although the more concerns would arise about administrative feasibility. I think that a provision which can be shown to strike a reasonable balance between these concerns stands a good chance of withstanding a s.15 challenge.

**Distinctions Based on Sexual Orientation**

While the Act does not explicitly rule out survivor benefits for same sex partners of deceased workers, I think it does so implicitly. At best, same sex couples may be granted some survivor benefits but on a wholly discretionary basis, and at worst, they are precluded from receiving survivor benefits at all. There is strong recent Supreme Court of Canada authority to support the conclusion that either situation and particularly the latter constitutes discrimination on the basis of sexual orientation and infringes s.15.

It is a more difficult question whether such discrimination can be justified under s.1. There is no consensus on this point at the Supreme Court of Canada level and it may simply be too early too
early to predict what courts will do with this issue. There is some authority suggesting that the
government will bear a heavy onus of establishing why same sex couples should be treated
differently than opposite sex couples. There is other authority suggesting that the legislature will
be according a great deal of deference in dealing slowly and incrementally in light of the very
recent evolution in this area of the law.

I note that the B.C. legislature is in the process of what is intended to be a comprehensive
overhaul aimed at removing this type of legislative distinction. As the distinctions disappear in
other areas of law, I think the prospects for justification under s.1 diminishes proportionately. It
may be that a court would find that the legislature is entitled to some time to deal with these
developments incrementally, and such an argument might be bolstered if it can be shown that
adjustments to funding are necessary so that sufficient reserves exist to cover resulting increases
in entitlements. However, I think that this is apt to provide only a temporary justification under
s.1, and, subject to the uncertainties stated above, this type of distinction may well be unlikely to
withstand a s.15 challenge in the long term.

**Distinctions Based on Age**

The current provisions draw distinctions between surviving spouses on the basis of age. While
the system is somewhat complex, the general effect is that childless non-invalid spouses under age
40 are paid less than their counterparts aged 40 - 49, who are in turn paid less than their
counterparts aged 50 or over. This is perhaps the most difficult of the Charter questions
considered in this opinion, as there are some authorities going both ways on analogous issues.
Even the Review Board and Appeal Division currently take opposite sides on this precise
question, with the former upholding the age distinctions and the latter generally refusing to
enforce them. On balance, I think that the Appeal Division’s position is better supported by
current authorities.

There is a fair bit of authority suggesting that the age distinctions would constitute discrimination
under s.15 because they distinguish on the basis of presumed rather than actual characteristics.
That means the onus is apt to fall upon the government to justify the distinctions under s.1. Thus
the government would have to show that the distinctions are rationally connected to entitlement
to benefits and do not impair equality rights more than is reasonably necessary. This sort of
distinction is not common in other jurisdictions. I have not conducted definitive research on the
factual basis for the distinctions, but what I have found so far suggests that there may be
insufficient statistical support for the particular lines drawn, which seem to have been put in place
on a rather “rough and ready” basis which may well not suffice for s.1 purposes. I also note that
the distinctions may be better indicators of need for benefits, whereas entitlements under the Act
are generally based not on need but on compensation for actual loss. A court may find that other
criteria would provide better indicators of the latter.
PART III – DISCUSSION

1. GENERAL PRINCIPLES APPLICABLE TO EQUALITY ANALYSIS UNDER THE CHARTER

1.A. Section 1 Analytical Framework

Section 1 of the Charter makes it clear that guaranteed rights are not absolute:

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

Section 1 is not triggered unless it is first established by the party challenging the legislation that there has been an infringement of a Charter right. I begin with a discussion of s.1 because there is some overlap and, on occasion, confusion in the case law regarding whether certain tests are to be employed under s.15 or reserved instead for the s.1 analysis after an infringement has been shown.

To understand some of the problems which have arisen with s.15 analysis, it is necessary to first examine the accepted framework for analysing whether an infringement of a Charter right can be justified under s.1.

The onus of establishing justification under s.1 rests upon the party seeking to uphold the impugned legislation. The framework for a s.1 analysis was first set out in R. v. Oakes (1986), 26 DLR (4th) 200 (S.C.C.), and what is now known as the “Oakes test” has since been universally adopted by Canadian courts. The Oakes test involves a number of components.

1. The measures responsible for limiting the Charter right must be designed to serve objectives which are sufficiently important to warrant overriding a constitutionally protected right. At a minimum, the objectives must relate to “concerns which are pressing and substantial in a free and democratic society.” (This is often referred to as the “objectives test.” It is designed to ensure that Charter rights are not overridden for trivial purposes, and there are relatively few instances where this part of the Oakes test is not passed.)

2. Once sufficiently significant objectives are established, it must also be shown that the means of serving these objectives are proportional to the objectives themselves. This stage of the test in turn involves three components:

(a) The measures responsible for limiting the Charter right must be rationally connected to the objectives. That is, they must further the objectives in some way and not be arbitrary, unfair or based on irrational considerations. (This is generally referred to as the “rational connection test.”)

(b) The measures must impair the Charter right in question as little as possible. At this stage, the court will consider whether other means could have been employed to serve the objective with lesser infringement of Charter rights. (This is generally referred to as the “least restrictive means, or minimum impairment test.”)
There must be proportionality between the effects of the measures responsible for the impairment of the Charter right and the objectives which they serve. At this stage, the court engages in weighing the degree of importance of the objectives against the degree of importance of the Charter right affected. Thus a goal which is sufficiently important to pass the objectives test may nonetheless fall short when weighed against what is seen as an especially vital Charter right, such as the right to liberty. (This part of the Oakes test is not consistently named in the case law. While “proportionality test” usually refers to all three of components 2(a)-(c), I will use it here for the sake of convenience to refer only to 2(c).)

In applying the various components of the Oakes test, courts do not require a standard of perfection, but instead aim to apply a policy of “measured deference” to the government:

... when evaluating legislative measures that attempt to strike a balance between claims of legitimate but competing social values, considerable flexibility must be accorded to the government to choose between various alternatives... “the question is whether the government had a reasonable basis for concluding that it impaired the relevant right as little as possible given the government’s pressing and substantial objectives”... (Tetreault Gadoury v. Canada, infra, p.372)

1.B. Section 15 Analytical Framework

Section 15 of the Charter provides:

15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Subsection 15(2) is generally used to justify distinctions drawn in the context of affirmative action legislation. I do not believe that it would have any application to the issues addressed in this opinion and my analysis therefore focuses on s.15(1), which I will simply refer to throughout as “s.15.”

At this point, s.15 jurisprudence has had relatively little time to develop. While the rest of the Charter came into effect in 1982, s.15 was not in effect until 1985, and the earliest Supreme Court of Canada decision to focus in detail on the proper framework for deciding s.15 claims was not handed down until 1989. (Andrews v. Law Society of B.C. (1989) 56 D.L.R. (4th) 1 (Tab 1)) Cases decided by lower courts prior to 1989 should be approached with some caution as many
were based on approaches which are at odds with those subsequently formulated by the Supreme Court of Canada. The analysis endorsed in *Andrews* and since then universally accepted, is a two-step process which essentially asks two deceptively simple questions:

1. Is there a denial of equal protection or benefit of the law to an individual?
2. If there is a denial of equality, is it “with discrimination”?

Identifying “discrimination” is usually by far the most problematic part of the analysis. The following definition of discrimination set out by McIntyre J. in *Andrews* (dissenting in the result, but endorsed by the majority on the matter of how to interpret s.15) remains frequently cited and applied in s.15 cases:

Discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual’s merits and capacities will rarely be so classed. (P.18)

The *Andrews* decision is also notable for ruling out several alternative approaches to s.15 analysis which had been suggested by academics and lower courts prior to 1989. In particular, the Court rejected as overly formalistic the American “similarly situated” test, which essentially establishes discrimination when those who are similarly situated are differently treated and justifies different treatment of those who are differently situated (see pp. 11-13). The Court also rejected the suggestion that any type of distinction would suffice to establish discrimination under s.15, triggering the s.1 justification analysis, noting that such an approach gives too large a role to s.1. At the same time, the Court rejected the suggestion that discrimination should be defined under s.15 as an “unjustifiable or unreasonable distinction,” because assessing the reasonableness of a distinction under s.15 would leave too small a role for s.1. (See pp.21-23.) The Court admitted that the relationship between s.15 and s.1 is difficult to define in a wholly satisfactory way, but stressed that it is important to keep them analytically distinct (p.21).

The issue in *Andrews* was whether a provision which allowed only Canadian citizens to become members of the B.C. Law Society infringed s.15. The majority of the Court struck down the law, finding non-citizens an analogous group to those enumerated in s.15, and finding that the citizenship requirement was not sufficiently connected to the legislative object to be justifiable under s.1. While the case has little application to present issues on the facts, courts do continue to apply *Andrews* for the above principles. However, the Supreme Court of Canada has continued to refine and enlarge upon the proper approach to deciding section 15 claims and, particularly over the last couple of years, a schism has developed in this area. Two cases of particular note here which illustrate this schism are *Miron v. Trudel* (1995), 124 D.L.R. (4th) 693 (S.C.C.) (Tab 12) and *Egan v. Canada* (1995), 124 D.L.R. (4th) 609 (S.C.C.) (Tab 6). I will discuss the specific findings in these cases in greater detail in the sections below regarding treatment of common law and same sex couples respectively. However, a general summary of the different approaches to s.15 taken by different members of the Court is in order here.
Miron involved a claim that automobile insurance legislation discriminated on the basis of marital status by denying certain benefits to common law spouses. Four Justices (McLachlin, Sopinka, Cory, and Iacobucci JJ.), found that the legislation in question violated s.15 and was not justified under section 1. L’Heureux-Dube J. reached the same result, but employed a different s.15 analysis. The remaining four Justices (Gonthier, Lamer, La Forest and Major JJ.) dissented, finding that there was no discrimination under s.15, and employing yet a different s.15 analysis.

Egan involved a claim that Federal old age security legislation discriminated against same sex couples by defining “spouse” as a person of the opposite sex. The Court split along the same lines as in Miron with respect to how to approach 15. Again, McLachlin, Cory, Iacobucci and Sopinka JJ. found a violation of section 15, with L’Heureux-Dube J., as in Miron reaching the same result by a different route. Again, Gonthier, Lamer, LaForest and Major JJ. found no infringement of s.15. In Egan, unlike Miron, the latter group arrived at the majority result because Sopinka J. found that although there was a breach of s.15, this was justified under s.1.

Thus there is now a 4/4/1 split in the Supreme Court of Canada’s approach to s.15 claims (i.e. McLachlin, Sopinka, Cory, and Iacobucci JJ. with one approach, Lamer C.J.C. and Gonthier, LaForest and Major JJ. with a second, and L’Heureux-Dube J. with a third). The absence of a majority view presents additional challenges in assessing whether legislative distinctions between different groups might be struck down under s.15, and all three approaches may need to be considered in a given case.

The first approach, which is expressed in the reasons of McLachlin J. in Miron and Cory J. in Egan, puts great emphasis on the grounds for the distinction in question:

First, the claimant must show a denial of “equal protection or equal benefit of the law,” as compared with some other person. Second, the claimant must show that the denial constitutes discrimination. At this second stage, in order for discrimination to be made out, the claimant must show that the denial rests on one of the grounds enumerated in s.15(1) or an analogous ground and that the unequal treatment is based on the stereotypical application of presumed group or personal characteristics. If the claimant meets the onus under this analysis, violation of s.15(1) is established. (Miron, p. 739, per McLachlin J.)

The second plurality’s approach, expressed in the reasons of Gonthier J. in Miron and LaForest J. in Egan contains some of the same elements, but also considers the extent to which a distinction is relevant to the legislative goals:

The first step looks to whether the law has drawn a distinction between the claimant and others. The second step then questions whether the distinction results in disadvantage. . . The third step assesses whether the distinction is based on an irrelevant personal characteristic which is either enumerated in s.15(1) or analogous thereto. (Miron, p. 702, per Gonthier J.)
L’Heureux-Dube J.’s separate reasons in both Miron and Egan, set out a third approach:

. . .(1) there must be a legislative distinction; (2) this distinction must result in a denial of one of the four equality rights [guaranteed by s.15] on the basis of the rights claimant’s membership in an identifiable group; and (3) this distinction must be “discriminatory” within the meaning of s.15. (Miron, p. 725)

As to the definition of “discrimination”, L’Heureux-Dube J. favoured a fresh approach giving independent content to this term rather than defining it indirectly by reference to the enumerated and analogous grounds, and putting emphasis on the effects of the distinction:

A person or group of persons has been discriminated against within the meaning of s.15 of the Charter when members of that group have been made to feel, by virtue of the impugned legislative distinction, that they are less capable, or less worthy of recognition or value as human beings or as members of Canadian society, equally deserving of concern, respect and consideration. These are the core elements of a definition of “discrimination” - a definition that focuses on impact (i.e., discriminatory effect) rather than on constituent elements (i.e., the grounds of the distinction). (Egan, p. 632. Emphasis in original.)

A key difference between the above approaches appears to lie in the extent to which one is to consider the the distinction’s relevance to the legislation’s objectives. In particular, the Supreme Court appears divided as to whether the reasonableness of drawing the distinction goes to whether the distinction is “discriminatory” at all (a s.15 question) or whether the distinction is justified (a s.1 question). While to a large extent, the same question is being asked in either instance, the point at which one asks the question may have a very important effect on the outcome of the overall question of constitutionality. This is principally because the party attacking the legislation has the onus of proof in establishing an infringement under s.15, while the party seeking to uphold the legislation bears the onus of establishing justification under s.1. Thus deficiencies in the evidence relating to reasons for drawing legislative distinctions are apt to operate to a plaintiff’s disadvantage if relevance is assessed at the s.15 stage, but to a defendant’s disadvantage if relevance is left mainly to the s.1 stage. In addition, a distinction’s relevance appears to be subject to a less stringent kind of scrutiny at the s.15 stage than it is at the s.1 stage where the various elements of the Oakes test must be considered.

There are some lower court decisions subsequent to Egan and Miron suggesting that since two pluralities of four split evenly on the question of how to define discriminatory distinctions, there are essentially two majority approaches, and lower courts may be free to apply either one. (See, for example, Grigg v. British Columbia, infra at p. 561.) Despite this kind of comment, I think that the relevance test employed by Lamer C.J.C. and LaForest, Gonthier, and Major JJ. has been disapproved by the remaining majority of the Supreme Court, and should thus not be applied.

In Egan the La Forest J. plurality found that there was no discrimination in denying benefits to same sex partners because sexual orientation is relevant to the functional values underlying the legislation, therein characterized as according support to the social institution of marriage. Similarly, in Miron, the same plurality found no discrimination in the denial of accident benefits to common law spouses on the ground that marital status relevant to the legislative object, which was characterized as defining rights and obligations attached to marriage. This approach was
criticized by both the plurality represented by McLachlin J. in Miron and Cory J. in Egan, along with L’Heureux-Dube J. in both cases, on the grounds that it is circular and improperly imports a relevance assessment which should properly be undertaken under s.1:

[Gonthier J.] concludes that distinguishing on the basis of marital status is relevant to [the legislative purpose of assisting couples who are married] and hence that the law is not discriminatory. On examination, the reasoning may be seen as circular. Having defined the functional values underlying the legislation in terms of the alleged discriminatory ground, it follows of necessity that the basis of the distinction is relevant to the legislative aim. This illustrates the aridity of relying on the formal test of logical relevance as proof of non-discrimination under s.15(1). The only way to break out of the logical circle is to examine the actual impact of the distinction on members of the targeted group. . . The focus of the s.15(1) analysis must remain fixed on the purpose of the equality guarantees which is to prevent the imposition of limitations, disadvantages or burdens through the stereotypical application of presumed group characteristics in violation of human dignity and freedom. (Miron, pp. 742-3)

This is not to say that the relevance of the distinction to the legislative objects is in no way a part of the s.15 analysis. The Supreme Court of Canada appears to be unanimous (with the possible exception of L’Heureux-Dube J.) in holding that a distinction which is clearly irrelevant to the functional values underlying the legislation is likely to discriminatory under s.15. However, a 5:4 majority has expressly disapproved of the corollary view that there is no discrimination if a distinction is shown to be relevant to underlying values. As McLachlin J. put it in Miron:

While irrelevance of the ground of distinction may indicate discrimination, the converse is not true. Proof of relevance does not negate the possibility of discrimination. (Miron, p. 745)

Further confusion arises from the fact that it is often difficult to distinguish a relevance assessment of the sort disapproved by the above 5:4 majority from other types of questions which the majority of the Supreme Court has routinely approved. For example, in the seminal passage cited from Andrews, supra McIntyre J. noted that distinctions based on an individual’s merits and capacities will rarely be classed as discriminatory under s.15. I find it hard to distinguish this from saying that if the individual’s merits and capacities are relevant to the distinction which is being drawn, the distinction will rarely be classed as discriminatory. In light of this, it may be fair to say that distinctions based on relevant grounds are unlikely to be discriminatory, but that the relevance cannot be considered absolutely conclusive. This remains an unresolved issue. Since the 1995 rulings in Egan and Miron, the Supreme Court of Canada has not resolved its differences, but has simply noted the lack of unanimity in this area and attempted to resolve more recent s.15 cases on the basis of those principles which do not involve disagreement. (See, for example, Eaton v. Brant County Board of Education [1997] 1 S.C.R. 241 (Tab 5) and Benner v. Canada [1997] 1 S.C.R. 358 (Tab 2); headnotes only attached.)

Bearing in mind that approach, I have identified several considerations which appear to be non-controversial and which may be sufficient in some cases to resolve s.15 issues. I note that no factor among these is determinative on its own, and any s.15 assessment is likely to involve a weighing of the various considerations. I also note that these are culled from various cases and I
have found no authority setting out an exhaustive list of relevant factors and tests. Since the
general approach of courts to the Charter has been to avoid generalizations about matters not
squarely in issue and allow the law to develop on a case-by-case basis, it is likely that further tests
will continue to develop as more s.15 issues make their way before the courts.

One key question is whether the group affected by a legislative distinction is among those
enumerated in s.15 or is an analogous kind of group. “Cases where a distinction made on an
enumerated or analogous ground does not amount to discrimination... are rare.” [Per McLachlin
J. in Miron, p. 741.] There are various indicators of analogous grounds. For example, the
targeted group may be a historically disadvantaged group and/or a “discrete and insular minority”
which is vulnerable to discrimination. The group may share other characteristics with those
groups listed in s.15. The distinction in question may be based on personal and/or immutable
characteristics. (See, for example, the cases discussed by McLachlin J. in Miron at pp. 747-748.)

Again no factor is determinative on its own:

All of these may be valid indicators in the inclusionary sense that their presence may signal
an analogous ground. But the converse proposition - that any or all of them must be
present to find an analogous ground - is invalid. As Wilson J. recognized in Turpin (at
p.35), they are but “analytical tool” which may be “of assistance.” (Miron, per McLachlin
J. at p.748.)

A distinction which has the effect of touching on an individual’s dignity and self worth or
impinges on that person’s dignity is also apt to be characterized as discriminatory. This has been
expressed in various ways:

It is clear that the purpose of s.15 is to ensure equality in the formulation and application
of the law. The promotion of equality entails the promotion of a society in which all are
secure in the knowledge that they are recognized at law as human beings equally deserving
of concern, respect and consideration. (Andrews, per McIntyre J. at p. 15)

Equality means that our society cannot tolerate legislative distinctions that treat certain
people as second-class citizens, that demean them, that treat them as less capable for no
good reason, or that otherwise offend fundamental human dignity. (Egan, per L’Heureux-
Dube J. at p.631.)

All these and more may be indicators of analogous grounds, but the unifying principle is
larger: the avoidance of stereotypical reasoning and the creation of legal distinctions which
violate the dignity and freedom of the individual, on the basis of some preconceived
perception about the attributed characteristics of a group rather than the true capacity,
worth or circumstances of the individual. (Miron, per McLachlin J. at p. 748)

The latter passage echoes the above comment from McIntyre J. in Andrews (at p.18) that the
more a distinction is based on stereotypical application of presumed group characteristics rather
than on individual merit, capacity or circumstance, the more likely that it is discriminatory, and
vice versa.
Finally, as noted, while there is disagreement among the members of the Supreme Court of Canada as to how large a role relevance should play in a s.15 analysis, a clear majority appears to feel that distinctions which are clearly irrelevant to the functional values underlying the legislation are likely to be discriminatory.

2. ANALYSIS RE: DISTINCTIONS MADE IN SURVIVOR BENEFITS PROVISIONS OF THE WORKERS’ COMPENSATION ACT

2.A. Distinctions Based on Marital Status

I have considered two principal aspects of differential treatment based on marital status. First, the current legislation draws distinctions between legally married and common law spouses. (I will consider distinctions between same sex and opposite sex couples in a separate section relating to sexual orientation below.) Second, while there is currently no distinction made between surviving spouses who have remarried and those who have not, I have been asked to consider whether such a distinction would survive a s.15 challenge if it were reinstated.

2.A.i. Distinctions between Legally Married and Common Law Spouses

Subsections 17(3)(a)-(e) are the main provisions specifying how benefits are to be calculated for the surviving widow(er)s of deceased workers. The widow(er)s’ rights to receive the sums specified appears to be conditional only on dependence on the worker, and mutual dependence is deemed under s.17(7) for workers who are married and contributing to a common household. Subsections 17(11) and(12) are the main provisions dealing with benefits payable to surviving common law spouses.

17 (11) Where a worker has lived with and contributed to the support and maintenance of a common law wife or common law husband, and

(a) where the worker and the common law wife or common law husband have no children, for a period of 3 years; or

(b) where the worker and the common law wife or common law husband have children, for a period of one year

immediately preceding the worker’s death, and where the worker does not leave a dependent widow or widower, the board may pay the compensation to which a dependent widow or widower would have been entitled under this Part to the common law wife or common law husband.
Where

(a) a worker has lived with and contributed to the support and maintenance of a common law wife or common law husband for the period set out in subsection (11);

(b) the worker also left surviving a dependent widow or widower from whom, at the date of death, the worker was living separate and apart, and

(c) there is a difference in the amount of compensation payable to the widow or widower by reason of the separation and the amount of compensation that would have been payable to that person if that person and the worker had not been living separate and apart,

the board may pay compensation to the common law wife or common law husband up to the amount of the difference.

Section 17(3) also provides for an entitlement to a lump sum of $500, making no distinction between dependent widows, widowers, and common law husbands and wives.

As noted, s.17(7) deems 2 workers who “are married to each other and . . . contributing to the support of a common household” to be dependents of one another. While the term “married” is not defined in the Act, ordinary usage suggests that this section would not apply to common law spouses. The May 22, 1995 report entitled “Compensation and the Death of a Worker - A Discussion Paper” prepared by an Ad Hoc Committee established by the Board to consider changes to s.17, (the “Ad Hoc Committee Report”) identifies s.17(7) as one which applies only to marriages, so that actual dependency must be determined with respect to common law relationships. I think this is consistent with the wording of the provision. The Committee found no reason for this distinction, noting that “whether people are contributing to a common household should be the crucial issue, not their legal status.” The Committee was also of the view that extending the deeming provision to common law couples would not result in additional costs, and might well reduce the administrative costs associated with determining actual dependence in the absence of a deeming provision without creating additional entitlements to benefits. (See Ad Hoc Committee Report, part C-50.)

Leaving aside situations where a deceased worker leaves both a common law spouse and widow(er) (where I think distinctions simply attempt to reflect the division of entitlements to the worker’s single salary), there appear to be two principal ways in which legally married and common law spouses are treated differently. First, s.17(11) says that where a worker leaves a common law spouse, the board “may” pay that spouse the same amount to which a dependent widow or widower would have been “entitled”. As to widow(er)s’ entitlements, s.17(3) states that compensation to widow(er)s “must be paid as follows.” Thus the Act clearly appears to contemplate that payment of survivor benefits to legally married spouses is mandatory while payment of such benefits to common law spouses is discretionary.

The second distinction is that legally married spouses have the advantage of the deeming provision in s.17(7) while common law spouses must prove actual dependency.
On a s.15 analysis, these factors would appear to satisfy the initial part of the Andrews test in that the benefits of certain provisions are denied to unmarried partners on the basis of their marital status. The next question is whether this distinction is discriminatory. In Miron v. Trudel, supra, all members of the Supreme Court of Canada agreed that marital status may be an analogous ground to those enumerated in s.15(1). As noted, that case involved a claim by a common law spouse under his partner’s policy to accident benefits available to “spouses” of policy holders. The claim had been denied on the ground that the relevant provision of the Ontario Insurance Act at the relevant time did not apply to common law couples. After the claim and before the hearing, the legislation had been amended to include common law spouses, but this was not retroactive.

The majority of the Supreme Court of Canada found, in two separate sets of reasons, that the original provision infringed s.15 by discriminating on the basis of marital status and that this could not be justified under s.1. McLachlin J., with three other members of the Court concurring, noted that marital status is a personal characteristic which is often beyond an individual’s effective control and that persons involved in unmarried relationships constitute a historically disadvantaged group. As noted, those features were not determinative on their own but merely indicators. The unifying principle behind such indicators was described as the avoidance of stereotyping.

... discrimination on the basis of marital status touches the essential dignity and worth of the individual in the same way as other recognized grounds of discrimination violative of fundamental human rights norms. Specifically, it touches the individual’s freedom to live life with the mate of one’s choice in the fashion of one’s choice. This is a matter of defining importance to individuals. It is not a matter which should be excluded from Charter consideration on the ground that its recognition would trivialize the equality guarantee. (P. 749)

McLachlin J. thus found marital status an analogous ground, further finding that this was “not one of the exceptional cases where a distinction drawn on the basis of an enumerated or analogous ground does not fall within the anti-discrimination guarantees of the Charter.” Thus, discrimination under s.15 was established and the inquiry shifted to whether this could be justified under s.1.

In McLachlin J.’s view, the goal or “functional value” of the legislation was “to reduce the economic dislocation and hardship” apt to result to families when one of their members is injured in an automobile accident. (See p.753. It is interesting to note that the other plurality described the functional value underlying the legislation at pp. 721-722 as “defining certain benefits attached to marriage.” Clearly there is a great deal of scope for courts to define a distinction’s object in a manner which may impact greatly on the outcome of a Charter challenge while remaining extremely difficult to predict in advance. While I think it is very likely that Workers’ Compensation survivor benefit legislation would be characterized as aimed at compensating survivors for losses associated with a workers’ demise, the dissenting view in Miron suggest that characterization cannot be taken for granted.)

Continuing with her s.1 analysis, McLachlin J. found that the goal in question was sufficiently important, but that the distinction failed the rational connection and least restrictive means tests.
The insurer defends the marker of marital status as an indicator of stability which goes to the economic interdependence of the family unit. To maintain this claim, the state (or the insurer that here stands in its stead) must show that stable, and thus economically interdependent family units typically involve married partners, and conversely, that unmarried partners in stable relationships are but a minor anomaly. Further, given the injustice of any anomalies, one would expect a demonstration that better criteria, producing fewer anomalous cases, are not readily available . . .

. . . in fixing on marital status as the criterion of eligibility for family accident benefits, the legislature chose a criterion that was at best only collaterally related to its legislative goal; a criterion, moreover, that had the effect of depriving a substantial number of deserving candidates of receipt of benefits. Better tests were available. (Pp.754 and 755)

L’Heureux-Dube J. reached the same result in separate reasons. In finding that there was discrimination under s.15, she noted that the total exclusion of common law couples from receipt of accident benefits promotes the view that persons in such relationships are less worthy of recognition or value as human beings (p.734). As I read her reasons on the s.1 issue, she essentially reaches the same conclusions for the same reasons as McLachlin J.

I note that the legislation in issue in Miron went further than the survivor benefit provisions of the Act because the former excluded all common law couples from receipt of benefits, while the Act provides for a discretionary awarding of benefits upon proof of dependence. I do not think that this is a sufficiently important difference to distinguish the present case and it is my view that the majority result in Miron would be likely to apply with respect to the Act’s distinction between mandatory benefits for widow(er)s and discretionary benefits for common law surviving spouses. As a result, I think that the distinction would most likely be struck down on the basis that common law spouses, upon proof of dependence, should have the same entitlement to benefits as legally married spouses.

I would be very curious as to whether the discretion in s.17(11) is ever actually exercised and how many instances there have been where a worker leaves only a surviving common law spouse and the latter is not given the same benefits he or she would have received if legally married. I note that if the discretion is seldom or never exercised to deny benefits, there would be little or no impact resulting from redrafting these provisions to make them less likely to infringe s.15. On the other hand, there would also be little if any chance of a Charter challenge if the provision is left as is: if there are no common law spouses denied benefits pursuant to the discretion, no one would have a reason for seeking to have the distinction declared invalid.

While I think that the extension of the dependency deeming provision in s.17(7) to legally married but not common law spouses is also likely to breach s.15 and be unjustifiable under s.1, I do not think that there is quite as great a potential for this, largely because the effect of this distinction is not potentially as drastic. While the first distinction and the one considered in Miron can result in the total denial of benefits to deserving family members, the deeming provision simply deprives common law couples of the ability to skip an evidentiary step in showing their entitlement. While that distinction might still constitute discrimination on McLachlin J.’s reasoning in Miron, it may be more easily justified on her view of s.1 because dependence is rationally connected to
entitlement to benefits and by giving common law spouses the opportunity to show dependence, it minimizes or eliminates “anomalous cases”. Thus, I would think that this distinction:

. . .is reasonably relevant to the legislative goal in all the circumstances of the case, having regard to the available alternative criteria and the need to minimize prejudice to anomalous cases within the group. (Miron, p.755)

Similarly, in assessing discrimination under s.15, L’Heureux-Dube J. put considerable emphasis on not only the group affected by the distinction, but the nature of the affected interest as well. In Miron, she described the affected interest as “protection of family units from potentially disastrous financial consequences due to injury of one of their members” and found that interest to be: . . . sufficiently pressing, the possible economic consequences to be sufficiently severe, and the manner of exclusion to be sufficiently complete to constitute a significant, though not overwhelming, discriminatory potential. (P.733)

I do not think that the interest affected by the lack of a deeming provision could be similarly described and thus on L’Heureux-Dube’s reasoning, the distinction might well be regarded as non-discriminatory.

There has not yet been a much case law involving s.15 challenges based on marital status subsequent to Miron. In Taylor v. Rossu (1996) 140 DLR (4th) 562 (Alta. Q.B.) (Tab 17), the court struck down a provision in the Alberta Domestic Relations Act which precluded alimony claims by common law spouses. As is often the case, the court’s reasons for concluding that the distinction was discriminatory under s.15 and not justified under s.1 are not spelled out in great detail, but I think that the factors which were cited would also be likely to apply to the present issue. The court quoted at some length from Miron, and particularly McLachlin J.’s reasons in that decision. It also noted that many other jurisdictions did not draw the same distinction between married and common law relationships, stating that this “suggests recognition of the fact that it is often wrong to deny equal benefit of the law because a person is not married.” Similarly, in B.C. there appears to be a trend toward eliminating distinctions between legal marriages and common law relationships. (See, for example, excerpts from the Family Maintenance Enforcement Amendment Act, 1997 and the Family Relation Amendment Act, 1997, infra, at Tabs 25 and 26.) The court also quoted from a paper suggesting that:

The effect of Miron is that all of the attributes of a legal marriage must now be extended to unmarried couples. Any failure to do so would discriminate on the basis of marital status, and would be unconstitutional, except in the unlikely event that the law could be justified under section 1. (Pp.569-570)

In Falkiner v. Ontario (Comm. & Soc. Services) (1996) 140 DLR (4th) 115 (Ont. Gen. Div.) (Tab 7 - headnote and dissent only attached), several women who had been receiving social assistance benefits challenged regulations which defined the men with whom they lived as “spouses” thus resulting in their disentitlement to certain welfare benefits. Two of the three members of the court declined to consider the Charter issue, finding it was premature in light of the fact that an internal review on the termination had not been completed. The remaining member, Rosenberg J. dissenting in part, found that the regulations discriminated on the basis of both sex and marital status because they had the effect of disadvantaging sole support parents.
receiving social assistance, and did so on the basis of stereotypical assumptions not justified by statistics (pp.162-164).

I think that this decision has limited application to the present issues, but note that it provides some interesting illustrations of the kinds of evidence courts might consider in the course of a s.15 analysis. For example, the court considered expert evidence as to the historical disadvantage suffered by the affected group and impact of the regulations, and direct evidence from the applicants and comments from other judicial decisions about the sorts of stereotypical biases faced by the affected group. The reasons suggest that this met the plaintiffs’ s.15 onus and essentially shifted the onus under s.15 to the legislation’s proponent to rebut the evidence of stereotyping with statistical or similar evidence. I think that it is likely to be difficult to meet such an onus in the present case, particularly with regard to the first distinction.

2.A.ii. Termination of Benefits upon Remarriage

The Act used to provide for a blanket termination of spousal survivor benefits where a surviving spouse entered into a new legal or common law marriage. The current situation is more complex than this. Before s.15 of the Charter was in effect, the Act provided that the monthly pension payable to a widow of a deceased worker would terminate upon the widow’s entry into a new marriage or common law relationship. (For the sake of brevity, I will refer to situations of both remarriage and entry into a common law relationship as “remarriage” in the following discussion.) When s.15 came into effect, the Act was amended to extend the same benefits to both widows and widowers, and at that point remarriage was a terminating event for either gender. In 1993 and 1994, the Act was further amended to remove remarriage as a terminating event, but this was made retroactive only to April 17, 1985, which was the date s.15 came into effect. Thus, widow(er)s who had remarried prior to April 17, 1985 and had their benefits terminated on remarriage remained disentitled to pension benefits, while those who remarried on or after April 17, 1985 had their benefits reinstated. (This legislative history is set out in somewhat greater detail in Grigg v. British Columbia (1996) 138 DLR (4th) (B.C.S.C.) at pp.551-553 (Tab 8).)

In Grigg, widows who had remarried prior to April 17, 1985 brought a class action suit alleging that the distinction between those who had remarried before and after April 17, 1985 contravened s.15. The court stated in obiter that the distinction did not discriminate on the basis of sex or age, but found that it did discriminate on the basis of marital status (p.553). In doing so, the court noted the difficulties inherent in defining “discrimination” under s.15, particularly in light of the current lack of consensus from the Supreme Court of Canada (pp. 558-561). The court was bolstered in its conclusion by the fact that marital status had been recognized by the Supreme Court of Canada in Miron, supra as, at least in some contexts, an analogous ground to those prohibited grounds of discrimination listed in s.15 (pp. 567 and 571). The court also found persuasive a decision of the Nova Scotia Human Rights Commission, finding that similar provisions under the Nova Scotia Workers’ Compensation legislation regarding the timing of remarriage constituted discrimination on the basis of marital status (pp.570-571).
It was not fatal to the plaintiffs’ claim that there was no evidence that their group (i.e. widows who remarry) was historically disadvantaged or a “discrete and insular minority” - indeed, as acknowledged in Miron, far from causing disadvantage, marriage has historically been an institution upon which the state confers special benefits and privileges (p.568). Much of the court’s analysis focuses on whether the legislation drew a distinction on the basis of marital status, as opposed to some other ground. Having found that it did, the court had comparatively little to say about why that distinction was discriminatory and seems to have simply thought that the distinction made no sense:

That a group of women who remarried and are denied the pension and a group of women who also remarried but are given the benefit - simply because the former remarried prior to April 17, 1985 and not after April 17, 1985, makes the legislation in my view objectively unfair. (P.569)

It may be that this “objective unfairness” was another way of saying that the distinction was clearly irrelevant to the legislation’s legitimate objects (which did not include avoidance of Charter litigation - p.569) and therefore infringed s.15. While this is not spelled out, it would be consistent with what most or all members of the Supreme Court of Canada agreed upon in Miron and Egan.

The parties in Grigg had agreed to argue only the issue of discrimination under s.15 and to leave for a later stage the question of whether any discrimination found by the court could be justified under s.1. That later stage never came because the Provincial government settled the case after the above ruling by agreeing that the distinction based upon the date of remarriage would not be enforced. Thus, at this point all surviving spouses regardless of whether or when they remarry are entitled to retain their survivors’ benefits and receive what the court described in Grigg as “pensions for life.”

With respect to the narrow question considered in Grigg, I think it is very unlikely that the distinction could have been justified under s.1 had the second stage of the case proceeded. While the court only refers in passing to the legislative intention of avoiding Charter litigation (at p.569), I could arrive at no reason for distinguishing between those who remarried before or after April 17, 1985 apart from a belief that the latter group is entitled to Charter protection and the former group is not. Since the court had already ruled that such a belief is incorrect in the course of its s.15 analysis, there would appear to be nothing left for the government to put forward under s.1 to satisfy even the first stage of the Oakes test by showing that the infringement was designed to serve a sufficiently important legislative objective.

However, although I believe that the government would not have succeeded had the s.1 inquiry proceeded, extending “pensions for life” to all surviving spouses was not necessarily the only response to the ruling made in Grigg, and I have been asked to consider whether it would be feasible to reinstate a general provision for termination of benefits upon remarriage.

I am not certain whether the legislature enacted s.19 in its present form (i.e. reinstating benefits for those who remarried after s.15 came into effect) because of a belief that the termination of benefits upon remarriage would be unconstitutional per se. (That may be a point meriting further investigation, although I do not whether any legal opinions on this provided to the government at
the relevant time would be available to the Commission, nor how much relevance they would have in light of the developments in s.15 jurisprudence since they would have been prepared.) It is important to note that this question was not addressed in *Grigg*. Rather, that case, as well as the Nova Scotia Human Rights Commission decision which was followed by the court, dealt only with the *timing* and not the *fact* of remarriage as a basis for differential treatment. Thus, in *Grigg* the court found that distinguishing between those who remarried on different dates was discriminatory; the court did not consider or comment upon whether distinguishing between those who remarried and those who did not would contravene s.15. This appears to be quite a novel issue and I did not find any authority directly on point.

An important underlying issue, whether it arises at the s.15 or s.1 stage, is the proper identification of the reason for the distinction between surviving spouses who have remarried and surviving spouses who have not. In that regard, I think it is important to note that while the workers’ compensation scheme may have a few points in common with insurance and social welfare schemes, it is, as its name might suggest, fundamentally and principally compensatory in its aim. This is consistent with the historic compromise whereby workers gave up their rights (and, in the case of fatalities, their dependants’ rights) to bring common law tort-based actions in exchange for certainty of compensation under an employer-funded no-fault system. (See, for example, *Reference re Validity of Sections 32 and 34 of the Workers’ Compensation Act, 1983* (1987) 44 DLR (4th) 501 (Nfld. C.A.) at pp.509-510; appeal dismissed 56 DLR (4th) 765 (S.C.C.) (Tab 13).)

It is clear that the Workers’ Compensation scheme does not aim to duplicate precisely what would have been recoverable at common law, and courts have noted that the scheme has both advantages and disadvantages for workers. In some cases, more will be recoverable at common law than under the Act and in some cases the reverse will be true. (*Reference re Validity of Sections 32 and 34, supra*, at pp.511-514) The scheme was never intended to be “a total insurer or compensator.” (*Grigg*, supra, p. 557) However, while it does not aim for perfect symmetry between loss and compensation, the actual loss occasioned by a worker’s injury or death is generally at least the starting point for calculation of benefits, and there are relatively few instances where compensation received is not tied to some estimate of actual loss. Thus, for example, survivor benefits are calculated as a percentage of the amount which would have been payable had the worker been permanently disabled, which in turn is calculated as a percentage of the worker’s actual earnings. The amount and distribution of survivor benefits is generally intended to reflect the average allocation of a worker’s earnings between the worker and his or her dependent family members. (Although whether this intention is well served by the current system appears to be open to some question. See, for example, the Ad Hoc Committee Report, supra Part C-30 ff.)

Since the Workers’ Compensation scheme replaces the tort system, it makes sense to consider how the latter treats the issue of remarriage. In the tort context, where *Family Compensation Act* claims have been brought by surviving spouses, deductions are often made to take account of contingencies of remarriage if the court is in the position of trying to predict whether a plaintiff will remarry in the future. Where a plaintiff has already remarried, that fact is invariably considered in assessing the plaintiff’s loss. The idea is, of course, that there should be no recovery in the absence of actual loss, and where a plaintiff remarries, he or she may receive comparable financial benefits to those previously provided by the deceased. However, this is
always a question of fact in all of the circumstances. Thus, no deduction or a very minimal
deduction may be made if the evidence suggests that it is quite unlikely that the deceased will
remarry, and courts will look at evidence of the plaintiff’s individual circumstances as well as
statistical evidence on remarriage in attempting to gauge the likelihood that a plaintiff will remarry
and that the remarriage will be of financial benefit. If remarriage has already occurred prior to
trial, the extent to which that has reduced the plaintiff’s losses must be taken into account and the
plaintiff’s compensation will be reduced accordingly. If there has been no reduction (for example,
because the new spouse is providing no support), there is no deduction. (For examples of
application of these principles, see Bonin v. Robertson [1992] B.C.J. No. 2348 (B.C.S.C.) at
(Tab 4), and the cases cited in K. Cooper-Stevenson, Personal Injury Damages in Canada, 2d
ed. (Toronto: Carswell, 1996) at pp. 710-711 (Tab 28).)

In my view, the common law approach shows that there is a rational basis for distinguishing, at
least to some degree between spouses who remarry and those who do not: in some
circumstances, it will be directly relevant to the extent of the financial loss suffered as a result of a
worker’s death. If the Act’s general aim is to compensate for such loss, remarriage is a relevant
consideration. Unlike the common law, the Act would not require any guessing as to whether a
surviving spouse will later remarry, as benefits would only be affected upon the actual occurrence
of remarriage. However, I think that the common law also illustrates the potential for unfairness
to some surviving spouses if a blanket rule is enacted whereby survivors’ pensions are invariably
terminated upon remarriage. It is a question of fact whether remarriage actually has the effect of
reducing a surviving spouse’s losses. A blanket termination provision, unlike the common law,
would not allow this question of fact to be posed and would undoubtedly result in the termination
of benefits for some people whose loss was unaffected by remarriage. I will discuss this further
below in connection with applicable case law.

I have also considered how other jurisdictions treat remarriage. This is not necessarily
determinative, but courts will often consider this type of evidence in assessing whether legislation
infringes the Charter. (See, for example, Taylor v. Rossu, supra, at p.569.) In this case however,
I do not think that this approach is of much assistance because the other jurisdictions reviewed are
fairly evenly divided in their approach. (As a comprehensive comparative review of legislation in
various jurisdictions was carried out quite recently, I did not conduct original research, but relied
on the report dated May 23, 1997 prepared for the Commission by Perrin, Thorau & Associates,
titled “Comparative Review of Workers’ Compensation Systems and Governance Models -
Final Report” (the “Perrin Thorau Report”). For ease of comparison, I have compiled excerpts
from the report summarizing the survivor benefits provisions from each jurisdiction considered in
that review. These are attached at
Tab 29.)

According to the Perrin Thorau Report, there is a fairly even split between continuance and
termination of benefits upon remarriage, with a slim majority of Canadian jurisdictions favouring
continuance. Among the jurisdictions besides B.C. surveyed in the report, Alberta, New
Brunswick, the Northwest Territories, Prince Edward Island, Oregon, Texas and Washington
provide for termination of benefits upon remarriage. The termination is generally accompanied by
lump sum payments of varying size. Benefits continue after remarriage in Manitoba,
Newfoundland, Nova Scotia, Ontario, Saskatchewan, the Yukon, New Zealand and Sweden. It is
not stated what provision is made in Quebec, Michigan and Germany, and the issue is not applicable in the remaining jurisdictions, Comcare Australia, New South Wales, Queensland and Victoria, which provide for lump sum benefits only. (Some jurisdictions, such as Alberta and Saskatchewan, appear to draw distinctions based on the date of the accident or remarriage. It is not clear whether these distinctions are or will continue to be enforced in light of Grigg, supra.)

It thus appears that either side in a s.15 debate could point to plenty of other jurisdictions which take the approach advocated and these considerations might well cancel one another out. Arguably, the differing approaches have nothing to do with Charter entitlements and instead reflect the different choices to be made between the administrative ease of allowing benefits to continue even though the underlying loss may have abated, and acknowledging that losses often are diminished by subsequent remarriage. The latter approach is likely to save some costs by reducing entitlements, but increase costs because of the need to keep tabs on whether survivors have remarried or entered into common law relationships - a potentially enormous task. I do not have any information on how these costs compare or whether administrative feasibility and cost are driving considerations behind the treatment of remarriage in B.C. or other jurisdictions. While those issues do not bear directly on Charter considerations, the Commission may want to consider the extent to which a provision for termination of benefits on remarriage is administratively workable and cost effective.

As noted, there is no judicial authority on this precise Charter question, so it is difficult to predict on the basis of precedent the outcome of a challenge by surviving spouses whose benefits had been terminated on remarriage. As a first step in the s.15 analysis set out in Andrews and other cases, I think it would be beyond dispute that such a group could show that they had been denied equal benefit of the law. The next stage of the inquiry, whether this denial is discriminatory, is of course more problematic.

While Miron clearly shows that marital status can be an analogous ground to those enumerated in s.15, whether this is so depends upon the context of a given case. In particular, I note that Miron involved the question of discrimination against unmarried individuals while the present issue would involve discrimination against those who were married. It would be difficult for remarried survivors to show themselves to be a “discrete and insular minority,” historically subject to disadvantage and within the contemplation of s.15. That was a key factor in the decision that there was no discrimination in Schachtschneider v. Canada (1993) 105 DLR (4th) 162 (Fed. C.A.) (Tab 15). In that case, the plaintiff claimed that certain provisions of the Income Tax Act discriminated on the basis of marital status because they gave child tax credits to unmarried couples or married couples living apart and the same credits were not available to married couples living together. As a result, the latter group paid more tax. Although the plaintiff was thus denied equal benefit of the law, the court rejected the argument that the distinction in question infringed s.15:

... the group now in issue is composed of married persons with a child of the marriage, living together and not supporting each other. In my opinion, that is not a group that can be described as being disadvantaged in the context of its place in the entire social, political and legal fabric of our society. It follows that it is not a distinct and insular minority within the contemplation of s.15. The distinction made by s.118(1) of the Income Tax Act between married and unmarried persons in those like circumstances is not discriminatory.

(Per Mahoney J.A., at p.174)

JANET CURRIE, Barrister & Solicitor
Notwithstanding the importance of this factor in *Schachtschneider*, authorities are equivocal on this point. For example, I note that in *Grigg*, the B.C. Supreme Court found discrimination even though there was no evidence that the group considered there (which also consisted of married persons, although there they were being distinguished from other married persons) was a historically disadvantaged discrete and insular minority. These two cases illustrate the fact that there is no one test which will prove decisive in determining whether a distinction is discriminatory and courts can reach opposite results on fairly similar considerations.

With respect to some of the other tests which I have outlined above, I note that a distinction based on remarriage is not based upon an immutable personal characteristic. It is also difficult to describe such a distinction as relating in any way to an individual’s dignity and self worth, although this might be done indirectly if one acknowledges that a provision for automatic termination of benefits might make surviving spouses less likely to remarry and thus affect fundamental life choices. As discussed above, the distinction is not “clearly irrelevant to the functional values underlying the legislation.” Thus discrimination is not shown on the basis of most of these tests. However, that does not go so far as to establish that there is no discrimination.

Perhaps the most problematic aspect of a blanket rule requiring termination of benefits upon remarriage is that it makes assumptions about the group in question on the basis of presumed rather than actual characteristics. As noted in cases such as *Andrews* and *Miron*, supra, the more a distinction is based on stereotypical application of presumed group characteristics rather than individual circumstances, the more likely it is to be discriminatory within the meaning of s.15. An assumption that surviving spouses who remarry will receive a comparable level of financial contribution from the new spouse is likely to be untrue for at least some of the group members. On much the same reasoning as was applied by McLachlin J. and L’Heureux-Dube J. in *Miron*, this could provide a basis for declaring such a provision discriminatory, and could also present problems under the s.1 analysis, particularly on the basis of the minimum impairment test. In the latter context courts will consider other ways the legislature might achieve the same ends without as much infringement of Charter rights. A provision allowing for termination of benefits upon remarriage only if survivors do receive comparable financial benefits from new spouses would presumably achieve the same goal (i.e. reducing compensation so that it is more in line with actual loss) without the same degree of impairment of equality rights. I do not know if relevant statistics can be ascertained, but again on the above reasoning in *Miron*, the larger the number of “anomalous cases” of individuals whose loss is not offset by remarriage, the more difficult it would be to justify such a provision under s.1.

While it is difficult to predict with much certainty the degree of likelihood that termination of benefits on remarriage would infringe the Charter, I can at least say that there is some risk that it would and that in my view, the risk diminishes considerably if the legislation leaves room for a surviving spouse to show that his or her loss has not been offset by remarriage and that survivor benefits should therefore remain unaffected. This modification would make the legislation less dependant upon presumed rather than actual group characteristics, thus removing one of the main grounds on which it risks being found discriminatory.
There remains some risk that discrimination might still be found because such a modified provision would create a different procedure and impose additional burdens of proof upon remarried survivors. However, I think that presents a lesser risk of Charter infringement, for many of the same reasons discussed above in connection with the lack of deemed dependency for common law spouses - that is, the distinction has a less severe impact than a total denial of benefits. In any event, if it did infringe s.15, I think that such a modified provision still has an improved chance of being justifiable under s.1. The objective of providing benefits to those who have suffered financial loss as a result of the death of a worker is an important one. On the rational connection test, such a modified provision is clearly connected to the aim of continuing to provide benefits to those surviving spouses whose measure of loss has been unaffected by remarriage. It effects a minimum impairment of Charter rights in allowing the surviving spouse, who has superior information about such matters, to prove continuing loss. And as to proportionality, any impairment of rights created by the additional burden of proof seems relatively minor in comparison with the overall compensatory objectives.

Once again, administrative issues would need to be considered along with the legal question in designing a modified approach. One approach might be to simply include a rebuttable presumption of reduced loss by providing that surviving spouses who remarry will have their benefits terminated unless they can show that the loss of support from the deceased worker has not been offset by support from the new spouse. Rather than treating the issue as simply involving termination vs. continuance of benefits, this might also be combined with a provision for a range of reduction of benefit levels, depending upon the degree to which lost financial support is offset. For example, if a surviving spouse shows that the new spouse has only half the income of the deceased worker, perhaps the survivor’s pension should be cut in half. I think that the more the legislation is tailored to individual circumstances, the less likely it becomes that it would infringe Charter rights, but the more administratively onerous it is apt to become. In that regard, I note that courts do apply “measured deference” to legislative choices among reasonable alternatives which aim to strike a balance between competing concerns.

2.B. Distinctions Based on Sexual Orientation

The first question to consider is how the Act currently treats same sex partners of workers. This is not entirely free from doubt since there is no express stipulation in the Act that workers’ spouses must be members of the opposite sex. However, I think that the most plausible interpretation of the current wording of s.17 would limit spousal survivor benefits to those in heterosexual relationships.

Section 17(3) refers at various points to survivor benefits for a “spouse,” “widow” or “widower.” None of these are defined terms under the Act, but common usage and the fact that there are separate provisions for common law spouses who are expressly labelled as such, suggest that the former terms are intended to refer to the legally married, which would automatically exclude same sex couples. Subsections 17(11)-(13) refer to benefits available to a “common law wife or husband.” “Wife” and “husband” are not defined, but again, on the basis of common usage, I think that these terms would probably exclude people in same sex relationships. (For example, the Random House College Dictionary defines “wife” as “a woman joined in marriage to a man.”)

Section 17(3)(h)(i) also provides for benefits payable to “other dependants” where a worker
leaves no dependent spouse or child entitled to compensation. “Dependant” is defined in s. 1 of
the Act in part as “a member of the family of a worker who was wholly or partly dependant on the
worker’s earnings...” “Member of family” is in turn defined in s.1 as meaning various relatives
who are listed. The only relations of a spousal nature in the list are again “wife” and “husband” so
I think that same sex couples would be excluded here as well. Section 17(17) affords the board
some flexibility in circumstances not specifically addressed by the rest of s.17:

17 (17) Where a situation arises that is not expressly covered by this section, or
where some special additional facts are present that would, in the board’s
opinion, make the strict application of this section inappropriate, the board
must make rules and give decisions it considers fair, using this section as a
guideline.

It may be that the latter provision provides some scope for the provision of survivor benefits to
same sex partners of deceased workers. Even this is open to some doubt, since it is questionable
whether the above interpretations would mean that same sex partners are “expressly covered” in
that they are excluded from the provisions relating to widow(er)s, common law spouses, and
other dependants.

I will assume for the purposes of this discussion that the Act excludes same sex spouses from
entitlement to survivor benefits altogether. Should the Act be interpreted so that benefits are
available to same sex couples under s.17(17), this is wholly discretionary and many of the same
considerations would apply as are discussed above in connection with the distinctions drawn
between legally married and common law spouses. If common law spouses of the opposite sex
are entitled under the Charter to benefits the same benefits as married couples (as I think they
are), then a distinction between mandatory benefits for such individuals as opposed to a discretion
to pay benefits to same sex partners is as likely to run afoul of s.15 as the same distinction
between married and common law spouses discussed above. If s.17 should be modified or
interpreted so that the definition of common law spouses encompasses same sex partners, then all
of the same considerations would apply as are discussed under section 2.A.i., above.

Assuming that same sex couples are excluded from receipt of survivor benefits, the Supreme
Court of Canada considered a somewhat analogous issue in 1995 in Egan, supra. That case
involved a challenge to provisions of the Federal Old Age Security Act providing that certain
allowances are payable to “spouses” of pensioners. “Spouse” was defined in that legislation as
follows:

“spouse”, in relation to any person, includes a person of the opposite sex who is living
with that person, having lived with that person for at least one year, if the two persons
have publicly represented themselves as husband and wife.

Thus the allowance was available only to heterosexual married and common law couples.
The appellants had “since 1948 lived together in a relationship marked by commitment and
interdependence similar to that which one expects to find in a marriage” and met all eligibility
requirements for the benefits, except that they were not members of the opposite sex.

Egan is a landmark decision on the question of distinctions between heterosexual and homosexual
relationships, but due to the split in the reasons, it is very difficult to apply as precedent. The
appellants did not succeed in *Egan*, because four members of the Supreme Court found that there was no discrimination, and a fifth member, Sopinka J., found that while there was discrimination under s.15, it was justified under s.1. The remaining four members found that there was discrimination which was not justified. It is important to note that notwithstanding the result, the Court was unanimous in holding that sexual orientation can be an analogous ground to those enumerated in s.15, and a five member majority found that the provisions in issue did in fact infringe s.15 by discriminating on the basis of sexual orientation. In my view it is difficult to distinguish the legislative exclusion of same sex couples considered in *Egan* from an exclusion from receipt of survivor benefits under the Act. However, it also somewhat difficult to determine how *Egan* should apply to the present issue.

As noted, Mr. Justice Sopinka provided the “swing vote” with his conclusions on the s.1 issue in *Egan*. He emphasized in his fairly brief s.1 analysis (at pp.653-656) that “government must be accorded some flexibility in extending social benefits and does not have to be proactive in recognizing new social relationships” (p.653). His comments appear to take the principle of “measured deference” to legislative choice to unusual lengths, noting that *Egan* marked the first time the Supreme Court of Canada recognized sexual orientation as an analogous ground and this recognition was apt have far-reaching effects which the government was entitled to deal with incrementally.

Given the fact that equating same-sex couple with heterosexual spouses, either married or common law is still generally regarded as a novel concept, I am not prepared to say that by its inaction to date, the government has disentitled itself to rely on s.1 of the Charter. (P.656)

The remaining four Justices who concurred in the result stated in obiter and with relatively little explanation, that if they had found that the legislation infringed s.15, they would still have upheld it under s.1. It is not clear to what extent, if at all, they agreed with the above reasons of Sopinka J. The latter group, represented by La Forest J. in *Egan*, gives the relevance of a distinction a much larger role at the s.15 stage, so that some of the analysis under s.15 concerns matters which the remainder of the Court might be more likely to include under s.1. In that regard, La Forest J. characterized the underlying object of the legislation as according support to married or common law heterosexual couples, a unique social unit as “the only unit in society that expends resources to care for children on a routine and sustained basis” (p. 626). Providing old age spousal benefits to married and common law couples in need was characterized as a means of supporting this form of social unit, which benefits all of society by performing the “critical task” of producing and caring for children (pp. 625-626). While not all heterosexual couples have children, and some homosexual couples do, these were described as exceptions which do not affect the general picture (pp. 626-627). La Forest J. felt that making the benefits available specifically to couples who had children would be too intrusive and difficult to administer (p. 627), so the opposite sex stipulation was an acceptable means of achieving this result in most cases. La Forest J. said that he was unable to find any meaningful basis for distinguishing between homosexual couples and other types of people living together in relationships excluded from the definition of “spouse”, such as brothers and sisters or other relatives. As a result, homosexual couples were not discriminated against, but were “simply included with these other couples.” (Pp.624-627)
L’Heureux-Dube and Iacobucci JJ. writing separately in dissent on the s.1 issue expressed very different views. L’Heureux-Dube J. was particularly critical of the “novel approach to s.1 taken by Sopinka J."

There is a first time to every discrimination claim. To permit the novelty of the appellants’ claim to be a basis for justifying discrimination in a free and democratic society undermines the very values which our Charter, including s.1, seeks to preserve. (Pp.652-653)

Both L’Heureux-Dube and Iacobucci JJ. concluded that the exclusion of same sex couples was not rationally connected to the legislative object of alleviating poverty among elderly couples, nor did it pass the minimal impairment test. Neither felt that the respondent had supplied evidence to show that economic interdependence was sufficiently different in same sex couples than opposite sex couples to justify excluding the latter from the scheme. None of the proportionality aspects of the Oakes test were met.

Sopinka J. does not so much disagree with these dissenting views as he does sidestep the issues they raise by suggesting that the distinction in issue is acceptable for now, albeit that question might need to be revisited at some point in the future when the government has had more time to proceed with its “incremental approach.” As a result, although Sopinka J.’s views on s.1 happened to determine the outcome in Egan, he may be a lone voice in this regard. Since Egan was so recently decided, there have not yet been very many lower court decisions considering how the case should operate as precedent in terms of s.1 analysis, and the cases decided to date do not shed a great deal of light on this.

Rosenberg v. Canada (1995), 127 DLR (4th) 738 (Ont. Gen. Div.) (Tab 14) concerned a challenge to the definition of “spouse” under the Income Tax Act. The applicants were partners in same sex relationships who were employees of the Canadian Union of Public Employees (C.U.P.E.). C.U.P.E. provided a pension plan which was mandatory for all full time employees. The pension plan provided for spousal survivor benefits. Such pension plans must be registered under the Income Tax Act in order for contributions to benefit from tax deferral. When C.U.P.E. amended the definition of “spouse” in its plan to include same sex couples, it sought the approval of the Department of National Revenue for registration of the amended plan. Approval was refused because the definition of “spouse” in the applicable portion of the Income Tax Act included only persons of the opposite sex. The applicants sought a declaration that the latter definition infringed s.15. As in Egan, the Court found that the provision was contrary to s.15 but was justified under s.1.
The issue of discrimination under s.15 was not strictly before the court in Rosenberg because the Attorney General had conceded in light of Egan that the definition in issue did infringe s.15. The court noted the split in reasoning at the Supreme Court of Canada, and expressed doubts about Egan’s value as precedent, suggesting that inferior courts could “go either way” on the s.15 question and still be consistent with the ultimate finding (p.746).

If one considers the strict application of the doctrine of stare decisis, it is debatable whether courts of inferior jurisdiction, in a subsequent case which cannot be distinguished, are bound by the finding made by five of the nine justices on the s.15(1) issue since only one of these five justices formed part of the ultimate majority who governed the outcome of the case. (Page 746)

Despite this concern, the court agreed that the Attorney General’s concession was appropriate and that s.15 was infringed. It then proceeded to quite a brief and cursory s.1 analysis, noting the majority view in Egan that the infringement was justified under s.1 (although this was obiter on the part of the 4 out of 5 members forming the majority who had found no breach of s.15). The court simply found that there was no viable basis for distinguishing Egan and so the majority result was binding upon it.

There may be some scope for distinguishing Egan and Rosenberg at the s.1 stage on the basis of underlying legislative objectives, but I do not regard it as particularly promising. In Rosenberg, the Court noted that the legislative provisions in both Egan and Rosenberg were part of an overall federal retirement scheme aimed at alleviating poverty among the elderly and assuring Canadians of a certain level of income in their retirement years (p.747). As such, it might arguably be characterized as “needs-based” social benefits legislation. In contrast, the Workers’ Compensation scheme aims generally to compensate survivors for financial losses which would have been compensable under the tort system prior to the historic compromise.

At this point, there is some scope for arguing that same sex partners have fewer legally recognized rights to compensation than opposite sex spouses and in particular are not among those entitled to sue in tort upon a partner’s death outside the workers’ compensation context. However, I think that this argument is being eroded by ongoing changes in the law and particularly by the B.C. government’s avowed intention to amend B.C. statutes generally to eliminate distinctions between same sex and opposite sex couples (which may ultimately extend to removing the distinction examined here). This has already been done in the Family Relations Amendment Act, 1997 (s.1(c) (Tab 26) and the Family Maintenance Enforcement Amendment Act, 1997 (s.1(d) (Tab 25), with the result that same sex couples now have the same support obligations toward one another as legally married and common law couples. Same sex couples are still excluded in many other pieces of legislation, including, for example, the Family Compensation Act (Tab 24), which governs for whose benefit wrongful death actions can be brought, but that appears likely to change in the near future.

In Vriend v. Alberta (1996) 132 DLR (4th) 595 (Alta. C.A.) (Tab 19 - headnote only attached) an individual was fired when his employer learned he was homosexual. His complaint to the Alberta Human Rights Commission was dismissed because sexual orientation was not a prohibited ground of discrimination under the governing legislation. He then challenged the constitutionality of the latter legislation arguing that the failure to protect from discrimination on the grounds of sexual
orientation was itself discriminatory and an infringement of s.15. The majority of the Alberta Court of Appeal found that the legislation did not infringe s.15, for reasons I think are distinguishable. The majority’s decision turned on the fact that the legislature had simply remained silent as to sexual orientation, and any discrimination suffered by homosexuals was not caused by the legislation but arose independently of it. Those are questionable conclusions, as noted by the dissent in that case, but in any event, the same considerations would not apply to the exclusion of same sex partners from eligibility for spousal survivor benefits. In the latter case, it is the legislation itself which creates the differential treatment. The dissenting Justice, who did find discrimination, did not apply Sopinka J.’s s.1 reasoning, finding instead that the government had not produced sufficient evidence to meet its s.1 burden, and that the distinction which excluded homosexuals from protection was not rationally connected to the objective of ensuring equal treatment in the employment context.

In M. v. H. (1996), 31 O.R. (3d) 417 (Ont. C.A.) (Tab 10), the claimant was a partner in a same sex relationship who sought support upon breakdown of the relationship. “Spouse” was defined for the purposes of the support provisions under the Ontario Family Law Act as either of a “man and woman” who were married to each other or who had cohabited either for a minimum of three years or, if the couple had children, in a relationship of some permanence. The claimant met all requirements for support entitlement except for the requirement that she and her partner be a man and a woman. The issue was whether the legislation was discriminatory in drawing distinctions between unmarried opposite sex couples and unmarried same sex couples. The majority of the Ontario Court of Appeal held that the legislation infringed s.15 and was not justified under s.1. In finding the legislation discriminatory, the court applied Egan, noting in particular the reasons of Cory J.:

. . . looking at the Act from the perspective of the appellants, it can be seen that the legislation denies homosexual couples equal benefit of the law. The Act does this not on the basis of merit or need, but solely on the basis of sexual orientation. The definition of “spouse” as someone of the opposite sex reinforces the stereotype that homosexuals cannot and do not form lasting, caring, mutually supportive relationships with economic interdependence in the same manner as heterosexual couples. The appellants’ relationship vividly demonstrates the error of that approach. The discriminatory impact can hardly be deemed to be trivial when the legislation reinforces prejudicial attitudes based on such faulty stereotypes. The effect of the impugned provision is clearly contrary to s.15’s aim of protecting human dignity, and therefore the distinction amounts to discrimination on the basis of sexual orientation. (M. v. H., p. 444)

The majority also rejected the argument that Egan was determinative of the s.1 issue, noting that the legislative objectives in issue were different in each case and that this necessitated a separate analysis under s.1 (p.446). In M. v. H., the court identified the legislative goal as providing for the equitable resolution of economic issues that arise when intimate relationships between financially interdependent individuals break down. While that goal was deemed sufficiently important, the exclusion of same sex couples was not rationally connected to it. In fact, the evidence established that “cohabitation between partners who have intimate relationships, regardless of sexual orientation, creates emotional and financial interdependencies” (p.458).
I think that on the weight of current authority, the above distinction between same sex and opposite sex common law spouses is very likely to constitute discrimination within the meaning of s.15. That is consistent with the majority view in Egan as well as most of the cases following that decision.

The inquiry then shifts to whether such discrimination can be justified under s.1. This is somewhat more problematic. The outcome in Egan may be taken to suggest that such distinctions are generally justifiable under s.1, and Sopinka J.’s reasons in that case suggest that courts should give legislatures a good deal of leeway in dealing incrementally with legislative distinctions between same sex and opposite sex couples and should not strike down legislation just because it does not yet acknowledge the “novel concept” of equality for same sex couples. (In this regard, the B.C. legislature is clearly going about addressing this issue and it is arguable that courts should not rush it unduly but should give it an opportunity to weigh various options for legislative amendment.) However as noted, the precedential value of Egan on s.1 is open to question. So far, it has been accepted as binding in the result by the Ontario Court (General Division) in Rosenberg. However, it was not applied and distinctions between same sex and opposite sex couples were held not to be justified under s.1 by the dissent in Vriend v. Alberta and by a majority of the Ontario Court of Appeal in M. v. H. Both of the latter stressed the shortage of evidence from the proponents of the legislation which would justify the distinction, a matter largely ignored by Sopinka J. and those concurring in the result in Egan. While this is not a substantial body of authority to go on, on balance the law to date appears to be more in line with the dissent in Egan.

As a result of the foregoing, I believe that there is a fair chance that denial of survivor benefits to same sex partners would constitute discrimination under s.15 and would not be justified under s.1. This chance is increasing as B.C. legislation provides for support obligations between same sex couples, putting the latter are in a more closely analogous position to opposite couples in terms of legal rights to financial support, a matter which is closely tied in with entitlements to survivor benefits under the Act. The chance will increase further if and when the legislature amends the Family Compensation Act to provide that wrongful death suits can be brought for the benefit of same sex partners. The chance would decrease to the extent that compelling evidence exists to support the distinction, but I am not aware of much evidence in that regard. I note that the Ad Hoc Committee Report has little to say about same sex spouses, except to note that the Board might have to establish a policy to identify factors which will distinguish roommates from spouses (see Part C-58). However, I do not see why this would not be an equal consideration for distinguishing roommates from spouses among cohabiting members of the opposite sex as well.

I also note that the Ad Hoc Committee Report estimates the increased costs resulting from an expanded definition of spouse including same sex partners at between $1,129,000 and $3,388,000 (Part B-5, item 1). While these costs are substantial, lack of affordability is not generally accorded much weight as justification for a distinction, and in any case, and evidence on costs must be strong enough to withstand strict scrutiny by the courts. For example, in both Egan and Rosenberg, evidence on the cost of extending benefits to same sex couples was dismissed as “highly speculative and statistically weak.” (Eg., Rosenberg at p. 748.) As indicated by the range of estimates in the Ad Hoc Committee Report, this is an extremely difficult projection to make with any degree of accuracy, and that difficulty is likely to operate to the detriment of the party seeking to uphold the legislation who bears the onus of proof under s.1.
2.C. Distinctions Based on Age

Subsections 17(3)(a)-(e) of the Act set out a rather complex scheme of survivor benefits whereby the amount payable to the surviving spouse of a worker varies depending upon the age of the spouse, whether the spouse is an invalid and whether there are surviving children. Amounts payable are generally expressed as a percentage of the amount which would have been payable to the deceased worker had the latter sustained a permanent total disability, and the percentage will vary depending on the surviving spouse’s circumstances.

If a surviving spouse is an invalid and/or if there are surviving children, the spouse’s age is irrelevant. However, for non-invalid childless widow(er)s, age is a key determinant for the level of benefits. Non-invalid childless widow(er)s over the age of 50 receive a monthly pension which is equivalent, when combined with federal benefits, to 60% of what the worker would have received on permanent total disability. Non-invalid childless widow(er)s between 40 and 50 also receive a monthly pension which increases incrementally with each year of age. Thus, a 49 year old widow(er) receives slightly more than a 48 year old widow(er), who in turn receives slightly more than a 47 year old widow(er), and so on. The most dramatic dividing line is at age 40. Non-invalid childless widow(er)s under the age of 40 are not eligible for a monthly pension at all and instead receive a lump sum payment. That sum is prescribed by the Act and, unlike the pension, does not vary depending upon the deceased worker’s income or disability benefit level if permanently disabled. As of July 1, 1996, the lump sum amounted to about $36,700. (See report to the Commission entitled “Compensation and the Death of a Worker - A Briefing Paper” dated November 14, 1996, at page 10, footnote 29.)

The general effect is that with a few anomalous exceptions (such as, for example, when a 50+ year old widow(er) dies before amounts received through the pension total $36,700), younger widow(er)s receive less in the way of survivor benefits than older widow(er)s. The most pronounced distinction is drawn at age 40.

Whether the above age distinctions contravene s.15 and are justified under s.1 has been considered by both the Review Board and the Appeal Division, which have reached opposite conclusions on the issue. The Review Board has upheld the distinctions as non-discriminatory under s.15 and in any event justifiable under s.1, while the Appeal Division has disagreed on both points. As a result, individuals who challenge the age distinctions under s.15 will not succeed before the Review Board, but are likely to have such rulings overturned if they appeal to the Appeal Division, which has so far been granting the remedy of awarding non-invalid childless widow(er)s, whatever their age the same amount which those 50 and over receive. The inconsistency of approach between the two bodies has been criticized in a number of submissions made to the Commission. (See, for example, the July 3, 1997 Submission of Kenneth V. Georgetti on behalf of the B.C. Federation of Labour, at p.9 where the inconsistency is criticized for adding “yet more confusion, delay and cost.”.)

I attach copies of Appeal Division Decisions No. 93-1222 (Tab 21) and No. 95-1062 (Tab 22) and excerpts from Review Board Decision No. 951557-A (Tab 23). These are representative of the decisions made by the two bodies on the age discrimination issue. (I have deleted pp.366-390 from Review Board Decision No. 951557-A, as this part relates to whether the Review Board has jurisdiction to declare legislation infringing the Charter of no force or effect.)

JANET CURRIE, Barrister & Solicitor
are some problems with the analyses applied by each body, but I am inclined to agree more with the position reached by the Appeal Division.

The Appeal Division’s Decision No. 93-1222 drew on early s.15 jurisprudence and appears to be based largely on the finding that the age distinction was arbitrary or irrelevant and that it involved stereotyping of younger women (women making up the vast majority of those claiming survivor benefits) as better able to secure their financial futures by remarrying. (See, for example, p. 73.) That needs to be considered in the context of a provision for termination of benefits upon remarriage, a term which was at least partially in effect when the decision came down in 1993 and a provision which may be re-enacted in broader terms. If a surviving spouse’s pension will be terminated upon remarriage, then I think it would make no sense to consider a younger spouse’s prospects for remarriage in deciding the initial pension entitlement. This would strengthen the view that if such prospects underlie the age distinctions, they are irrelevant.

The Appeal Division also applied some principles which I think are quite consistent with the majority views in later s.15 cases like Egan and Miron, although these had been handed down yet at the time. For example, the Appeal Division placed considerable emphasis in its s.15 analysis on age being an “irrelevant personal factor” (p.74), a factor which has been acknowledged as likely to mean that a distinction is discriminatory. The Appeal Division also noted the historic compromise and suggested that in the tort context, younger widows bringing wrongful death claims tend to receive higher awards than older widows (pp.73-74). In some cases, this would no doubt be true because some younger widows might be found to have lost support over a much longer period than some older widows. While this was not considered as such by the Appeal Division in the s.1 context, it might be evidence of a lack of rational connection between the survivor’s age and loss.

In the course of its s.1 analysis, the Appeal Division noted that the objective underlying the age distinction was “less clear and more speculative” than the overall legislative objective of compensating dependent spouses of deceased workers. This illustrates that there may be deficiencies in the evidence about why these age levels were selected, which would make it more difficult for the party bearing the onus of showing justification under s.1. The decision quotes at length from a 1973 report discussing similar age distinctions in a prior version of the Act (at pp. 76-78). The goal was to establish broad categories to acknowledge that not all widows are affected to the same extent, while avoiding an unworkable case-by-case assessment.

The Appeal Division noted that the Act is not a social welfare scheme and entitlements should not generally turn on considerations of financial need. To the extent that the fatality benefits criteria appeared to be based on need rather than compensation for loss, it was “difficult” to find such objectives “pressing and substantial” (pp.78-79). In any case, the Appeal Division considered that the distinctions failed other aspects of the Oakes test, particularly the rational connection test. This appears to have resulted primarily from a lack of solid unequivocal evidence justifying the drawing of distinctions on the basis of age alone. While there is reference to some Statistics Canada information suggesting that younger widows earn more money, the age distinctions used do not correspond exactly to those now used in s.17, the data does not separate widow with children from those without at s.17 does, and “income level does not necessarily determine the degree of financial reliance on the previous marriage” (pp.79-80). If, as seems likely, this is the sort of evidence which was used to decide upon the age distinctions and which could be produced
now to justify them, it appears to leave a number of questions about the relevance of the distinctions open unanswered.

Appeal Division Decision No. 95-1062 cites the foregoing Decision No. 93-1222 and repeats many of the same points. It also places considerable reliance on Silano v. B.C. (Govt.) (1987) 16 B.C.L.R. (2d) 113 (B.C.S.C.) (Tab 16). That case involved a challenge to regulations passed under the Guaranteed Income for Need Act, which provided that support recipients under the age of 26 received lower benefits than those 26 or older. The Court struck down the distinction on the basis that it was discriminatory and was not justified under s.1. The evidence suggested that the distinction was based on the assumptions that younger people generally have greater mobility to seek work and are better able to obtain support from their families while seeking work. The court held that there was “no logical basis” for the distinction, noting that the regulation attributed qualities of mobility and potential for family support to persons under 26 and prescribed absence of these qualities for those over 26, when in fact the converse was true for some individuals and many persons over and under 26 were in indistinguishable circumstances. The court also noted that the cut-off age for support under Family Relations legislation was 19, which thus seemed more “logically referable” than 26 to a young person’s ability to call upon family for financial assistance.

The s. 15 analysis in Silano was quite cursory (pp. 118-120) and, as the Review Board properly notes in Decision No. 951557-A, the case was decided prior to Andrews or any other Supreme Court of Canada s.15 cases, and applied tests which have subsequently been disapproved. While I agree that this calls for some caution in placing reliance on Silano, I think that the decision reached in that case would be supportable on the application of tests which have since been formulated. In particular, the court in Silano considered whether the age distinction was “unreasonable or unduly prejudicial” in the context of deciding whether the distinction was discriminatory under s.15, whereas I think that the better view now is that such assessments are to be undertaken largely at the s.1 stage. However, I note that the court essentially found that the distinction in issue was based on stereotypical presumed characteristics, a factor which remains likely to lead to a finding of discrimination under s.15. Moreover, the lack of a “logical basis” for the distinction which the court found, at p. 120 could just as well be applied to the rational connection portion of the Oakes test, with the result that the distinction would not be justified under s.1.

The Review Board considered a number of Charter cases, including Miron and Egan in Decision No. 951557-A, but in concluding that the age distinctions are not discriminatory, it appears to have placed particular reliance on Law v. Canada (Minister of Employment and Immigration), a Pension Appeals Board decision subsequently affirmed by the Federal Court of Appeal at [1996] F.C.J. No. 511 (Tab 9). (See pp. 398-400 and 411-412. I note that a QL search did not turn up anything regarding an appeal to the Supreme Court of Canada referred to by the Review Board.) Law v. Canada involved a s.15 challenge to quite similar age distinctions in the Canada Pension Plan Act, which provided that survivors’ pensions were payable only to surviving spouses who were 35 or older, or who had dependent children, or who were disabled. Thus non-invalid childless widow(er)s over 35 were entitled to survivor benefits, while non-invalid childless widow(er)s under 35 were not. Both the Pension Appeals Board and the Federal Court of Appeal held that these provisions did not discriminate on the basis of age. It was held that able bodied young surviving spouses without responsibility for young children were not a historically
disadvantaged group and, moreover, that relative youth is “a very relevant characteristic to be taken into account as one factor in determining relative need for survivor benefits.” The Review Board found this persuasive, citing evidence such as labour force statistics which showed that individuals over 45, particularly widows with no children at home, were less likely to be working than their younger counterparts (at p. 407-8).

One potential problem with the Review Board’s approach is that it seems to focus on the surviving spouse’s need for benefits, a factor which was considered of central importance in the context of the “social insurance scheme” in Law v. Canada, but which arguably has less place in the Workers’ Compensation context. There are some exceptional provisions in the Act which arguably focus on need (such as the minimum allowance prescribed in s.17(3)(g) and the provision of pensions for life to surviving spouses even though the worker would most likely have stopped working at some point). However, the primary aim is compensation for loss, as discussed above. While need may at times correspond with loss, this is not invariably true, so that a relevant characteristic for determining need may not be similarly relevant for determining loss. For example, the fact that a younger surviving spouse has less need for benefits because he or she has statistically better odds of finding employment does not necessarily mean that he or she wouldn’t have been financially dependent on his or her spouse.

The Review Board also suggested that the above provisions do not draw distinctions solely on the basis of age:

Although the widow in this appeal points to only the age factor as being discriminatory, disability and the presence of children are other factors which affect entitlement. Eligibility turns upon the interplay of these factors - and is not based solely upon age but on one’s individual situation. (P.410)

This point was also made by the Pension Appeals Board in Law v. Canada. The Review Board went on to characterize the group alleging discrimination as “able bodied, childless widows and widowers under the age of 40” and found that such a group is not historically disadvantaged or an insular minority subject to prejudice. I think it needs to be kept in mind in connection with these two points, that s.17 treats non-invalid childless widow(er)s of a certain age differently than non-invalid childless widow(er)s of a different age. In that respect, it does draw distinctions solely on the basis of the age. I also think that the distinction here is quite analogous to the one considered in Grigg, supra, where remarried surviving spouses of deceased workers were not regarded as a disadvantaged group in comparison to the world generally; however, they were nonetheless subject to discrimination in the context of legislation which treated them differently than remarried surviving spouses whose remarriage had simply taken place on a different date. Characterizing the group disadvantaged by the legislation as able bodied childless widow(er)s of a certain age tends to obscure the point that the legislation distinguishes that group, not from everyone else, but from able bodied childless widow(er)s of a different age - sometimes only a very marginally different age at that.

As noted by both the Appeal Division and the Review Board, most cases regarding age distinctions concern distinctions based on ages which are generally recognized in our society as watersheds or transitional periods, most notably the transition from childhood to adulthood and from working life to retirement. These are of somewhat limited use in the present context, since
the key distinguishing ages of 40 and 50 are not similarly well recognized as corresponding to major life changes. However, I attach the headnote of *McKinney v. University of Guelph* (1990) 76 DLR (4th) 545 (S.C.C.) (Tab 11), one of the seminal early decisions on age distinctions in the s.15 context. While the case concerned mandatory retirement at age for University employees, it is useful for general principles. The majority of the Court found that the distinction was discriminatory and infringed s.15 rights. “Mandatory retirement policies . . . impose a burden, taking away work solely on the basis of a personal characteristic attributed to an individual solely because of his association with a group” (p.546). I think that the same can probably be said of the age distinctions for survivor benefits at the s.15 stage. (The distinction was upheld under s.1 on an analysis which is think is quite specific to the facts of that case.)

In *Tetreault-Gadoury v. Canada* (1991) 81 DLR (4th) 358 (S.C.C.) (Tab 18), the court found that a provision terminating unemployment benefits for claimants over the age of 65 was discriminatory and was not justified under s.1. The court found the legislative distinction similar to mandatory retirement policies and similarly discriminatory in its violation of s.15:

> Both policies make a distinction based upon the same “personal characteristic” attributed to an individual simply because he belongs to the same group of people - namely, that because the individual is over the age of 65, he no longer forms part of the active working population. (P.369)

In its s.1 analysis, the court found that the distinction failed the minimum impairment test.

> Even allowing the government a healthy measure of flexibility in legislating in this area, the complete denial of unemployment benefits is not an acceptable method of achieving any of the government objectives set forth above, all of which could easily be attained by less intrusive means.

It is not so clear whether the Act’s objects could “easily” by attained by measures other than the age distinctions.

A very recent decision considering somewhat similar issues in the Workers’ Compensation context is *Zaretski v. Saskatchewan (Workers Compensation Board)* [1997] S.J. No 319 (Sask. Q.B.) (Tab 20). That case involved a challenge to a provision in Saskatchewan’s Workers’ Compensation legislation providing that when an injured worker reached age 65 loss of income benefits would cease and be replaced by annuity benefits. The plaintiff was 70 years of age. He had been receiving permanent partial disability benefits of approximately $1400 per month and calculated that the annuity benefits available to him after age 65 would only amount to about $70 per month. He gave evidence that had he not been injured, he would have continued working past age 65 out of economic necessity, and he argued that the relevant provision violated his s.15 rights. The court found that the age distinction did constitute discrimination on the basis of tests applied by both McLachlin and L’Heureux-Dube JJ. in *Miron*, as well as the mandatory retirement cases and *Tetreault-Gadoury*, supra.

However, the court went on to find that the discrimination was justified under s.1. On application of the Oakes test, the court first found that that Act’s objectives were reasonable and rational. These were identified as dovetailing lost earnings benefits with retirement benefits available from

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other sources, establishing a fixed termination date to avoid problems of determining when a worker would have retired, and providing compensation based on worker’s loss reflecting normally expected employment and benefit patterns. The court further found that the age distinction was rationally connected to these goals. Unspecified labour force statistics were apparently cited by both sides in support of their positions. Finally, the court found that the minimum impairment and least restrictive means tests were met. This appeared to be based in large measure on the fact that while the compensation benefits were cut off, annuity benefits were payable, despite the substantial difference in amount between the two. In canvassing examples of similar legislation from other jurisdictions, the court noted that where there was no age cut-off, there was generally no provision for annuity benefits. Thus applying “measured deference” to the legislature’s policy choices, the court considered that the legislation struck a reasonable balance.

Zaretski relied in part on approaches taken in similar legislation from other jurisdictions. I think that this sort of consideration would be unlikely to assist in justifying age distinctions in the context of survivor benefits, since B.C.’s approach is definitely in the minority. According to the Perrin Thorau Report (excerpts at Tab 29), only Ontario, Germany and New Zealand have provisions similar to B.C.’s in this regard. Manitoba, New Brunswick, Nova Scotia and P.E.I. have provisions terminating benefits when spouses reach a certain age (65 or older), but otherwise, survivor benefit entitlements do not appear to be tied to age. While this is not determinative, it is apt to make it more difficult to justify B.C.’s approach.

On balance, I think that in light of cases such as McKinney, Zaretski, and Tetreault-Gadoury, as well as a reconsideration of Silano in light of principles subsequently enunciated by the courts, it is very likely that the age distinctions would be characterized as discriminatory and contrary to s.15. Again, the more difficult question is whether such distinctions can be justified under s.1, and this will depend to a large extent on the type of evidence which could be mustered in support of the distinction’s relevance to legislative purpose. While I cannot state with certainty that better evidence is not available, I do not think that the type of statistical evidence considered by the Appeal Division and Review Board in the above decisions would be sufficiently clear, compelling and prefereable to other indicators of a surviving spouse’s financial loss to meet the heavy onus which the government tends to bear under s.1.

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I hope that you find the above of assistance. Thank you very much for referring this matter to me, and please do not hesitate to contact me should you require anything further from me.

Yours truly,

Janet Currie

Encl.
# APPENDIX: Attachments to August 27, 1997 Opinion

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**Administrative Decisions**

- Appeal Division Decision No. 93-1222, 10 W.C.R. 53
- Appeal Division Decision No. 95-1062, 11 W.C.R. 533
- Review Board Decision No. 951557-A, 12 W.C.R. 365

**Legislation**

- *Family Maintenance Enforcement Amendment Act, 1997* - Bill 32 (Excerpt)
- *Family Relations Amendment Act, 1997* - Bill 31 (Excerpt)

**Other**