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Sexual Orientation as a Human Rights Issue in Canada 1969-1985

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Abstract:

Equality is a protean concept. Even if one has taken a position on the equality of opportunity versus equality of outcomes debate, there remains the problem of deciding what equality means in particular contexts: racial equality, equality between the sexes, between those with and without mental or physical disability, and so on. Finally, there is the issue of which groups in society are entitled to "equality", whatever it may mean. Given the open-ended nature of the equality guarantees contained in section 15 of Canada's *Charter of Rights and Freedoms*, it is clear that groups other than those specifically mentioned therein may have claims to assert. This article will address the claims of gays and lesbians to equal treatment under section 15 of the *Charter*.

Which non-enumerated groups will be accorded *Charter* protection is very much a political issue. Organization, numbers, and success in the area of public opinion will all be key factors in determining which groups are recognized and which are not. During the last dozen or so years, gay and lesbian groups have come out of the shadows and entered the political arena in a determined way. They have spent a considerable amount of effort educating the public (and governments) about the discrimination and oppression which they face in all walks of life. In attempting to effect changes in the law, these groups have situated their demands within an ideology of human rights, arguing that one's sexual orientation (whether heterosexual, homosexual or bisexual) is a basic attribute of personhood which should not result in invidious differential treatment in the public or private sphere.' It is further argued that discrimination against gays and lesbians is based on inaccurate stereotypes, which automatically attribute to all gay persons the characteristics that have traditionally been associated with them (gay men as unreliable, lesbians as bad mothers, etc.). In this respect, the parallels with discrimination on the basis of race or sex are clear.

This article will examine the Canadian experience with gay rights as a human rights issue. This material establishes the context within which section 15 will be interpreted. The following two sections will look at legal developments in Quebec and common law Canada, respectively, and the last section will look at public opinion on gay rights issues in Canada since 1969.

Keywords:

Canada, Gay, lesbian, Section 15, Human rights, Quebec, equality, Canada's Charter of Rights and Freedoms

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Sexual Orientation as a Human Rights Issue in Canada 1969–1985

Philip Girard*

1. INTRODUCTION

Equality is a protean concept. Even if one has taken a position on the equality of opportunity versus equality of outcomes debate, there remains the problem of deciding what equality means in particular contexts: racial equality, equality between the sexes, between those with and without mental or physical disability, and so on. Finally, there is the issue of which groups in society are entitled to “equality”, whatever it may mean. Given the open-ended nature of the equality guarantees contained in section 15 of Canada’s *Charter of Rights and Freedoms*, it is clear that groups other than those specifically mentioned therein may have claims to assert. This article will address the claims of gays and lesbians to equal treatment under section 15 of the *Charter*.

Which non-enumerated groups will be accorded *Charter* protection is very much a political issue. Organization, numbers, and success in the area of public opinion will all be key factors in determining which groups are recognized and which are not. During the last dozen or so years, gay and lesbian groups have come out of the shadows and entered the political arena in a determined way. They have spent

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a considerable amount of effort educating the public (and governments) about the discrimination and oppression which they face in all walks of life. In attempting to effect changes in the law, these groups have situated their demands within an ideology of human rights, arguing that one's sexual orientation (whether heterosexual, homosexual or bisexual) is a basic attribute of personhood which should not result in invidious differential treatment in the public or private sphere.¹ It is further argued that discrimination against gays and lesbians is based on inaccurate stereotypes, which automatically attribute to all gay persons the characteristics that have traditionally been associated with them (gay men as unreliable, lesbians as bad mothers, etc.). In this respect, the parallels with discrimination on the basis of race or sex are clear.

This article will examine the Canadian experience with gay rights as a human rights issue. This material establishes the context within which section 15 will be interpreted. The following two sections will look at legal developments in Quebec and common law Canada, respectively, and the last section will look at public opinion on gay rights issues in Canada since 1969.

2. QUEBEC

Quebec is the only Canadian province to date to add "sexual orientation" to the list of prohibited grounds of discrimination found in its human rights legislation.² As the *Quebec Charter of Human Rights and Freedoms* is a constitutional document which prevails over inconsistent provincial laws enacted before or after the *Charter* itself (barring a contrary stipulation in the law), it provides protection against discrimination in the public sector as well as the private sector, unlike other human rights codes in Canada.³ The Quebec Commission des droits de la personne has characterized the motivation of this legislative provision as follows:

1 On the development of the "homosexual identity", see *The Making of the Modern Homosexual*, K. Plummer, ed. (Totowa, N.J.: Barnes & Noble, 1981).

2 It was added to the *Charter* in 1977: S.Q. 1977, c. 6. See now, *Charter of Human Rights and Freedoms*, R.S.Q. 1977, c. C-12, s. 10 [am. S.Q. 1982, c. 61].

3 R.S.Q. 1977, c. C-12, s. 52 [repealed S.Q. 1982, c. 61, s. 16]. Until 1982, the *Charter* prevailed only over laws enacted subsequent to its passage in 1975; after the coming into force of the 1982 amendment, it prevails over all Quebec legislation.

Réticence à accepter le phénomène de l'homosexualité, d'une part, disposition à accepter de traiter la personne homosexuelle en toute égalité d'autre part, telles nous semblent les veurs sous-jacentes aux dispositions législatives qui concernent les homosexuels au Québec.⁴

The rights protected by the Quebec *Charter* are not absolute, but are subject to two limitations. The first is a "reasonable limits" clause similar to that contained in section 1 of the *Canadian Charter*, added to the Quebec *Charter* in 1982:

9.1 In exercising his fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, public order and the general well-being of the citizens of Quebec.

In this respect, the scope of the freedoms and rights, and limits to their exercise, may be fixed by law.⁵

The second limitation is contained in section 20 of the Quebec *Charter*:

A distinction, exclusion or preference based on the aptitudes or qualifications required for an employment, or justified by the charitable, philanthropic, religious, political or educational nature of a non-profit institution or of an institution devoted exclusively to the well-being of an ethnic group, is deemed non-discriminatory.

Similarly, under an insurance or pension contract, a social benefits plan or a retirement, pension or insurance plan, or under a public pension or public insurance plan, a distinction, exclusion or preference based on risk determining factors or actuarial data fixed by regulation is deemed non-discriminatory.⁶

It has been established that the exceptions to the general principle of equality found in paragraph 1 of section 20 are to be interpreted restrictively. In *Assn. ADGQ v. La Commission des Écoles Catholiques de Montréal*, Mr. Justice Beauregard of the Quebec Superior Court (now of the Quebec Court of Appeal) held that

la justification de l'exclusion doit être objective, c'est-à-dire fondée non pas sur une discrétion plus ou moins capricieuse de l'institution mais sur des faits qui

4 Commission des droits de la personne du Québec (C.D.P.Q.), "Les lois applicables au Québec qui concernent les homosexuels", paper presented to the first Quebec symposium on homosexuality, Montreal, April 25, 1980, p. 3.

5 S.Q. 1982, c.61, s. 2.

6 R.S.Q. 1977, c. C-12, s. 20 [am. S.Q. 1982, c.61, s. 6]. Para. 1 formerly read "required in good faith for an employment"; the underlined words were removed in the 1982 amendment, and para. 2 added.

font de l'exclusion une conséquence logique et rationnelle du caractère religieux ou éducatif de l'institution.⁷

The respondent school board had a policy of offering to rent certain of its buildings to the public for events to be held outside of school hours. The applicant gay rights organization had applied to rent a building for a weekend conference, when there would be no children on the premises, and challenged the school board's refusal to rent to them. The court rejected the school board's reliance on section 20, noting that it

a même consenti des baux à des Églises non catholiques et à des partis politiques athées ou agnostiques. En marge de cette exploitation plus ou moins commerciale je ne vois aucune connexité entre le caractère religieux ou éducatif de l'intimée et sa décision d'exclure comme locataire l'association requérante à cause des idées que véhicule cette dernière.⁸

In other words, a party seeking to rely on the exception contained in section 20 has a heavy burden of proof to discharge.

Complaints based on allegations of discrimination on the basis of sexual orientation do not form a large part of the work of the Commission des droits de la personne. They never formed more than 4% of the total caseload of the Commission, as can be seen from the following table.

Table 1

Year	Total no. of files opened	Files opened—sexual orientation	% of total
1978	857	18	2
1979	936	29	3
1980	1412	26	2
1981	987	10	1
1982	609	8	1
1983	402	16	4

Source: Annual Reports of the Commission

7 [1980] C.S. 93 at 94-95. The case has been appealed by the C.E.C.M. but has still not been heard by the Court of Appeal.

8 *Ibid.*, p. 95.

These numbers represent only the files *opened*, not the complaints *resolved*. The great majority of the files opened do not result in any action by the Commission after the completion of a preliminary investigation. This result occurs for the same reasons that most formal complaints of discrimination do not proceed past the preliminary stage: the complainant or the adverse party disappears, the adverse party goes bankrupt, the complainant instructs the Commission to desist, or the preliminary investigation reveals that there is no factual basis upon which to proceed. This state of affairs does not necessarily indicate any flaw in the process or the legislation; it is almost inevitable in any scheme where complaints by individual members of the public are the key which activates the state apparatus.

The cases in which a complainant has actually obtained relief, either through mediation by the Commission or court action, are few in number, probably no more than a dozen since the addition of "sexual orientation" to the *Charter* in December 1977. A few examples will suffice to give an idea of the kinds of cases considered by the Commission.

- In the employment field, two men, one a teacher, were awarded \$10,000 and \$11,500 after being dismissed because of their sexual orientation. Two female teachers fired because they were often perceived as lesbians were awarded \$4,000 and \$3,000.⁹

- A student taking courses toward a diploma in special education alleged that a professor lowered his mark to a failure in a course after discovering that he was gay, as the professor did not believe that gays should teach. After mediation by the Commission, the college awarded the student a passing grade in the course.^{9a}

- A Montreal newspaper, which had published classified ads by gay clubs in the past, refused an ad which it claimed was too overt. The newspaper and the club agreed on the form of the ad after mediation by the Commission.¹⁰

- Two waiters claimed to have been harassed and ridiculed as a result of their sexual orientation by the manager of the restaurant where they worked. The restaurant agreed to pay \$100 to each after the Commission intervened.¹¹

9 *Droits et libertés* (Bulletin de la C.D.P.Q.), vol. 5, no. 5 (May-June 1982).

9^a Dossier M-M 02, 131-1, April 30, 1980.

10 Dossier M-M 02, 325-1, September 7, 1980.

11 Dossier M-M 02, 509-1, 510-1.

- A man seeking employment in a senior citizens' home was not interviewed for a position even though he had experience and none of the other candidates did. The Commission found that the supervisor refused to interview him after discovering that he was gay, and awarded \$300 damages plus \$200 in exemplary damages.¹²

- Two men complained of having been forbidden by the management from dancing together in a bar frequented by heterosexuals. The owner did not deny the act and agreed to pay \$75 to each complainant.¹³

- The Association des Pères Noël, having advertised in 1978 for candidates "N'[ayant] aucune tendance homosexuelle", agreed to alter its ad to read "nonobstant son orientation sexuelle" in 1979.¹⁴

- A transsexual who was refused service and treated abusively by the proprietor of a restaurant was awarded damages by the Provincial Court.¹⁵

Although this last award was actually said to be based on discrimination on the basis of "civil status", the Commission generally considers discrimination on the basis of sexual orientation to include motives relating to homosexuality, heterosexuality, or transsexualism. The Commission has heard complaints from heterosexuals: e.g., a man alleged that his employer, supposedly a homosexual, fired him in order to replace him with a homosexual.¹⁶

One major area of contention—relations between the gay community and the police—does not seem to have occupied any significant place in the Commission's business. Discussion with the Commission's Research Director suggests that complaints of police harassment are more likely to be brought directly before the Police Commission than taken up with the Commission des droits de la personne. The Commission has not been asked to mediate in any disputes between the gay community and the police.¹⁷

The Commission plays an advisory role in the drafting of legislation and regulations which may have a discriminatory impact on groups protected by the *Charter*. In this context, the Commission has

12 Dossier M-NO 01, 263-1.

13 Dossier Q-Q 01, 018-1, 019-1.

14 Dossier M-M 00, 040-257.

15 *C.D.P.Q. v. Anglsberger* (1982), 3 C.H.R.R. D/892 (C. Prov. Que.).

16 Dossier M-M 02, 505-1, December 3, 1980.

17 The author wishes to thank Madeleine Caron, Director of Research at the C.D.P.Q., for taking the time to discuss these matters.

recommended since at least 1980 that gay and lesbian couples be recognised for the purposes of social welfare benefits.¹⁸ The Commission has reiterated these views most recently in response to a draft regulation on factors to be considered in the determination of risk and the notion of spouse for the purposes of pension plans and social welfare benefits, to be promulgated under section 86.8 of the *Quebec Charter*.¹⁹ The draft regulation would recognize heterosexual couples living as *de facto* spouses after two years of *vie commune*, but does not include gay or lesbian couples. It seems very unlikely that the government will alter its proposals in this regard, and one has the sense that the Commission brings up the issue out of a sense of duty rather than because of any deeply-felt conviction. The Commission has not really attempted to analyse whether gay or lesbian couples fit the heterosexual model, or to predict the consequences, financial, social, or political, of its recommendation. Nor has it attempted to survey the gay community to discover whether there is any support for such a move. It has, however, suggested that a global re-thinking of the concept of "family" is needed in this context, which is surely correct given the myriad definitions of the term currently in use in Quebec legislation—dealing with heterosexual family situations alone.²⁰

3. COMMON LAW CANADA

The common perception is that discrimination on the basis of sexual orientation is prohibited only in Quebec, and is thus "permitted" elsewhere in Canada at the provincial level. This is only partly true. British Columbia and Manitoba have both had provisions in their human rights codes for some time which forbid all kinds of discrimination, not just those specifically enumerated, in certain private

18 C.D.P.Q., Service de la recherche, "Remarques relatives à l'élimination de la discrimination dans les régimes d'avantages sociaux et régimes d'assurance des personnes", October 24, 1980.

19 S.Q. 1982, c. 61, s. 21.

20 See François Héleine, "Le concubinage, institution à la merci des politiques législatives des différents départements ministériels" (1980), 40 R. du B. 624; Mirreille Castelli, "La notion de famille et son impact en droit social" (1981), 22 C. de D. 5.

Note also that art. 598 of the Civil Code of Quebec reads: "Any person of full age may, alone or jointly with another person, adopt a child", making it theoretically possible for gays or lesbians to adopt children.

sector activities unless "reasonable cause" exists for the impugned act. B.C. adopted this provision in 1973 and repealed it in 1984.²¹ Manitoba adopted it in 1976 and it still forms part of the law in that province.²²

In *Gay Alliance Toward Equality v. Vancouver Sun*,²³ hereinafter referred to as *GATE*, a B.C. board of inquiry found that the newspaper's refusal to publish an advertisement from the applicant association was an act of discrimination for which no reasonable cause existed. The decisions of the B.C. Court of Appeal and the Supreme Court of Canada are not clear as to whether the board was incapable, as a matter of statutory interpretation, of holding that discrimination on the basis of sexual orientation could not be justified under the "reasonable cause" provision. Robertson J.A. said that

what the Board has done is to add (by some quasi-legislative process which is not a function of the Board) homosexuality to the attributes of persons which are specifically protected in varying circumstances from discrimination. . . .²⁴

This would seem to indicate that the Board could never intervene where discrimination on the basis of sexual orientation was alleged. But Branca J.A. said that

21 *British Columbia Human Rights Code*, R.S.B.C. 1979, c. 186, s. 3. *Human Rights Act*, S.B.C. 1984, c. 22, repealed and replaced the *Code*. Section 3 of the *Code* formerly read as follows:

"3.1(1) No person shall

(a) deny to a person or class of persons any accommodation, service, or facility customarily available to the public; or

(b) discriminate against any person or class of persons with respect to any accommodation, service or facility customarily available to the public, unless reasonable cause exists for such denial or discrimination.

(2) For the purposes of subsection (1),

(a) the race, religion, colour, ancestry, or place of origin of person or class of persons shall not constitute reasonable cause; and

(b) the sex of any person shall not constitute reasonable cause unless it relates to the maintenance of public decency or to the determination of premiums or benefits under contracts of insurance."

22 *The Human Rights Act*, S.M. 1974, c. 65 [am. S.M. 1976, c. 48, ss. 3, 4].

23 [1979] 2 S.C.R. 435, [1979] 4 W.W.R. 118, 10 B.C.L.R. 257 (S.C.C.), affirming [1977] 5 W.W.R. 198, 77 D.L.R. (3d) 487.

24 77 D.L.R. (3d) 487 at 499.

a bias motivated because of the belief . . . that the homosexual engages in unnatural practice or that their sexual practices are immoral or against religion, does not make the conclusion wrong, in the sense that it is unreasonable.²⁵

This suggests that an "honest belief" in the immorality of homosexuality would amount to "reasonable cause" for a discriminatory act, but that in other cases (malicious discrimination, perhaps) a case for discrimination might be made out.

The majority of the Supreme Court did not address this aspect of the issue at all, simply saying that section 3(1) of the *Human Rights Code* did not purport to restrict the freedom of a newspaper to publish what it saw fit.²⁶ The three dissenting judges all found that as a matter of law and fact, the board was entitled to conclude that discrimination on the basis of homosexuality could be discrimination without reasonable cause.²⁷

As only Robertson J.A. of all the judges who heard the case thought (*semble*) that the legislation in question could never cover discrimination on the basis of sexual orientation, it is suggested that the opposing view was a correct interpretation of the legislation. It was commonly believed that the legislation did protect gays and lesbians to a certain extent, as shown in the debates of the B.C. legislature when the provision was repealed in 1984.²⁸ A recent board of adjudication decision in Manitoba, based on a very similar provision, adopted the approach taken by the B.C. board of inquiry in the *GATE* case.²⁹

Thus one province outside Quebec currently provides at least some protection for gays and lesbians in its human rights legislation. But going beyond the provincial level, one finds that at the municipal level a number of cities have added "sexual orientation" to the list of the grounds on which they agree not to discriminate against their employees. The City of Toronto by-law reads as follows:

25 *Ibid.*, p. 494.

26 [1979] 2 S.C.R. 435 at 454-456, *per* Martland J. For comments on the *GATE* case, see W.W. Black (1979), 17 *Osgoode Hall L.J.* 649; H. Kopyto (1980), 18 *Osgoode Hall L.J.* 639 (*Counsel for GATE in the S.C.C.*); R.A. Goreham (1981), 59 *Can. Bar Rev.* 165; J. Richstone and J.S. Russell (1981), 27 *McGill L.J.* 92.

27 *Per* Laskin C.J.C., Dickson and Estey JJ.

28 B.C. Leg. Debates (May 3, 1984) at 4491-4492.

29 Manitoba Human Rights Commission, "Proposed Manitoba Code of Human Rights" (1985), 6 *C.H.R.R.* C/85-1.

Employees of the City of Toronto are to be in no way discriminated against in regards to hiring, assignments, promotion or dismissal on the basis of their sexual orientation. 'Sexual orientation' is understood to include heterosexuality, homosexuality and bisexuality.³⁰

This by-law dates from 1973, making Toronto the first city in Canada to adopt a policy of non-discrimination on the basis of sexual orientation. Other cities to follow were Ottawa (1976), Windsor, Ontario (1977) and Kitchener (1982).³¹ Such action on the part of local elected officials is significant in that it represents a considerable amount of support for equal employment rights for gays and lesbians at the "grass roots" level of politics, supposedly the repository of antipathy toward all gay issues.

Turning to the human rights commissions themselves, all provincial commissions west of Quebec, and the Canadian Human Rights Commission, have recommended that sexual orientation be added to the prohibited grounds of discrimination in their respective jurisdictions.³² Ontario first made its recommendation in 1977, the Canadian Human Rights Commission in 1979, and Commissioner Gordon Fairweather has vigorously put the case for the extension of the *Canadian Human Rights Act* on several occasions before Parliamentary committees.³³ The Manitoba and Alberta commissions added their voices in 1984, although the Alberta government has already made it clear that it will not proceed with the recommendation.³⁴ The Manitoba government is currently vacillating on the issue, and the prospects for the amendment there do not look bright.

Thus it is incorrect to portray Quebec as the sole jurisdiction in Canada where there is political support for viewing gay rights in a human rights perspective. A number of cities have prohibited discrimination in employment on the basis of sexual orientation, and most human rights commissions—staffed by people who are paid from the public purse to defend and promote human rights in Canada—have agreed that action should be taken. It is quite true to say that at the level of provincial politics there does not seem to be great enthusiasm for taking the recommended action. When a political

30 Quoted in *The Body Politic*, no. 99, December 1983, 13–14.

31 *Ibid.*

32 Source: annual reports of the commissions.

33 E.g., Can. H. of C. Standing Committee on Justice and Legal Affairs, *Proceedings*, No. 115, December 21, 1981, at p. 45.

34 "Bill of rights for homosexuals refused," *Globe and Mail*, April 22, 1985, p. 5.

party such as the NDP, which is avowedly in favour of banning discrimination on the basis of sexual orientation, fails to take action when it forms the government of a province, one can see that the political issue in question is indeed one which governments would rather avoid.

The common wisdom is that "the public" are "not ready" for such a step. Who comprises this "public" is never made clear. The next section tries to present an overview of Canadian public opinion on the issue of gay rights.

4. GAY RIGHTS AND PUBLIC OPINION IN CANADA

While public opinion polls are perhaps not the best method of arriving at answers on difficult questions of social policy, they nonetheless provide some evidence of changing attitudes toward homosexuality in Canada. A 1977 Gallup Poll found that 52% of Canadians supported the protection of homosexuals from discrimination in employment and access to public services under the *Canadian Human Rights Act*.³⁵ Thirty per cent (30%) were opposed and 18% expressed no opinion. In 1979 a poll conducted for the Canadian Human Rights Commission found that 68% of respondents agreed that a "self-acknowledged homosexual" who possessed better qualifications than other candidates should be hired by the RCMP as a national security agent.³⁶ Twenty-five per cent (25%) disagreed and 7% had no opinion.

Perhaps most interesting of all is a poll on religious practices and attitudes conducted by a University of Lethbridge sociology professor in 1980, which found that $\frac{2}{3}$ of the respondents disapproved of homosexual relations (only 15% thought they were "not wrong at all") but that $\frac{2}{3}$ also believed that homosexuals should have the same rights as heterosexual Canadians.³⁷ In other words, Canadians may be willing to tolerate equal rights for homosexuals even though they think homosexuals are morally misguided. This is an important distinction which politicians tend to obliterate by equating disapproval

35 Reproduced in Gays for Equality (Manitoba), *Digest on Gay Rights* (Winnipeg, 1983), p. 29. But note the cautionary remarks contained in Marjorie Ward, *Sexual Orientation—A Policy Planning Report* (prepared for the Canadian Human Rights Commission, 1979), p. 23.

36 Reproduced in Gays for Equality, *Digest on Gay Rights*, p. 30.

37 Reproduced *ibid.*, p. 33.

with intolerance. Tolerance and disapproval *can* co-exist—indeed, that is the basic premise of the entire law of human rights, that society must *tolerate* diversity in certain areas of life even though it does not *approve* of all the forms which that diversity make take.³⁸

This point is reinforced when one looks at the way in which the positions of various Canadian churches have evolved on the issue of homosexuality over the last decade or so. The House of Bishops of the Anglican Church of Canada issued a statement in 1978 to the effect that

[t]he gospel of Jesus Christ compels Christians to guard against all forms of human injustice and to affirm that all persons are brothers and sisters for whom Christ died. We affirm that homosexual persons are entitled to equal protection under the law with all other Canadian citizens.³⁹

The United Church of Canada has taken a similar stance, and has made submissions to the Ontario Human Rights Commission in 1976 and to the federal government in 1977 supporting the idea that “homosexual persons are entitled to equal protection under the law with all other Canadian citizens.”⁴⁰ This does not mean, of course, that either of these churches has achieved a consensus on the morality of homosexual conduct—this remains a source of spirited and sometimes anguished debate in most Christian churches at present. The United Church in particular has recently gone through a very trying period during which the General Council of the Church rejected the recommendation of its Division of Ministry Personnel and Education that “in and of itself, sexual orientation should not be a factor determining membership in the order of ministry of the United Church of Canada.”

38 The Supreme Court of Canada recently made this distinction in the context of the community standards test for obscenity. In *Towne Cinema Theatres v. The Queen*, [1985] 1 S.C.R. 494, 37 Alta. L.R. (2d) 289, [1985] 4 W.W.R. 1, 45 C.R. (3d) 1, 59 N.R. 101, 18 C.C.C. (3d) 193, 18 D.L.R. (4th) 1 (S.C.C.), Dickson J., speaking for all members of the court on this point except Wilson J., said at p. 13 (D.L.R.), “What matters is not what Canadians think is right for themselves to see. What matters is what Canadians would not abide other Canadians seeing because it would be beyond the contemporary Canadian standard of tolerance to allow them to see it.”

39 *Canadian Churchman*, Vol. 105, No. 3, p. 1 (March 1978).

40 “Human Rights for Homosexual People” *Issue 27, December 1982*, p. 11 (*Issue* is a publication of the Division of Mission in Canada of The United Church of Canada).

Additional concrete evidence of "public opinion" on the issue of gay rights can be found within the trade unions. As statistics on anti-discrimination clauses in collective agreements are not collected in any systematic way in Canada, it is impossible to give an accurate picture of the numbers of workers who are already protected by such clauses. However, numerous large unions and labour federations support the principle of non-discrimination on the basis of sexual orientation, including the Canadian Labour Congress, the Ontario Federation of Labour, the Canadian Union of Postal Workers, the Saskatchewan Federation of Labour, the Canadian Association of University Teachers and various locals of the Canadian Union of Public Employees.⁴¹ Many employers have declared that they do not discriminate on the basis of sexual orientation (or are bound not to by collective agreements): Air Canada, Atomic Energy of Canada Ltd., CBC/Radio Canada, T. Eaton Co. Ltd., Hudson's Bay Co., Bank of Montreal, Bank of Nova Scotia, Bell Canada and most Canadian universities, to name only a few.⁴²

It will be noted that various federal and provincial public sector employers have already bound themselves not to discriminate on the basis of sexual orientation. If such a policy is acceptable on an *ad hoc*, agency-by-agency basis, why is the general principle considered so threatening?

One assertion that is often made in this context is that "the public will not accept gay/lesbian teachers." In fact the public does already "accept" them, in the sense that many teachers' unions and federations across the country already oppose discrimination on the basis of sexual orientation, and some have clauses in their collective agreements forbidding such discrimination. In 1982 the Canadian Teachers' Federation adopted an "equal opportunity" policy declaring that it was opposed to discrimination against students or teachers, and to stereotyping, on the basis of, *inter alia*, sexual orientation.⁴³ In early 1985 I surveyed CTF member associations in order to determine how many supported this policy, and how many already had anti-discrimination clauses in their collective agreements. No reply was received from Saskatchewan, New Brunswick or the Northwest Territories, but of the remaining respondents, only three teachers' associations did

41 See Ward, *supra*, note 35 at pp. 76-85 and the *Digest on Gay Rights*, *id.*, pp. 11-22.

42 *Ibid.*

43 *Canadian Teachers' Federation: Its Objectives, Its Policies 1984-85* (Handbook available from CTF).

not support this aspect of CTF policy: the Nova Scotia Teachers' Union, the Ontario English Catholic Teachers' Association, and the Ontario Public School Teachers' Federation. Those associations which did support it represented over 100,000 teachers across the country, and this does not include the teachers in Quebec who are protected under the Quebec *Charter*. Clauses explicitly forbidding discrimination on the basis of sexual orientation in collective agreements were rare, but there were some: six out of 78 agreements in B.C. were reported to have such clauses.⁴⁴ Such clauses are not the only way in which teachers are protected: some school boards, such as the Toronto Board of Education, have an established policy of non-discrimination on the basis of sexual orientation.⁴⁵ Others have exactly the opposite policy: the representative of the Alberta Teachers' Association indicated that the Alberta School Trustees' Association has a policy advocating that homosexual employees be dismissed. None of the respondents thought that teachers were currently being denied jobs because of their sexual orientation.⁴⁶

Finally, no account of public opinion could be complete without some reference to editorial opinion in the country's major newspapers. Many of these have supported the extension of human rights legislation to homosexuals. The *Edmonton Journal* said that by adding "sexual orientation" to the federal and provincial human rights codes, "we are not granting rights, we are simply restoring them."⁴⁷ In response to the firing of John Damien by the Ontario Racing Commission in 1975, the *Toronto Star* said that "[a] government which preaches against discrimination by private employers while practicing it against its own employees, is guilty of rank hypocrisy," and urged that full civil rights be extended to homosexuals.⁴⁸ The *Montreal Gazette* called the action of the Hon. Ron Basford "unjust, embarrassing and just plain chicken" when he refused to add "sexual orientation" to the *Canadian Human Rights Act* in 1977⁴⁹, and the *Montreal Star* echoed

44 Letters on file with the author.

45 "Gay rights are upheld by board", *Globe and Mail*, February 25, 1981. The board does not countenance the proselytization of homosexuality within its jurisdiction, but that is understood not to preclude discussion of homosexuality when conducted by teachers or board staff as the subject arises out of the curriculum.

46 Although the Alberta respondent added, significantly, "they probably would be if they advertised a homosexual orientation."

47 "Discrimination", March 29, 1976.

48 February 19, 1975.

49 "Lesbians need rights too," May 20, 1977.

these sentiments.⁵⁰ Even the *Toronto Sun*, not noted as especially avant-garde on social issues, has advocated that homosexuals have the basic rights of all citizens.⁵¹ Newspapers in middle-sized cities such as Windsor, Ontario and London, Ontario supported the recommendation of the Ontario Human Rights Commission to amend the *Ontario Human Rights Code* to prohibit discrimination on the basis of sexual orientation, as did a number of newspapers in smaller centres.⁵² Some newspapers have expressed caution about "absolute" equality for gays, wondering about "sensitive" professions like teaching, but have still supported the general principle of equality.⁵³

Overall, the idea that the individual has a basic human right to pursue his or her sexual orientation has become almost a commonplace in Canada since 1969, if one is to judge from the sources canvassed here. It is true that some parts of the public have reservations about equal rights for homosexuals because they "cannot foresee exactly what granting [equality] would mean,"⁵⁴ or are concerned about particular professions. But the general principle that one's sexual orientation does not justify discrimination in the private or public sphere seems to have become well-established in Canadian public opinion.⁵⁵

50 "Homosexuality," June 13, 1977.

51 "Not so 'Gay,'" July 5, 1977.

52 "Expanding the Human Rights Code," *London Free Press*, July 23, 1977; "Realistic approach to human rights," *Windsor Star*, July 22, 1977.

53 E.g., *Peterborough Examiner*, July 22, 1977; *Bancroft Times*, July 27, 1977; *Times-News* (Thunder Bay), July 29, 1977; *Sun-Times* (Owen Sound), July 30, 1977. Some opposed the change: *Canadian Statesman* (Bowmanville), July 27, 1977; *Independent* (Kincardine), July 27, 1977.

54 "Security for homosexuals," *Globe and Mail*, July 26, 1977.

55 The most recent evidence on this point may be found in the *Report of the Parliamentary Committee on Equality Rights* (Ottawa: Queen's Printer, 1985), which concluded that "'sexual orientation' should be read into the general open-ended language of section 15 of the *Charter* as a constitutionally prohibited ground of discrimination" (at p. 29).

