

**Working Against Discrimination
The Amendment to the Canadian Human Rights Act
The Facts**

May 1996

1. WHAT IS THE CANADIAN HUMAN RIGHTS ACT?

The federal government, as well as every province and territory in Canada, has human rights legislation. The Canadian Human Rights Act (CHRA) applies to the federal government and to federally regulated businesses like banks, railways, airlines and telecommunications companies. CHRA governs principally employment and the provision of goods and services in each of those sectors. It covers about 10 per cent of the Canadian workforce.

The rest of the Canadian workforce is covered by the provincial and territorial human rights codes. The vast majority of retail businesses, manufacturing industries and residential accommodations are dealt with by provincial and territorial human rights laws.

The CHRA does not apply to religious, cultural or educational institutions. These are not under federal jurisdiction.

The CHRA sets out certain fundamental characteristics, or "grounds", of discrimination that are against the law. That list includes, for example, race, colour, religion, age, sex, marital status or family status, and disability. The CHRA also sets out the procedures for handling complaints lodged under the CHRA.

2. WHAT IS THE DIFFERENCE BETWEEN THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS AND THE CHRA?

The CHRA is a federal law. It enables an individual to seek recourse against his or her employer when the citizen is fired or treated improperly in the workplace, or when denied goods and services. On the other hand, the Canadian Charter of Rights and Freedoms (the Charter) is part of the Constitution and, therefore, applies to all laws, including the CHRA. The Charter enables individuals to challenge the laws of the country, including the laws governing employment, when individuals believe their rights have been violated. The CHRA must comply with the Charter.

The Charter applies to all levels of law and government activity, but does not apply to private employers and service providers. For example, the CHRA would apply to the employment decisions of a private airline; the Charter would not.

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3. WHY ARE WE ADDING "SEXUAL ORIENTATION" TO THE CHRA?

First, and most important, the amendment expressly allows someone who has been fired from his or her job with a federal business, or denied a service by such a business because he or she is gay or lesbian, to file a complaint of discrimination.

This is a matter of fundamental fairness, and it is required to conform with the Charter.

Second, the Supreme Court of Canada held unanimously in Egan v. Canada that sexual orientation is a prohibited ground of discrimination under the equality provision, section 15, of the Charter. But the Charter does not apply to private companies in federally regulated industries.

The CHRA does apply. Therefore, we must amend the CHRA to expressly give this basic protection to gays and lesbians in the private sector workplace.

Third, we are catching up to the provinces. This kind of discrimination is expressly prohibited in eight provinces or territories that have already amended their human rights legislation to include sexual orientation: Quebec, Ontario, Manitoba, Yukon, Nova Scotia, New Brunswick, British Columbia and Saskatchewan.

Fourth, it is necessary to bring the text of the CHRA into conformity with the Charter. The Ontario Court of Appeal ordered in Haig v. Canada that the CHRA should be treated as though sexual orientation were already a prohibited ground of discrimination. If not for the decisions of the courts regarding the CHRA, an individual fired from a job with, for example, a private airline or railway, for being gay or lesbian, would have no recourse under human rights legislation. It should not be left to the courts to make policy or rewrite statutes. That is the role of Parliament. It is time to put the words into the statute to bring it into conformity with our Charter and our commitment to fundamental fairness.

In any event, we cannot be certain that any court or tribunal will decide any upcoming case regarding workplace discrimination or provision of goods and services in a particular way. For example, in Yriend v. Alberta, the Alberta Court of Appeal recently held, in disagreement with Haig v. Canada, that sexual orientation should not be read into Alberta human rights legislation. This current uncertainty is unfair to gays and lesbians who, like all Canadians, deserve equal protection in the federally regulated workplace. This amendment is intended to codify that protection.

The right of gays and lesbians to be free of discrimination is not an abstract or theoretical matter; it is very real for the men and women who face these barriers. What parent could argue that a son or daughter who is gay or lesbian should have less protection from workplace discrimination, or less access to services, than anyone

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else? This issue should be considered in light of the reality that it could be anyone's son or daughter who is gay or lesbian: what would one's reaction be in those circumstances?

4. WHAT EVIDENCE IS THERE THAT THERE IS DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION?

There are complaints made every year to provincial and federal human rights bodies about discrimination in the hiring, firing and employment of gays and lesbians. These complaints have nothing to do with same-sex benefits; they deal with gays and lesbians getting and keeping their jobs. There is other evidence that gays and lesbians suffer discrimination. Sexual orientation is a widely ignored risk factor for suicide. Studies show that youths, both male and female, who are homosexual are two to three times more likely to attempt suicide than non-homosexual youths.

Over 75 per cent of those young people who attempt suicide give "conflict resulting from their sexual orientation" as the prime reason. This is symptomatic of the negative environment in which gays and lesbians grow up in our country. It is an environment that leads these young people to believe that life itself is not worthwhile. The amendment is a small step in addressing this problem. If the amendment diminishes the factors that lead to these elevated suicide rates and saves even one life, then it is worthwhile.

5. WILL THIS CHANGE HAVE A NEGATIVE IMPACT ON THE TRADITIONAL FAMILY?

No. It in no way detracts from the importance Canadians place on strong, healthy families in our society. The Government will continue to support the role of the family in our society through legislation and policy. The proposed amendment will have no bearing on definitions of "marriage", "family" or "spouse." It will simply guarantee individual rights.

"Sexual orientation" includes both homosexuality and heterosexuality; it does not condone or condemn either one.

Furthermore, matters such as adoption fall primarily within provincial jurisdiction, not federal. This amendment does not deal in any way with the matters covered in Bill 167 proposed by the Ontario Government in 1994.

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6. WON'T THIS AMENDMENT LEAD TO BENEFITS FOR SAME-SEX PARTNERS?

No. The amendment will not extend same-sex benefits to partners of gays and lesbians.

The issue of benefits for same-sex partners under the CHRA and the Charter is before the courts and tribunals in any event, and whether or not the amendment is made, those cases will be decided as the courts and tribunals see fit. Furthermore, in Egan v. Canada, the Supreme Court of Canada held unanimously that sexual orientation is a prohibited ground of discrimination under the equality provision, section 15, of the Charter. But the Court also held that such discrimination did not support the extension to same-sex partners of the pension benefits which were in issue in that case.

Eight of the provinces and territories prohibit discrimination on the grounds of sexual orientation. Although the prohibitions have been around for 20 years in some cases, these provisions have not led to the automatic extension of benefits to same-sex couples.

7. WON'T IT GIVE "SPECIAL RIGHTS" OR "BENEFITS" TO GAYS AND LESBIANS?

No. No one could credibly argue that the federal and provincial human rights legislation now confers "special rights" on Catholics, on husbands, or on those with disabilities. Although each of those characteristics are now expressly covered by the existing statutes, it is obvious that no such "special rights" are conferred. It would be no different for sexual orientation.

The amendment will prohibit discrimination in areas of federal jurisdiction, including employment and access to goods and services. For example, if not for the decisions of the courts regarding the CHRA, an individual who was fired from his or her job with, for example, a private airline or railway, for being gay or lesbian would have no recourse under human rights legislation. Nothing in the amendment threatens the merit principle, or limits an employer's right to make a decision on the basis of merit.

This simple amendment does not in any way deal with the matters covered in Bill 167 proposed by the Ontario government in 1994. Matters such as adoption fall primarily under provincial jurisdiction, not federal.

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8. WON'T THIS CHANGE THE DEFINITIONS OF "MARRIAGE", "FAMILY", AND "SPOUSE"?

No. No changes to the definitions of "marriage", "family" or "spouse" are planned or necessary as a result of this amendment.

9. WON'T THIS LEAD TO ADOPTION FOR SAME-SEX COUPLES?

No. Matters such as adoption fall primarily under provincial jurisdiction, not federal. This amendment does not deal in any way with the matters covered in Bill 167 proposed by the Ontario Government in 1994.

Secondly, this amendment deals with discrimination in employment, accommodation and provision of services; nothing else. It does not condone or condemn either homosexuality or heterosexuality.

10. WILL THIS LEGALIZE PAEDOPHILIA?

No. Paedophilia is not a sexual orientation. It is a crime. And it is a crime regardless whether the offender is heterosexual or homosexual.

The claim made by some that paedophilia may be covered by the term "sexual orientation" has absolutely no grounding in logic or law. The term "sexual orientation" has been included in provincial human rights codes for nearly 20 years. It has never been used as a defence against criminal charges of paedophilia. There is no danger that paedophilia would, under any circumstances, be protected under human rights legislation.

11. WON'T THIS MEAN THE GOVERNMENT WILL HAVE TO AMEND 40 OR 50 OTHER FEDERAL STATUTES?

No. This amendment does not deal with benefits for same-sex partners. No other changes to federal legislation are planned or necessary as a result of this amendment. The issue of benefits for same-sex partners under the CHRA is already before the courts and tribunals. Whether or not the amendment is made, those cases will be decided, and the relevant statutes considered, as the courts and tribunals see fit.

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12. WILL THIS AMENDMENT MEAN THAT THE TEACHINGS OF CHURCHES AND RELIGIOUS SCHOOLS ON SEXUALITY WILL NOW BE CHALLENGED AS DISCRIMINATION?

No. Churches, religious organizations and schools are not under federal jurisdiction. The amendment to the CHRA will not affect the way they teach or operate.

13. WILL THIS AMENDMENT MEAN THAT CHURCHES AND RELIGIOUS SCHOOLS WILL NOW BE FORCED TO HIRE GAYS AND LESBIANS AS TEACHERS EVEN IF THAT IS CONTRARY TO THEIR CHURCH'S TEACHINGS?

No. Churches, religious schools and other religious organizations are not within federal jurisdiction. The amendment to the CHRA will not affect the way they operate.

In any event, an employer will still be able to refuse to hire on reasonable and justifiable grounds in the circumstances. For example, the Supreme Court of Canada has held that it is reasonable and justifiable for a Catholic school to require that the religious views of its instructors conform with the views of the Church.

14. WHY IS THE GOVERNMENT ACTING NOW?

The Liberal Party of Canada agreed a long time ago that discrimination on the basis of sexual orientation should be prohibited. The amendment has been a policy of the Liberal Party for nearly 20 years.

The Liberal Party passed a resolution in 1978 that urged that a revised Canadian constitution guarantee fundamental human rights so as to prohibit discrimination by virtue of, among other things, "sexual preference."

In 1985, the Liberal Party participated in an all-party House of Commons Committee that unanimously passed a resolution that this amendment should be made.

Most recently, a resolution supporting this amendment was passed at the Liberal Party of Canada 1994 Biennial Convention.

The amendment was promised by the Prime Minister in the last federal election. He made this commitment in a July 1993 letter to the gay and lesbian gay rights group EGALE, and reiterated that commitment in writing during the 1993 election campaign.

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Members of the Government have restated the commitment numerous times since the election.

15. DO CANADIANS SUPPORT THE ELIMINATION OF THE DISCRIMINATION AGAINST GAYS AND LESBIANS?

An Angus Reid public opinion poll released in October 1994 provided further illustration of the fact that Canadians believe that discrimination against gays and lesbians is wrong.

Fully 81 per cent of respondents to the survey stated that they would be bothered if a lesbian or gay colleague experienced discrimination in the workplace. Similarly, 81 per cent indicated their belief that gays and lesbians experience discrimination in the workplace. Moreover, 48 per cent of Canadians stated that they personally knew someone who was gay or lesbian, 36 per cent stated that they had a gay or lesbian friend, 12 per cent stated that they had a gay or lesbian co-worker, and 12 per cent said that they had a family member who is gay or lesbian.

There has never been a published poll showing that a majority of Canadians oppose prohibiting discrimination on the grounds of sexual orientation.

16. HOW WILL THE GROUND OF "FAMILY STATUS" BE INTERPRETED?

In 1993, the Supreme Court of Canada decided in Canada (Attorney General) v. Mossop that "family status" does not include same-sex relationships. That was the decision of the Court then, and it remains the law now.

Mr. Justice La Forest, who joined in the ruling that "family status" did not include same-sex relationships, wrote that:

No one denies that the dominant conception of family is the traditional family... I recognize, however, that particularly in recent years the word is loosely used to cover other relationships. The appellant here argues that "family status" should cover a relationship dependent on a same-sex living arrangement. While some may refer to such a relationship as a "family", I do not think it has yet reached that status in the ordinary use of language.

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Chief Justice Lamer came to the same conclusion: namely, that "family status" does not include same-sex relationships. Sexual orientation was not in the Act at the time the facts arose. Chief Justice Lamer speculated that his view might have been different if sexual orientation had been a ground. However, his remarks were *obiter dicta* - they were not part of the ruling, nor relevant to the determination of the case.

Last year, the Court ended the Chief Justice's speculation. In the *Egan v. Canada* case, the Supreme Court of Canada held that sexual orientation is a ground of discrimination in the Charter. The Court decided the issue of benefits for same-sex relationships only as a matter of sexual orientation. The ground of "family status" was not involved. It is clear now that there is simply no need to reopen the definition of "family status."

The point is that the amendment in Bill C-33 does not change the law on benefits. Sexual orientation is already in the law by court order. This amendment would only make express what is already there. The issue of same-sex benefits is already before the human rights tribunals and courts. The amendment will not change this.