

# **The Challenges in Expanding Workplace Equity Policy: The Case of Sexual Diversity<sup>1</sup>**

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## **Abstract**

Employment equity policy in Canada has routinely focused on demographic representivity, and on four “designated” groups – women, visible minorities, people with disabilities, and Aboriginals. Inequities based on sexual diversity raise questions about the need to expand conceptions of proactive workplace equity, and complicate our approaches to creating inclusivity. Counting itself is challenging for a minority group that remains invisible in part at least. Strategies going beyond formal representivity also raise important questions about intersectionality as well as the potential conflict arising from workplace rights based on sexuality and faith.

No one doubts that achieving full equity in workplaces requires much more than legislation and formal institutional policy. Anyone with experience in advocating equity would be among the first to recognize that formal steps are critical, but often only first steps, or vehicles of legitimation for the long haul on the ground.

Most advocates also recognize that inclusivity requires more than numerical representation. Aiming for “demographic” diversity in workforces, as well as positions of influence, has unquestionable importance. It contributes toward a broadening of opportunities for population segments that have experienced historical marginalization, and potentially deepens the socio-economic and political meaning of recognizing difference. It affords an opportunity to argue that workplace equity has utility for the institution, whether it be in expanding markets, diversifying clientele, expanding recruitment talent pools, or enlivening the exchange of ideas about how the institution can improve what it does. And finally, it has the potential for creating role models, encouraging others (particularly young people) from that demographic pool to imagine a broader range of career options than they otherwise would.

There are, however, risks for policies (encoded at the institutional level or in legislation) that focus on numerical representation.<sup>2</sup> Employment equity statutes at the federal and provincial levels lean in this direction, even those that do not imply quotas. For example, the reportage requirements in the federal Employment Equity Act (1986) suggest that the single most important indicator of compliance is in the numbers of employees from the four designated groups – women, visible minorities, people with disabilities, and Aboriginals. Regardless of legislative intention, this can easily lead to the marginalization of initiatives other than those required for reportage. It also sidesteps instances in which difference is comparatively invisible, and in which self-disclosure is problematic. It also compartmentalizes dimensions of difference, and risks ignoring intersectionality. And finally, it does not account for the very real possibility that employers will recruit workers and staff from traditionally marginal groups that are least threatening to institutional cultures – in other words imposing standards of “normalcy” and “respectability” higher than those hired from more established population groups.

An examination of employment equity policies aimed at sexual diversity provides a useful lens for exploring these issues. This is in part because difference along lines of sexual orientation and gender identity are so routinely excluded from such policies, in part because they so dramatically point to the inadequacy or incompleteness of “counting” approaches, and finally because they demonstrate in high relief the challenges in creating full equity even in communities where public acceptance of difference appears so widespread, including opposition based on religious or moral grounds.

This paper will begin by providing overviews of the sexuality-related changes in Canadian law, and in policies developed by governmental and corporate institutions, especially over the last quarter century. Then after providing a summary view of dramatic changes in popular opinion about sexual difference, it will confront the unevenness of change in institutional practice, and explore the very limited evidence pointing to continuing disadvantage for sexual minorities, before assessing the distinctive challenges in equity policy aimed at such minorities.

## **Canadian Law and Public Policy**

Canadian law and public policies across three jurisdictional levels now place this country in the small group of political settings that have moved on a wide range of fronts in recognizing

the rights of lesbians and gay men. There were early steps taken in criminal law and in the establishment of municipal prohibitions against discrimination based on sexual orientation from the late 1960s to the mid-1980s, but the policy “take-off” only began in the late ‘80s.<sup>3</sup> The enactment of the Charter of Rights and Freedoms in 1982 provided new vehicles for activists, and the catastrophe of AIDS provoked new waves of advocacy – and new opportunities for engagement with mainstream politics.

#### **Time-Line of Selected Steps Toward Formal Recognition of Sexual Diversity<sup>4</sup>**

1969	Decriminalization (partially) of homosexual activity
1973	Toronto prohibits sexual orientation discrimination, one of first on continent to do so
1977	Quebec adds sexual orientation to its Charter
1986	Hamilton is 1 <sup>st</sup> large city to extend workplace benefits to same-sex partners of civic employees
1986-90	Ontario, and then most other provinces and territories, prohibit sexual orientation discrimination
1988	Yukon extends benefits of territorial employees to same-sex partners
1990	Toronto, Vancouver, Montreal extend employee benefits to same-sex partners
1990-92	Courts in Ontario, BC, Manitoba, and Ontario support same-sex partner benefits for gov’t employees
1991-93	Ontario, Manitoba, BC, NWT, New Brunswick, and Quebec extend benefits for provincial employees to include same-sex partners
1992	Canadian military removes ban on lesbians and gay men serving. First successful refugee claim based on persecution/risk deriving from sexual orientation
1992-93	BC first senior jurisdiction in Canada to redefine spouse in four provincial statutes
1993	Supreme Court of Canada (SCC) turns down relationship claim ( <i>Mossop</i> ), but implies that sexual orientation is an analogous ground covered by Section 15 prohibitions on discrimination
1995	SCC confirms analogous status of sexual orientation, though upholds relationship claim as a “reasonable limit” under the Charter’s Section 1
1995	BC legislature includes same-sex couples in adoption law, and Ontario court rules against discrimination in adoption by same-sex couples
1995	Sexual orientation added to sentencing provisions on hate crimes in criminal code
1996	Sexual orientation added to Canadian Human Rights Act
1998	SCC “reads in” sexual orientation to Alberta’s human rights statute
1998	Income Tax Act successfully challenged for exclusion of same-sex common law partners
1998	Quebec court rules that discrimination against trans person covered under “civil status”
1999	SCC declares unconstitutional the exclusion of same-sex couples from family law provisions (including those on parenting) that cover common law heterosexual couples ( <i>M. v. H.</i> )
1999-2002	Most provinces and territories enact sweeping measures eliminating statutory discrimination between same-sex and opposite-sex couples, in the Quebec case only partly through 1999 legislation on relationships, and more fully with the 2002 creation of a Civil Union regime..
2000	Ontario Human Rights Commission adopts policy covering transgenderism under “sex.”
2002	Federal immigration law and regulations recognize same-sex relationships Northwest Territories passes human rights act with gender identity and sexual orientation included (the only province or territory to do so up to 2012).
2003	Ontario appeal court (like others in Quebec and BC), declares exclusion of same-sex couples from civil marriage unconstitutional, and in this case opens up marriage immediately
2005	Federal Parliament enacts inclusive marriage law.

By 1993, court rulings and labour tribunals were making clear that employment discrimination based on sexual orientation was unconstitutional, by which time most province's and territories had included it in their human rights statutes.<sup>5</sup> By 1999, discrimination against same-sex couples was also prohibited, a development most obviously affecting employment-related benefit programs. Several of the most important thresholds in creating a less discriminatory foundation for sexual minorities in official state policy are marked by court rulings, though activists had prepared the ground for litigants, and many legal claimants drawn from activist ranks.<sup>6</sup> Local governments were also routinely in the lead in enacting inclusive measures, well ahead of the application of judicial leverage.

Transgender activism acquired significant profile in the mid-1990s, though it faced severe challenges in the heterogeneity of the constituencies being represented, and the extent of prejudice directed at all groups who cross or challenge gender categories.<sup>7</sup> Within a half decade, there were tribunal judgements indicating a readiness to prohibit trans-related discrimination on other grounds, most commonly "sex."<sup>8</sup> To date, only one senior jurisdiction (NWT) has explicitly included gender identity into human rights law – the move insisted on by trans advocates. Attempts have been made in other jurisdictions, most notably the federal Parliament, to effect the same change, but so far without success. Transition-related medical costs receive uneven treatment across the country, and even where they are formally listed for medicare coverage (as for example in Ontario), there are imposing barriers on the way to approval.<sup>9</sup>

The extraordinary gains made by lesbians and gays over the course of the 1980s and '90s did not, of course, eliminate official policy inequities or secure effective implementation. Customs and immigration are two policy areas in which there is considerable discretion left to officials, and substantial evidence exists that this has often disadvantaged sexual minorities or materials aimed at them.<sup>10</sup> In addition, the gains chronicled here have not been matched by inclusion in employment equity legislation, nor in the employment equity practices of most employees. The federal statute of 1986 did not include sexual orientation (nor of course gender identity), and the same is true of provincial legislation enacted over the following decade (for example in Ontario, Quebec, and British Columbia). The federal Employment Equity Act set the model in designating only four groups – for which employment data had to be provided. Neither this nor other equity laws precluded institutional expansion of equity agendas beyond the four designated groups, though this list has commonly be treated as defining the outer limits for equity.

## **Workplace Rights**

A few employers (city governments, for example) had started to explicitly prohibit discrimination based on sexual orientation in the 1970s and early '80s, IBM being one of the first large corporations to do so, in 1984. In Canada, the extension of benefit programs to include same-sex partners began in the late 1980s (as it did in the U.S.), led by a few cities, the Yukon Territory, and several universities. Large Canadian companies did not move on this front until the early 1990s, beginning with North American Life in 1992 and Dow Chemical in 1993. It was only in 1994 that the first three of Canada's 25 largest corporations followed suit (General Motors, Nortel, Bell). By 1998, more than half of these largest firms had done so.<sup>11</sup> All this was happening at a time when controversy was swirling around political attempts at recognizing

lesbian and gay relationships.

Labour unions had begun taking on issues of sexual diversity with some forcefulness in the late 1980s, and several had been prominent in campaigns to add sexual orientation to provincial human rights codes in Ontario and elsewhere.<sup>12</sup> Most, like the Canadian Union of Public Employees, were in the public sector, but a few, most notably the Canadian Auto Workers, were not.<sup>13</sup> Union pressure at the bargaining table (and supporting cases taken to courts and tribunals) was an important factor in provoking the shift in employer policies, as was the rapid spread of LGBT employee groups in unionized and non-unionized settings alike. The inclusion of same-sex partners of employees was an obvious focus of attention for those seeking formal policy recognition of sexual diversity. It helped that such benefits were by then routinely available for common law partners of heterosexual couples, and that the incremental costs associated with expanding programs to lesbian and gay partners was modest (in part a product of small numbers, in part because medical expenses were supplemental to the more substantial costs born through medicare). A successful challenge to the exclusionary definition of spouse or common law partner in the Canadian Income Tax Act (*Rosenberg*, in 1998) eliminated an important barrier to the inclusion of same-sex partners in pension benefits.

For most employers, either in the public or the private sector, this was as far as inclusivity went as the sexual diversity front.

## **Public Attitudes**

Public beliefs in Canada as well as many other countries have shifted dramatically towards acceptance (or at least toleration) of sexual diversity. Specialists on such beliefs such as Chris Cochrane, on Canada, and Clyde Wilcox, on the U.S., can think of no other policy area that has seen such a striking shift.<sup>14</sup>

Support for basic civil rights protections against discrimination based on sexual orientation was just over 50 percent in 1977, approaching 70 percent in the mid-1980s, and is now over 90 percent.<sup>15</sup> Access to rights and responsibilities for same-sex partners was barely on the radar screen for the public during the 1980s, and basically not surveyed. As Amy Lanstaff shows, Environics' first surveys asking about spousal benefits showed only about 50 percent support in 1993. However, by the mid-2000s, over 50 percent were expressing support in response to the far more demanding question on full-fledged marriage.<sup>16</sup>

Some attitude change related to sexual diversity lagged considerably. Until the 1990s, "disapproval" of homosexuality remained very high. In a 1980 survey by Reginal Bibby, 69 percent of respondents expressed the view that homosexuality was "always wrong."<sup>17</sup> Langstaff's survey of Environics' data shows that in 1987, only 10 percent expressed "approval," with that percent passing the 20 percent mark only in the mid-1990s.<sup>18</sup> By the early 2000s, however, it was over 40 percent, and later in the decade Pew data were showing that 70 percent of Canadians were agreeing that "homosexuality should be accepted by society." The Canadian National Election Studies include "thermometer" items that ask respondents to assess their warm or cold feelings towards particular groups by providing a temperature rating from zero to 100. Average scores show a considerable "warming" of sentiments, climbing to 59 degrees in 2006. That said, such scores remained low compared to almost all other groups, with 10 percent giving scores of a very frigid zero. The World Values Surveys showed that in 1981, 51 percent of Canadians said that homosexuality was "never justified," with that number declining

to 37 percent in 1990, 26 percent in 2000, and 21 percent in 2005.<sup>19</sup>

On questions of rights, the areas in which the public retains most unease are those related to children. One example is adoption rights, showing only 50 percent support or not much more than that, though again a much more positive response than in years past. Langstaff uses a variety of indicators to suggest that there remains an “adamant” 30 percent or so of Canadians who retain profoundly negative attitudes toward sexual minorities, much lower than the proportion of the population displaying deep antipathy twenty years earlier but still enough to give policy makers pause. Beyond that lies a significant population that retains anxieties and concerns about sexual diversity that can occasionally be mobilized in opposition to policies aimed at full inclusion.

## **Employment Discrimination**

The favourable shift in popular attitudes over recent decades contributes to the difficulty facing LGBT advocates for great inclusiveness in employment equity policies. They also regularly confront sentiments that gay men in particular are a privileged minority, generated by generalizations from the conspicuous consumption of a portion of that demographic, and by exaggerated assumptions about same-sex couples not having children. These distortions are sometimes fuelled by glossy magazines aimed primarily at lesbians and especially gay men that sell advertising by promoting the view that their readership has high disposable incomes.

Few studies with any credibility have explored economic outcomes across sexuality categories. Among the more reliable, conducted in several western countries, there are strikingly consistent findings that gay men earn less than heterosexual men, and that lesbians earn correspondingly more than straight women, the latter a function of a higher proportion working full time.<sup>20</sup> Christopher Carpenter’s Canadian study shows earnings gaps of 12 percent in the former, and 15 percent in the latter.<sup>21</sup>

What any such study taps, of course, are outcomes of those prepared to declare their sexual orientation in a survey. This may well now constitute a majority of those who in fact are lesbian or gay, but it is entirely possible that the forcefulness of the closet affects those in lower paid and vulnerable jobs (or those from especially vulnerable populations), skewing results towards favourable economic outcomes. Even without such cautionary reading, the data clearly indicate that stereotypes about economic privilege are just that - stereotypes. And of course such surveys do not address the continuing pressures in many work environments to retain secretive, or to reveal relationship details much more selectively than would be true for heterosexuals. They also do not address questions of promotion to senior managerial or leadership positions. There can be no serious doubt that “out” lesbians and gay men are underrepresented in the highest ranks of institutional leadership – outness being gauged only in terms of the degree of public visibility considered routine for heterosexuals at work.

The economic disadvantage of trans persons is unmistakable. Canadian studies of any reliability have not yet been completed, but there are one or two American studies, and no reason to believe that findings in Canada would be significantly different. A report prepared in 2011 for the National Center for Transgender Equality and the National Gay and Lesbian Task force showed that 59 percent of trans people earned less than \$50,000/year, compared to 41 percent in the general population, and that four times as many earned less than \$10,000.<sup>22</sup> Unemployment was twice the average, and 90 percent reported harassment or discrimination at work.

## **Modest Employer Proactivity**

There are no large scale or systematic studies of the extent to which Canadian employers have moved beyond the most obvious formal policies that eliminate or reduce explicit discrimination. The Human Rights Campaign in the U.S. has created an equality index that does in fact go beyond such formal policy, and has found that since the early 2000s a growing number of corporations have taken steps beyond formal policy inclusion.<sup>23</sup> These include training supervisors on sexual orientation and gender identity issues, incorporating sexual diversity into the categories used for self-identification in employee surveys, including LGBT metrics in performance indicators for senior managers, and creating supportive policies and guidelines in respect of gender transitioning. By 2010, 20 percent of companies surveyed achieved full marks on the HRC index. This is good news if you use pre-2000 data as a benchmark; discouraging news if you see how long it has taken to get to this point.

Among Canadian employers, there are important stories of serious attention being paid to sexual diversity. IBM was an early adopter of formally inclusive policies, and has built on those early gains in working towards inclusivity, for example in establishing educational programs and setting targets for the number of openly-gay and lesbian employees at all levels. The Toronto Dominion Bank was not a ground-breaking early starter in establishing LGBT-positive policies, but has now established a series of proactive policies intended to create a more inclusive organizational culture, including the sponsorship of community events across Canada, and the regular surveying of employees to monitor inclusivity.<sup>24</sup>

The University of Toronto was also not a pioneer in formal policy development, but it did move toward the front of the pack during the 1990s. It extended its benefit programs, including its pensions, to include same-sex partners in 1991. In 1996, it launched North America's first LGBT Positive Space campaign, since adopted by many other institutional settings. In 1998, an undergraduate program in sexual diversity studies was created, and soon became the largest in Canada. 1999 saw the establishment of an LGBTQ office, with a fully time equity officer heading it. All this was a result of recurrent pressure from faculty, staff, and students, at an institution that has experienced the most sustained activism on these issues of any place in Canada.<sup>25</sup>

During the early-to-mid 2000s, the University added sexual diversity to its employment equity framework, flagging that fact in hiring ads and guidelines sent to academic unit heads. In effect, companies like TD Bank and IBM had done so at an earlier stage, but it is safe to say that this is still a comparative rarity among Canadian employers. Especially rare is the formal inclusion in employment equity frameworks, including the incorporation of questions on sexuality in surveys conducted for reporting to governments on employment equity progress. It is worth pointing out that the University of Toronto only started including questions on sexual orientation for such surveys in about 2008, and only after extensive deliberation. Even then, it has resisted questions on gender identity.

## **Proactive Challenges**

The slow progress in fully including sexuality in employment equity frameworks, or in ensuring their application where formal policies have been expanded, has many origins. One

factor is that advocacy for inclusivity on this front arose later than claims on other equity fronts. Beyond that, there are several challenges to creating sexuality-inclusive workplaces that are shared with all other equity issue areas, though also challenges specific to either sexual orientation or gender identity.

### *In Common with Other Equity Issues*

Policies directed at numerical representivity inevitably evoke some resistance based on the view that the quality of employees hired or promoted will be compromised. In many cases, of course, this is based on a limited characterization of the talents called for in such positions, or on ignoring the value added to an institution by greater diversity. Nevertheless, there are some complex issues here that require suppleness on the part of employers and advocates.

There is also resistance from some members of historically disadvantaged groups opposed to any process that risks identifying them as “equity” appointments or promotions. They see stigma associated with such appointments, and have the same needs as other employees to feel that their hiring and promotion is based on what they see as widely accepted criteria for skill and performance.

In any equity field, there are challenges in implementation of policies, whether directed at improving demographic diversity or in creating more positive work environments for historically disadvantaged populations. Even in private and public institutions governed by clear “command” structures, implementation requires that managers and employees be convinced of the value of such moves and take ownership of equity programming. This is no easy task. It is even more challenging in large institutions marked either by decentralization, substantial variety in the nature of work and the shape of organizational culture, or the belief in professional autonomy on the part of large groups of employees. In TD Bank, for example, investment bankers might be an entirely different challenge than tellers. In a university, a department of sociology or faculty of education might be quite distinct from physics and nursing, and from groundskeeping and maintenance staffs. In a hospital, a school, a research lab, or an academic department, individual professionals will resist intrusions on their autonomy. One policy may not fit all, and most certainly one implementation strategy does not fit all.

There are also marked differences in the kind of supports that various equity initiatives have across regions. Employers in urban environments are likely to have an easier time establishing equity initiatives than those in small town and rural ones. Institutions in Quebec might have an easier time with initiatives related to gender and sexuality than those based in Alberta and Saskatchewan, though a more difficult one for programs related to ethno-racial diversity than those based in BC and Ontario.

All equity initiatives face challenges around intersectionality. Programs aimed at increasing the representation of women may well end up disproportionately recruiting white women; those aimed at ethno-racial minorities may end up over-representing men. Gender equity programs may encounter resistance or indifference in workplaces dominated by men who have recently migrated from comparatively traditional societies, or who practice forms of Christianity, Islam, Judaism, Sikhism or other religions that justify differential (usually unequal) treatment of women and men.

There is also, for lack of a better phrase, a growing equity “fatigue.” This is based in part on the passage of time, and the frequency with which programs using terms like “equity” and “diversity” are deployed. It is also a product of opinions that progress on some equity

dimensions has been considerable and no longer justify proactivity. Despite the many indicators showing inequality between men and women, there are many many Canadians who believe that feminist advocacy is addressing “yesterday’s” problems. The same may well be true of programs widely addressing the position of visible minorities, since some groups under that umbrella would be perceived as doing well economically. In cases where disadvantage is inescapable and obvious, for example in the case of Canadian blacks or Aboriginals, the language of individual responsibility that has so permeated the political landscape for the last couple of decades would reinforce the views of many Canadians that this was not a systemic but an individual challenge.

### *The Distinctiveness of Sexual Diversity*

Even an employment equity program geared primarily to numerical representation faces an extra challenge with sexual orientation and gender identity. These are not the only dimensions of difference that are often not visibly evident, for they share that characteristic with many forms of disability, and many Aboriginals. We are also dealing here with a reluctance to self-identify as gay or lesbian, particularly in work settings perceived as unfriendly toward sexual diversity. For many transgender people who have effected a complete gender transition, there would also be an emphatic reluctance to identify as anything other than their sex of choice or destination.

There are challenges not just in attempts at determining the make-up of the existing workforce, but at the hiring end too. Asking direct questions about sexual orientation or gender identity in the hiring process is almost always out of the question. True, it is entirely possible to send signals to prospective employees about the LGBT-positive work environment, if indeed that work setting is positive, but the script for such signalling is not always clear, and many hiring managers or committees would be uneasy because they feel insufficiently familiar with the issues.

For policies geared toward increasing the sexual diversity of the workforce or enhancing the institutional climate, implementation is at least as serious a challenge on these issues as on other issues. At the University of Toronto, for example, it is safe to say that most academic units have done nothing to act on the inclusion of sexual diversity in employment equity policy, and would not know how to. This is not just a function of the comparative newness of its incorporation, but also the widespread unfamiliarity with the language appropriate to use in conveying positive cues, and considerable uncertainty as to how important such diversity is for the work of any one administrative or academic unit.

Another factor that may allow the persistence of a form of exclusion is the persistent double standard as to what forms of behaviour are legitimate in “public” arenas. For example, even in high school and post-secondary environments, where heterosexual display is ubiquitous, there is often a degree of discomfort, sometimes stretching into disapproval, over displays of affection between people of the same sex, or over sexualized appearance with homoerotic undercurrents. There is a risk, perhaps greater than for other equity dimensions, to require or expect heightened behavioural conformity or “normalcy” than for other employees.<sup>26</sup> Organizations have rights, within reason, to establish dress and behaviour codes for employees, particularly those that deal directly with the public, but it is not inconceivable that such standards would be enforced too rigidly or without sufficient sensitivity to populations that define themselves as sexually different.

Intersectionality also raises especially complex issues in respect to sexuality. Canadian urban areas with highly visible sexual minorities are also poles of attraction for large waves of migration from societies dominated by traditional attitudes toward gender and sexuality. This has apparently not impeded the shift of attitudes in the overall population toward more positive views on sexuality, but much anecdotal evidence points to the difficulty for sexual minority members of such communities to publicly acknowledge their difference.<sup>27</sup> This reinforces community perception and the general public's belief that homosexuality is a western or white phenomenon. This can easily translate into a skewed ethno-racial composition of those LGBT employees prepared to be out in their workplaces, and into a view among visible minority or religious minority employees that equity policies aimed at sexual minorities have nothing to do with them.

### *The Special Challenges Coming from Religious Diversity*

Workplace life at the intersection of sexuality and faith is complicated by the persistent view among many religious traditionalists that homosexuality and gender non-conformity are sinful and harmful. There are, to be sure, religiously-based challenges to some of the goals set by gender equity advocates, but there is only rarely the same degree of total condemnation evoked by programming aimed at LGBT inclusivity. This creates enough of a challenge when resistance (from employees, managers, or customers) come from a traditional Christian stance. The challenge is more complex when religious condemnation (and workplace resistance) comes from ethno-religious minorities. Few Canadian workplaces have thought these issues through.

Canadian institutions who have developed policies and practices to accommodate religious diversity have to come to terms more systematically with conflicts between claims based on sexual and religious difference. They must also recognize that there are sexual minorities within religious communities. This requires launching discussions of sexual diversity within employee networks where such discussions have been entirely absent or conducted in only hushed voices. Such deliberation is made more challenging by the fact that so many LGBT advocates, and so many institutional managers, are religiously unknowledgeable or skeptical.

The potential for religious rights and sexuality rights to come into conflict has been evident in Canadian courts, but without a clearcut path being laid out to resolve these conflicts.<sup>28</sup> There are several employment issues that remain unresolved. For example, what faith-based organizations (social service agencies, international aid providers, media outlets, schools, churches and temples) have the right to exclude members LGBT from employment, or from what specific jobs, and to what extent do they have the right to discipline employees for transgressions of faith-based moral codes? Does a Catholic or a Muslim or Sikh adoption agency have the right to prioritize heterosexual couples as applicants, or to exclude same-sex parents entirely? No one doubts that churches, mosques, and synagogues can legally discriminate in the hiring of clerics, but beyond that where does the exemption from human rights law extend?

In schooling, do religiously conservative parents have the right to take their children out of classes where the teacher is talking about sexual diversity? Do faith-based schools have the right to refuse hiring lesbian or gay teachers in subjects that are not directly part of the religious curriculum? Do teachers in schools that receive public funding or that are subject to provincial regulation have the right to categorically condemn homosexual activity on the basis of scripture?

Beyond schools, what counts as hate speech, and do references to scripture provide any defense against the use of language that might be widely construed as hateful?

These questions are all complex in law and practice, but especially so in light of the considerable importance attached to faith and to religious institutions in many ethno-cultural communities.

## **Concluding Proposals**

There is no simple or formulaic solution to any equity challenge, and the impediments to inclusivity vary from one dimension of difference to others. Within each equity category, there are intersectional challenges that require suppleness and innovation. Sexual diversity highlights these complexities, and provides many illustrations of the risks in approaching these issues with a single template, or with a focus exclusively on numerical representation. Equity managers or advocates for change will often say that their work is about changing behaviour, or shifting organizational culture in a systemic fashion, rather than making employees conform to equitable norms in their thinking. But inevitably, an institutional commitment to equity requires confronting prejudice, including that based on sexual orientation, on gender identity, and yes, on religion.

What is at stake with sexual orientation is not under-representation in the workforce, but the creation of organizational climates that are welcoming enough to permit everyone whose sexual attractions, gender identity, or gender history, deviate from heterosexual norms to feel able to be as open as their colleagues are. There can be no requirement or even expectation that everyone be “out,” but there must be an institutional climate that creates more equitable choices on that front than exist now. “Counting,” then, may still make sense, since the number of employees and managers willing to be out would provide helpful information.

What measures have the potential to respond to these challenges. Although legislative change is only one part of an overall strategy, it provides legitimacy for more expansive institutional frameworks on equity. Employment equity statutes should be expanded to include sexual minorities, and thereby pushing more institutions to do what some (like IBM, TD, the U of T) already do in surveying their employees to learn more about the numbers identifying themselves as lesbian, gay, bisexual and transgendered.<sup>29</sup> And as with all equity categories, surveying and reportage should address questions of representation at all major levels in the institution’s hierarchy. Some reference to religion or religious minority status might seem reasonable as well, but questioning about faith and applying categories to responses is so enormously complicated a task as to make such an addition impractical.

Employment equity legislation should also include requirements to count that take intersectionality into account (for employers over a certain size), so that the “internal” diversity of each group is made visible. This should not necessarily be accompanied by any implication of targets, but would produce data useful both for policy makers, managers, and regular employees.

There are certainly advocates who would want such legislation to be tougher in requiring employers to move toward demographic representivity, particularly for those groups most disadvantaged in the work force (for e.g., Aboriginals, people with disabilities), or in creating stronger incentives for moving in that direction. There is some merit in such arguments, though there ought to be some recognition of the limits as to what can be accomplished realistically by

statute.

What about employer policies, and even more important, institutional practices? As we have seen, the Human Rights Campaign in Washington, D.C. now gauges U.S. employer commitment to equity on sexual diversity on a wide range of measures. They include the obvious policies on formal discrimination, and equitable workplace benefits, but also supports for those who have obtained or are now seeking gender transition. They also include manager training related to equity in general, and sexual diversity in particular, and the inclusion of equity “success” in the assessment of managers for salary increase or promotion.

On sexual diversity particular, it is important for institutions to create some visible indication that improvements in equity performance include sexual diversity. At the U of T and some other institutions, this has manifested itself in equity officers or managers specifically responsible for this part of the portfolio, though smaller institutions may simply not have the resources for such commitment. At the very least, there must be some person or group responsible for generating policy advice, and with whom members of sexual minorities can establish links.

There are a number of measures that employing institutions can take to signal not only to clients, customers, students that they aim for inclusivity, but also to their own employees. Material marketing an institution or its products should of course find ways of touting LGBT-inclusiveness, but should also be distributed through media serving sexual minority communities. Other forms of external “signalling” are also available. The TD Bank, the University of Toronto, and other major institutions have at various times flagged their commitment through participation in and sponsorship of Pride events. In some cases, this has been accompanied by visible participation in Pride by specialized units within those large institutions, the U of T Police and the Engineering student band being particularly effective examples.

In a political and social environment in which many people, inside and outside the employing organization, believe that disadvantage no longer characterizes the work lives of sexual minorities, equity initiatives must develop innovative programs aimed at the specific ways in which prejudice and exclusion still operate. Also, large and complex institutions must develop equity initiatives targeting those areas most in need of attention. For example, there has been growing recognition at the U of T that students from comparatively traditional ethnic or religious groups, and in some cases those from small towns, are likely to have more difficulty coming to terms with sexual difference than others. Generic promotional campaigns often miss the specifics relevant to such groups.

As argued above, religious faith is in fact a dimension of “difference” that few employers have thought through systematically. They have typically moved toward a recognition of the need to accommodate specific religious practices, in part because they are constitutionally obliged to do so. However, beyond that it is safe to say that there has been little sustained or systematic recognition of religious faith, or of religious differences, in the employment equity policies developed by employers. This does not mean that employers must see all beliefs, whether faith-based or otherwise, as automatically translatable into employer policy. Faith cannot, for example, be used as a justification for employees or managers to discriminate on the grounds of gender or sexual orientation. This, however, must be thought through in a way that recognizes the right to dignity and respect of faith-based groups. There needs to be mechanisms for generating discussion among employees and managers when a potential exists for rights

claims within the workplace to be in conflict, or perceived as such. No equity dimension more dramatically illustrates the need for respectful deliberation than sexual diversity.

In a period and in a setting when much has been gained in employment equity generally, and in the treatment of some sexual minorities particularly, advocacy faces more and more complacency, as well as resistance born of the belief that what can be done has been done. This requires constant innovation, and perhaps more targetting of all equity initiatives to areas of most urgent need, armed with telling information, artfully conveyed. This also requires an approach that in rhetorical and practical applied terms encourages rather than punishes.

Equity strategy does not come pre-packaged, or in standard templates – now less than ever. Making workplaces more inclusive of sexual minorities illustrates the need for an eclectic mix of legislative reform, detailed institutional policies, elaborate management incentives, and attention to areas in which change is least evident and most challenging.

## Notes

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1. Thanks to Gerald Hunt for assistance in preparing this paper. This builds on earlier work with Donn Short as well as Gerald Hunt, and I am grateful to both for the collaboration at that earlier stage. I am also appreciative for Chris Cochrane's willingness here, and several times in the past, to provide updated public opinion data.
2. The critical literature on employment equity policy in Canada includes Abigail Bakan and Audrey Kobayashi, *Employment Equity Policy in Canada: An Interprovincial Comparison* (Ottawa: Status of Women Canada, 2000); and the Canadian sections of Jain Marish, Peter Sloane, and Frank Horwitz, *Employment Equity and Affirmative Action: An International Comparison* (Amonk, NY: M.E. Sharpe, 2003).
3. On this see Tom Warner, *Never Going Back: A History of Queer Activism in Canada* (Toronto: University of Toronto Press, 2002); Miriam Smith, *Lesbian and Gay Rights in Canada: Social Movements and Equality-Seeking* (Toronto: University of Toronto Press, 1998), and *Political Institutions and Lesbian and Gay Rights in the United States and Canada* (New York: Routledge, 2008); and my own *Queer Inclusions, Continental Divisions: Public Recognition of Sexual Diversity in Canada and the United States* (Toronto: University of Toronto Press, 2008).
4. This material drawn from various sources already flagged, from Egale Canada, and from my own *Queer Inclusions*.
5. On this see Cynthia Petersen, "Fighting it Out in the Canadian Courts," in *Laboring for Rights: Unions and Sexual Diversity Across Nations*, ed. Gerald Hunt (Philadelphia: Temple University Press, 1999); Gerald Hunt, David Rayside, and Donn Short, "The Equality Landscape for Sexual Orientation in Canada," in *Employment Equity in Canada*, ed. Carol Agocs and Michael Lynck (forthcoming); and David Rayside, *Queer Inclusions, Continental Divisions: Public Recognition of Sexual Diversity in Canada and the United States* (Toronto: University of Toronto Press, 2008), chap. 4.
6. Warner, *Never Going Back*, has the most detailed chronicle of activist engagement with these and other vehicles for change.
7. On the U.S., which has the most developed literature on transgender issues, see Jaime M. Grant, et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination*

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*Survey* (Washington, D.C.: National Center for Transgender Equality and the National Gay and Lesbian Task Force, 2011); and Paisley Currah, ed. *Transgender Rights* (Minneapolis: University of Minnesota press, 2006).

8. See, for example, Ontario Human Rights Commission, *Policy on Discrimination and Harassment Because of Gender Identity* (Toronto: OHRC, 2000).

9. Nikke Stratigacos, "Sex for Sale: Prostitution, Government, and Regulation," paper presented to *Sex for Sale*, a conference organized by the Sexual Diversity Studies Student Union, University of Toronto, March 2009.

10. See Brenda Cossman, "Disciplining the Unruly: Sexual Outlaws, Little Sisters, and the Legacy of Butler," *University of British Columbia Law Review* 36, no. 1 (2003): 77-99.

11. This is based on a survey I supervised for *Queen Inclusions*, pp. 103-04.

12. See Warner, *Never Going Back*, and my own "Gay Rights and Family Values: The Passage of Bill 7 in Ontario," *Studies in Political Economy* 26 (Summer 1988): 109-47.

13. See Hunt, ed. *Laboring for Rights*; and Gerald Hunt and Jonathan Eaton, "We Are Family: Labour Responds to Gay, Lesbian, Bisexual, and Transgender Workers," in *Equity, Diversity, and Canadian Labour*, ed. Gaerald Hunt and David Rayside (Toronto: University of Toronto Press, 2007).

14. This point from Cochrane comes from personal correspondence, but see his co-authored article, Neil Nevitte and Christopher Cochrane, "Value Change and the Dynamics of the Canadian Partisan Landscape," in *Canadian Parties in Transition*, 3<sup>rd</sup> ed., ed. Alain-G. Gagnon and A. Brian Tanguay (Peterborough: Broadview Press, 2007). See also Langstaff, "A Twenty-Year Survey of Canadian Attitudes Toward Homosexuality and Gay Rights," pp. 49-66 in *Faith, Politics, and Sexual Diversity*, ed. Rayside and Wilcox. For the U.S., see Clyde Wilcox and Rentaro Iida, "Evangelicals, the Christian Rights, and Gay and Lesbian Rights in the United States: Simple and Complex Stories," pp. 101-120, in *Faith, Politics, and Sexual Diversity*, ed. Rayside and Wilcox. See also Patrick J. Egan and Kenneth Sherrill, "Neither an In-Law nor an Outlaw Be: Trends in Americans' Attitudes Toward Gay People," *Public Opinion Pros*, 2005; and Paul Brewer, "The Shifting Foundations of Public Opinion and Gay Rights," *Journal of Politics* 65 (November 2003): 1208-20.

15. The 1977 result is from a Gallup poll, showing 52 percent supported the inclusion of a provision in a new Canadian Human Rights Act of a provision protecting homosexuals from discrimination in employment and public services, reported in David Rayside and Scott Bowler, "Public Opinion and Gay Rights," *Canadian Review of Sociology and Anthropology* 25 (November 1988): 649-60. A 1980 survey by Reginald Bibby included a much broader question, asking respondents if homosexuals were entitled to the same rights as other Canadians, to which 70 percent responded yes (Reginald Bibby and Donald Postenski, *The Emerging Generation* (Toronto: Irwin, 1985), cited in Rayside and Bowler, "Public Opinion and Gay Rights.". A more specific question on protections against discrimination was asked in a commissioned 1985 poll, though the 70 percent support came from a very leading question.

16. "A Twenty-Year Survey of Canadian Attitudes," p. 52.

17. Reginald Bibby and Donald Postenski, *The Emerging Generation* (Toronto: Irwin, 1985).

18. "A Twenty-Year Survey of Canadian Attitudes," pp. 51-52.

<sup>19</sup> In response to a different WVS question, 30 percent of Canadians said in 1990 that they did not want homosexuals as neighbours, with 14 percent saying they did not in 2005 (possibly

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because they thought the gardening would improve). These data have been kindly supplied by Chris Cochrane.

20. See the pioneering work by Lee Badgett, “The Wage Effects of Sexual Orientation Discrimination,” *Industrial and Labor Relations Review* 48, 4 (1995): 726-39; as well as Suzanne Heller Cain and Karen Leppel, “An Investigation into Sexual Orientation as an Explanation for Wage Differences,” *Applied Economics* 33, 1: 37-47; Reza Arabsheibani, et al., “Gay Pay in the UK,” *Economica* 72, no. 286 (2005): 333-47; and Eric Plub and Peter Berkhout, “Effects of Sexual Orientation on Earnings in the Netherlands,” *Journal of Population Studies* 17, 1 (2004): 117-31.

21. “Sexual Orientation, Work, and Income in Canada,” *Canadian Journal of Economics* 41, 4 (2008): 1239-61.

22. Grant, et al., *Injustice at Every Turn*.

23. Human Rights Campaign, *Corporate Equality Index 2012: Rating American Workplaces on Lesbian, Gay, Bisexual and Transgender Equality* (Washington: HRC, 2012).

[http://sites.hrc.org/documents/CorporateEqualityIndex\\_2012.pdf](http://sites.hrc.org/documents/CorporateEqualityIndex_2012.pdf)

24. Scott Mullin (senior executive in TD), lecture to students in Pol. 315 - Sexual Diversity Politics - October 2010.

25. The University of Toronto Homophile Association was formed in 1969, and shaped by the liberationist radicalism that was now sweeping US and some European cities. For almost all the time since then, there has been at least one group on campus advocating equity based on sexual orientation and (later on) gender identity. See Don McLeod, *Lesbian and Gay Liberation in Canada: A Selected Annotated Chronology, 1964-1975* (Toronto: ECW/Homewood Books, 1996); and Ontario Heritage Trust, “Sexual Diversity Activism at the University of Toronto” (Toronto: OHT, 2011).

26. There is a large literature on the risks of normalization in state policy and the LGBT movement, one of the leading voices being Michael Warner, *The Trouble with Normal: Sex, Politics, and the Ethics of Queer Life* (New York: New Press, 1999).

27. See, for example on Muslims, Momin Rahman and Amir Hussain, “Muslims and Sexual Diversity in North America,” pp. 255-74 in *Faith, Politics, and Sexual Diversity*, ed. Rayside and Wilcox. On the U.S., there is also allusion to what I might call family traditionalism in Muqtedar Khan, “Constructing the American Muslim Community,” pp. 175-98 and Aminah Berly McCloud, “Islam in America: The Mosaic,” pp. 159-74 in *Religion and Immigration: Christian, Jewish, and Muslim Experiences in the United States*, ed. Yvonne Hazbeck Haddad, Jane I. Smith, and John L. Esposito (Walnut Creek, CA: AltaMira Press, 2003)

28. See Richard Moon, “The Supreme Court of Canada’s Attempt to Reconcile Freedom of Religion and Sexual Orientation Equality in the Public Schools,” pp. 321-38 in *Faith, Politics, and Sexual Diversity*, ed. Rayside and Wilcox; and Richard Moon, ed., *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008)

29. There are more categories than this, but survey requirements have to be kept manageable.