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Family Status, Sexuality and "The Province of the Judiciary": The Implications of Mossop v. A.-G. Canada

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The Supreme Court decision in Mossop amounts to a postponement of, rather than a precedent on, the issue of whether the exclusion of gay and lesbian families from employment benefits is a violation of current anti-discrimination law. The author argues that the Court managed to avoid the issue by departing from its well-established tradition of giving generous, dynamic and purposive interpretations to human rights statutes. He also questions the accuracy of the Court’s assertion of superior judicial expertise on anti-discrimination law. In the area of gay rights, Supreme Court justices have shown themselves to be disinclined to take on the responsibilities that such expertise ought to entail.

I. INTRODUCTION

In the case of Mossop v. A.-G. Canada, the Supreme Court had its first opportunity to develop the human rights of lesbians and gay men since its 1979 decision in Gay Alliance Toward Equality v. Vancouver Sun (hereinafter “Gay Alliance”). The case involved a complaint by...
a federal government employee, Brian Mossop, under the Canadian Human Rights Act. Mossop alleged that the government discriminated against him on the prohibited ground of family status by denying him paid bereavement leave to attend the funeral of his gay partner's father. Mossop is the first case to have arrived at the Supreme Court in a wave of litigation initiated by lesbian or gay couples across the country seeking to employ anti-discrimination law to challenge their exclusion from laws or policies that confer benefits or rights on family members.

Lower courts and human rights tribunals were divided when Mossop was heard (and continue to be divided) on the question of whether disadvantaging treatment of lesbian or gay couples amounts to discrimination on the basis of marital status, family status or sexual orientation. Much of the existing case law rejecting complaints of discrimination is characterized by convoluted logic and a frequently alarming degree of ignorance regarding gay and lesbian lives. These features of the case law appear to be bound up with a resistance to conceptualizing the legal regulation of sexuality and family structures as equality issues. On the other hand, the case law upholding complaints of discrimination has tentatively acknowledged the reality and value of gay and lesbian relationships and has sought to overcome their devaluation by current laws and practices. These tentative steps towards affirmation often have been accompanied by a problematic assimilationist rhetoric. That is, courts and tribunals have suggested that gay and lesbian couples are deserving of legal recognition to the extent that they conform to a mythologized heterosexual norm.3

Given the uncertain, shifting and highly politicized legal terrain upon which the Mossop case arrived at the Supreme Court, it is perhaps not surprising that a 4-3 majority of the Supreme Court opted for a decision that amounted to a creative postponement of an engagement with the question of gay family status. The majority held that it did not need to determine whether gay or lesbian couples have a family status for the purposes of current anti-discrimination law. In its view, under the state of the law at the time of Mossop’s complaint, it was clear that Parliament did not intend to provide protection to gay or

lesbian families from discrimination. L’Heureux-Dubé J. on the other hand, writing for herself and two other members of the Court on the question of family status discrimination, wrote an impressive dissent that incorporated insights from a wide range of feminist thinking about the family.

It is hard to avoid a sense of déjà vu when reading the Supreme Court decision in *Mossop*: in the *Gay Alliance* case 14 years earlier, a majority of the Supreme Court, over strong dissents, relied on some curious arguments that allowed it to avoid directly commenting on the issue of discrimination against gay men and lesbians. Indeed, when one examines *Gay Alliance* as well as Supreme Court criminal law decisions touching upon the rights of gay men, it appears that the *Mossop* majority is continuing a Supreme Court tradition of failing to condemn, or even comment upon, heterosexism in laws and social practices.

I will begin by briefly outlining the facts and the decisions of the Canadian Human Rights Tribunal, the Federal Court of Appeal and the Supreme Court of Canada. I will then turn to an analysis of the Supreme Court opinions. First, I will discuss the impact of the decisions on the specific question of whether disadvantaging treatment of gay or lesbian couples amounts to family status or sexual orientation discrimination on the current state of the law. On this point, the dissenting judgment of L’Heureux-Dubé J. makes a significant contribution, while the principal majority opinion of Lamer C.J. has relatively little to say. In this sense, the *Mossop* decision is more of a postponement than a precedent. However, I will go on to discuss three troubling features of the majority decisions that could cause problems for the development of anti-discrimination law in the future.

The first problem is the reliance on an interpretive approach that places great weight on an imputed Parliamentary intent to diminish the scope of protection provided by anti-discrimination legislation. This approach is at odds with previous Supreme Court jurisprudence that has eschewed reliance on narrow constructions based on imputed legislative intent in favour of a dynamic, generous and purposive interpretation of anti-discrimination statutes.

Secondly, I will argue that the court’s reliance on the absence of a prohibition on sexual orientation discrimination as a rationale for restricting the scope of family status discrimination puts to pernicious use a recognition that grounds of discrimination frequently overlap and interact. Incorporation of a theory of interactive discrimination is essential if our jurisprudence is to be sophisticated enough to respond to the diversity and complexity of people’s lives and their experiences of oppression. Lamer C.J. employed a recognition that grounds of discrimination interact to diminish, rather than advance, the scope of protection available under anti-discrimination law.

Finally, I will raise some questions regarding the Court’s failure to accord any deference on judicial review to the Tribunal’s interpretation of its constituent statute, the *Canadian Human Rights Act*. The Court justified its interventionist posture on the grounds that the issues in *Mossop* were issues of “general law” that fell within “the province of the judiciary”. This posture is understandable given the weaknesses
in the administrative structure of the tribunal system of human rights adjudication in Canadian anti-discrimination statutes. Nevertheless, I will argue that the assertion of superior judicial expertise on issues related to sexuality is simply not demonstrated by the Supreme Court’s institutional record. Indeed, the fact that the majority chose to creatively avoid confronting the substantive issues presented by the Mossop case is troublingly at odds with the assertion of judicial self-confidence implicit in the standard of review adopted by the majority.

II. FACTS AND JUDGMENTS

The Facts

In June 1985, Brian Mossop worked as a translator for the Department of Secretary of State. On June 3, he attended the funeral of the father of his partner of over ten years, Ken Popert. The next day he applied for paid bereavement leave for the day of June 3. By the terms of a collective agreement between the Treasury Board and the Canadian Union of Professional and Technical Employees, employees could claim up to four consecutive days of paid bereavement leave upon the death of an “immediate family member”. The latter phrase was defined as including common law spouses “of the opposite sex” and fathers-in-law.

Mossop claimed that his partner, Popert, and the deceased, Popert Sr., were members of his “immediate family”, and thus he was entitled to paid bereavement leave for the day he attended Popert Sr.’s funeral. His request was denied. Mossop filed a grievance which was also rejected on the grounds that the denial of bereavement leave was in accordance with the terms of the collective agreement.

In August 1985, Mossop filed complaints under the Canadian Human Rights Act alleging that his employer and his union had committed a discriminatory employment practice on the prohibited ground of family status. Sexual orientation was not a prohibited ground of discrimination in the Act at the time.

THE JUDGMENTS

Canadian Human Rights Tribunal

In a carefully and cautiously reasoned judgment, the Tribunal member, Ms. Elizabeth Atcheson, found that Mossop was discriminated against on the prohibited ground of family status. She noted that family status was not defined in the Act. A thorough review of the available legislative history revealed that it was inconclusive on the meaning of family status. She concluded that “family” does not have a clear meaning in legal decisions or common usage. Relying on the broad and purposive approach to the interpretation of human rights legislation set out by the Supreme Court of Canada, she reasoned as follows:

The possibilities inherent in the term family are many, and complex ... In the Tribunal’s view, the test of “general understanding” must be rejected, quite

apart from its majoritarian aspects, because it cannot be ascertained with any degree of confidence... the Act does not promote certain types of status over others and... the Act is intended to address group stereotypes. For these reasons, the Tribunal finds that it is reasonable to conclude that homosexual couples may constitute a family.5

Ms. Atcheson went on to state that “[b]ereavement leave appears to be designed to meet the particular needs of family members at a difficult time”.6 She noted that in advancing this purpose the functional characteristics of relationships were more relevant than their “formal status”.7 She found that the collective agreement discriminated on the basis of family status by excluding from bereavement leave “a permanent and public relationship with a person of the same sex”.8 In the result, she ordered that the day of leave taken by Mossop be designated a day of paid bereavement leave.

Federal Court of Appeal9

The Attorney-General of Canada brought an application for judicial review of the Tribunal’s decision under s.28 of the Federal Court Act. The Tribunal decision was reversed by the Federal Court of Appeal. Marceau J.A., who wrote the principal judgment for a unanimous bench, rejected the submission of the Canadian Human Rights Commission that the court should interfere with the Tribunal’s interpretation of the meaning of “family status” only if it was patently unreasonable. In the absence of a privative clause, Marceau J.A. held that the standard of review on questions of law should be a correctness test.10

In Marceau J.’s view, the tribunal’s interpretation was not the legally correct one. He rejected the “functional” approach to the definition of family adopted by the Tribunal in favour of a “legal” approach. He argued that the “basic concept” of family is a group of individuals related by blood, marriage or adoption.11 Marceau J. went on to argue that the “real issue underlying the complaint” was sexual orientation rather than family status.12

Stone J. wrote a short concurring judgment in which he agreed with Marceau J.’s approach and placed special emphasis on the fact that Parliament had added family status, but not sexual orientation, as a prohibited ground of discrimination to the Act in 1983.13 Thus, Stone J.A., like Marceau J.A., appeared to believe that the “real” ground of discrimination at issue was “sexual orientation”.14

5 Id. at D/6092 and D/6094.
6 Id. at D/6096.
7 Id. at D/6096.
8 Id. at D/6097.
10 Id. at 31-2.
11 Id. at 34-5.
12 Id. at 37.
13 Id. at 41.
14 For an insightful analysis and comparison of the Tribunal and Federal Court of Appeal decisions, see D. Herman, “‘Sociologically Speaking’”, supra note 3. See also, Freeman, supra note 3, for an excellent critique of the Federal Court of Appeal decision.
Supreme Court of Canada

An appeal of the Federal Court of Appeal decision in Mossop to the Supreme Court of Canada was dismissed. A 6-1 majority of the Court agreed with Marceau J.A.'s holding that a tribunal's legal findings should be upheld on judicial review only if the reviewing judges agree with those findings. A narrow 4-3 majority did not agree with the Tribunal's finding that a gay couple could have a family status under the Act. Like Stone J.A. at the Federal Court of Appeal, Lamer C.J. found that Parliament's failure to add sexual orientation as a prohibited ground of discrimination was "determinative." He also agreed with Marceau J.A.'s assertion that sexual orientation was "really the ground of discrimination involved". Family status could not include a gay couple, because "Parliament's clear intent ... was to not extend to anyone protection from discrimination based on sexual orientation." La Forest J. also believed that Parliamentary intent was determinative. As he concluded, "neither ordinary meaning, context or purpose indicates a legislative intention to include same-sex couples within 'family status'."

III. THE IMPLICATIONS OF THE SUPREME COURT JUDGMENTS IN MOSSOP FOR GAY AND LESBIAN COUPLES LITIGATING EQUALITY RIGHTS

1. The Implications of the Majority Judgments for the Interpretation of Family Status Discrimination

(a) Family Status and the CHRA

Lamer C.J.'s majority judgment amounts to a simple deferral of the question of whether a gay or lesbian couple can have family status for the purpose of bringing a claim of discrimination on that ground under

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15 Supra note 1.
16 La Forest J. (Iacobucci J. concurring) wrote the principal majority judgment adopting the "correctness test" as the appropriate standard of judicial review of the legal findings of human rights tribunals. Lamer C.J. (Iacobucci and Sopinka JJ. concurring) agreed with La Forest J.'s approach (at 578). In short concurring judgments, both Cory J. (at 648) and McLachlin J. (at 648-9) also agreed with La Forest J. on this issue. L'Heureux-Dubé J. was the lone dissenting voice on the standard of review. She would have deferred to the Tribunal's interpretation of the Act unless that interpretation was "patently unreasonable" (at 647).
17 The majority judgments were written by Lamer C.J. (Iacobucci and Sopinka JJ. concurring) and La Forest J. (Iacobucci J. concurring). La Forest J. noted that he shared "the general approach of the Chief Justice and would dispose of the case as he proposes" (at 583). L'Heureux-Dubé J., dissenting, found that the Tribunal decision was not "at all unreasonable" (at 636). In their short dissenting judgments, Cory J. (at 648) and McLachlin J. (at 648-9) found that the Tribunal decision was correct for the reasons reviewed by L'Heureux-Dubé J.
18 Supra note 1 at 580.
19 Id. at 581.
20 Id.
21 Id. at 587.
the current state of the *CHRA*. This is because his reasoning is based on a state of the *CHRA* that appears to no longer exist.

Lamer C.J.'s denial of family status to the relationship between Mossop and the Poperts is based solely on the absence of sexual orientation as a prohibited ground of discrimination in the *Act* at the time that the complaint was brought in 1985. The 1992 decision of the Ontario Court of Appeal in *Haig*\(^2\) found that the equality rights in the *Charter* required that sexual orientation be added as a prohibited ground of discrimination under the *Act*. In the result, the Ontario Court of Appeal issued an order that the *Act* “be interpreted, applied and administered as though it contained “sexual orientation” as a prohibited ground of discrimination”.\(^2\) The Minister of Justice decided not to seek leave to appeal the *Haig* decision to the Supreme Court of Canada. Thus, the *Haig* ruling stands, and the Canadian Human Rights Commission, tribunals and lower courts must interpret the *CHRA* “as though it contained ‘sexual orientation’ as a prohibited ground of discrimination.”

Lamer C.J. made it clear that he was not passing judgment on the question of whether the facts of this case would amount to family status discrimination if the complaint had been brought at a time when sexual orientation was also a prohibited ground of discrimination under the *Act* (as it now appears to be). Since Parliament had not passed an amendment adding sexual orientation to the *Act*, and since the *Charter* had not been argued in this case to accomplish the same result, Lamer C.J. stated that he was unable to conclude that “Mr. Mossop’s situation included both his sexual orientation and his ‘family status’”.\(^4\)

It is possible that in some future case the Supreme Court of Canada may disagree with the *Haig* ruling, and find that the Constitution does not require that sexual orientation be read into the *CHRA*.\(^5\) If so, and

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\(^2\) *Haig v. Canada (Minister of Justice)* (1992), 94 D.L.R. (4th) 1.

\(^3\) *Id.* at 14-15.

\(^4\) *Id.*

\(^5\) In his judgment in *Mossop*, Lamer C.J. did not indicate whether he agreed with the result in *Haig*. The *Mossop* appeal was argued on June 3, 1992. On July 9, 1992, the Supreme Court released its decision in *Schachter v. Canada*, [1992] 2 S.C.R. 679, holding that the courts could add language to statutes to correct constitutional deficiencies in certain circumstances. The Ontario Court of Appeal released its judgment in *Haig*, adopting the “reading in” remedy, on August 6, 1992. On October 28, 1992, as it became increasingly apparent the federal government would not seek leave to appeal the *Haig* ruling the Supreme Court invited the parties to the *Mossop* litigation to make further submissions in light of *Haig*. The Human Rights Commission and the intervenors supporting *Mossop* chose not to challenge the constitutionality of s.3 of the *CHRA*. Lamer C.J. indicated that he would have preferred to address the constitutionality of the exclusion of sexual orientation as a prohibited ground of discrimination. In his words, “[i]t would then have been possible to give a much more complete and lasting solution to the present problem”, *supra* note 1 at 579. He went on to note that if such a challenge had been made and the legislation was found to violate the *Charter*, “then the courts are commanded under s.52 of the *Constitution Act, 1982* to declare the section inoperative or to amend it when permissible along the lines set out in *Schachter* as did the Ontario Court of Appeal in *Haig*”, *id.* at 382.
the new federal government, like the last one, proves unable to follow through on its promise to pass amending legislation adding sexual orientation as a prohibited ground of discrimination to the Act, then Lamer C.J.’s reasoning would continue to prevent gay or lesbian couples from using the CHRA to challenge laws or policies that exclude their relationships. The combination of these two events is a fairly unlikely scenario, but nothing can be taken for granted given the dismal record of both Parliament and the Supreme Court on gay and lesbian rights issues.

(b) Family Status and the Anti-Discrimination Statutes of Other Jurisdictions

Lamer C.J.’s judgment will also have very little practical impact on the interpretation of family status as a ground of discrimination in human rights legislation in other jurisdictions across the country. In addition to the CHRA, family status is currently a prohibited ground of discrimination in the human rights legislation of six provinces and the two territories. Three provinces — Nova Scotia, Ontario and Saskatchewan — define family status narrowly, as the status of being in a parent/child relationship (the other six jurisdictions do not define family status). In the nine jurisdictions that currently prohibit family status discrimination, only the Northwest Territories does not also prohibit discrimination on the basis of sexual orientation. Thus, the Northwest Territories is currently the only jurisdiction in the country in which Lamer C.J.’s judgment in Mossop could conceivably be re-

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26 They are: British Columbia, Manitoba, Nova Scotia, the Northwest Territories, Ontario, Quebec, Saskatchewan and The Yukon. Canadian Human Rights Act, R.S.C. 1985, c.H-6, s.3(1); Human Rights Act, S.B.C. 1984, c.22 (as am. by S.B.C. 1992, c.43) s.2(1), s.3(1), s.5(1), s.6, s.8(1), s.9; Human Rights Code, R.S.O. 1990, c.H.19, s.1, s.2, s.3, s.5, s.6; Saskatchewan Human Rights Code, S.S. 1979, c.S-24.1 (as am. by S.S. 1993, c.61) s.9, s.10(1), s.11(1), s.12(1), s.13(1), s.14(1), s.15(1), s.16; Human Rights Code, S.M. 1987-88, c.45 (C.C.S.M., c.H175), s.9(2)(i); Charter of Human Rights and Freedoms, R.S.Q. 1977, c.C-12, s.10 ("civil status" or "l’état civil"); Human Rights Act, R.S.N.S. 1979, c.214 (as am. by S.N.S. 1991, c.12), s.5(1)(r); Fair Practices Act, R.S.N.W.T. 1988, c.F-2, ss.3-5 (uses “family” rather than “family status”); Human Rights Act, S.Y. 1987, c.3 (R.S.Y. 1986 Supp., c.11), s.6(k).

27 Nova Scotia, s.3(h); Ontario, s.10(1); Saskatchewan, s.2(1)(h.1).

28 Of course, if the Haig ruling is followed by the courts in the Northwest Territories, sexual orientation will be added whether or not amending legislation is passed. This could also occur in Alberta, Newfoundland and Prince Edward Island, the remaining three provinces where sexual orientation is not a prohibited ground of discrimination. See the Individual’s Rights Protection Act, R.S.A. 1980, c.I-2; Human Rights Code, R.S.N. 1990, c.H-14; Human Rights Act, R.S.P.E.I. 1988, c.H-12. A recent ruling of the Alberta Queen’s Bench has followed Haig: see Vriend v. Alberta, [1994] A.J. No. 272, Russell J., April 12, 1994.
lied upon to argue that the legislature did not intend gay or lesbian relationships to be included in the term family status. Even then, Lamer C.J. warned against interpreting his ruling "as meaning that homosexual couples cannot constitute a "family" for the purposes of legislation other than the CHRA."²⁹

Thus, Lamer C.J.'s decision for the majority of the court appears to have been carefully crafted to avoid establishing a precedent one way or the other on the central question presented to it: namely, whether a gay couple has a family status for the purposes of bringing a complaint on that ground under anti-discrimination statutes.

2. The Implications of the Majority Judgments on the Interpretation of Sexual Orientation Discrimination

Sexual orientation is now a prohibited ground of discrimination in the CHRA³⁰ and in the human rights legislation of seven provinces and the Yukon.³¹ Moreover, there is a clear judicial consensus that sexual orientation is an analogous ground of discrimination for the purposes of s.15 of the Charter.³² The inclusion of sexual orientation as a prohibited ground of discrimination in human rights legislation and s.15 of the Charter means that sexual orientation is presumptively unrelated to a person's merits and capacities. This means that individuals cannot be denied opportunities, benefits or rights solely because they are, or are perceived to be, lesbian, gay, bisexual or transsexual. This much is relatively uncontroversial in legal theory. However, consensus is replaced with confusion in the case law when it comes to determining the implications of prohibitions on sexual orientation discrimination on the legal treatment of gay and lesbian relationships.

To date, the case law on whether prohibitions on sexual orientation discrimination

²⁹ Supra note 1 at 582.

³⁰ As a result of the Haig decision, supra note 22.

³¹ The seven provinces are British Columbia, Manitoba, Nova Scotia, New Brunswick, Ontario, Quebec and Saskatchewan. See Human Rights Act, S.B.C. 1984, c.22 (as am. by S.B.C. 1992, c.43) s.2(1), s.3(1), s.4, s.5(1), s.6, s.8(1), s.9; Human Rights Code, R.S.O. 1990, c.H.19, s.1, s.2, s.3, s.5, s.6; Saskatchewan Human Rights Code, S.S. 1979, c.S-24.1 (as am. by S.S. 1993, c.61) s.9, s.10(1), s.11(1), s.12(1), s.13(1), s.14(1), s.15(1), s.16; Human Rights Code, S.M. 1987-88, c.45 (C.C.S.M., c.H175), s.9(2)(h); Charter of Human Rights and Freedoms, R.S.Q. 1977, c.C-12, s.10; Human Rights Act, R.S.N.S. 1979, c.214 (as am. by S.N.S. 1991, c.12), s.5(1)(n); Human Rights Act, R.S.N.B. 1973, c.H-11 (as am. by S.N.B. 1992, c.30), ss.3-7; Human Rights Act, S.Y. 1987, c.3 (R.S.Y. 1986, c.11), s.6.

discrimination require the recognition of same-sex partners as "spouses" or "family" is divided. Some courts and tribunals have held that laws or policies that impose disadvantages on same-sex couples relative to their heterosexual counterparts discriminate on the basis of sexual orientation. The decision-makers in Veysey, Knodel, Leshner and Clinton have accepted that one's choice of an intimate living partner is closely linked to one's sexual orientation. Indeed, this point would be too obvious to be worth mentioning had it not been denied in a host of other decisions. Persons who consider themselves heterosexual do not generally choose to live with persons of the same sex in an intimate relationship. Similarly, persons who consider themselves lesbian or gay do not generally prefer to live with persons of the opposite sex in an intimate relationship, although this is not uncommon given the strong legal and social pressures to appear to conform to a heterosexual norm. It is hard to imagine that persons in different-sex relationships would not consider themselves the victims of discrimination on the basis of sexual orientation if, say, employment benefit plans included only same-sex partners. The point is that disadvantaging treatment of same-sex relationships is obviously also treatment that has a disparate and disadvantaging impact on persons who are lesbian and gay.

However, another group of decisions denies this elementary proposition. Some courts and tribunals have held that disadvantaging treatment of gay and lesbian couples does not amount to discrimination on the basis of sexual orientation. Instead, it has been argued that gay men and lesbians are not disadvantaged by such laws and policies because they are always free to enter a heterosexual relationship if they are truly determined to obtain the advantages that such laws or policies confer. Or, it has been argued that disadvantaging treatment imposed on gay and lesbian couples is not based on their sexual orientation per se, but rather on the fact that homosexuality is non-pro-

33 For detailed discussion of these cases, see the works cited in supra note 3. See also Ryder, "Becoming Spouses: The Rights of Lesbian and Gay Couples" (1994) Law Society of Upper Canada Special Lectures 1993 (forthcoming).
34 Veysey, supra note 32 (exclusion of inmate's gay partner from family visiting program at federal penitentiary violates s.15 of the Charter).
35 Knodel, supra note 32 (exclusion of gay partners from definition of spouse in health regulations violates s.15 of the Charter).
36 Leshner, supra note 32 (denial of spousal pension rights to employee's gay partner constitutes discrimination on the basis of marital status and sexual orientation).
39 Layland, supra note 32 at 223.
creative.\footnote{Id. at 222-3; Andrews, supra note 38 at 263.} Or, in an equally specious example of rigorous illogic, it has been argued that any disadvantage suffered by same-sex couples results from the fact that they are not spouses under the law; a result which, we are asked to believe, has nothing to do with their sexual orientation.\footnote{Andrews, supra note 38 at 263; Vogel (No. 2), supra note 38 at 101.}

Clearly, the life of the law in this area has very little to do with logic, and much to do with charged political struggles surrounding the meaning and value of homosexuality. For some, sexuality is a terrain of oppression, and anti-heterosexist struggle an important element of the fight for a just and equal society. Or, in a more liberal version, sexuality is a matter of morally neutral private choices. Thus, subject only to concerns regarding age, consent and consanguinity, not only must the criminal law be removed from the bedrooms of the nation, but also any other laws or policies that attach penalties or incentives to the manner in which citizens exercise sexual self-determination. For others, homosexuality is immoral if not dangerous, or at least, in the more tempered statements of conservative jurists, “controversial”.\footnote{See, e.g., Martland J.’s reference in the Gay Alliance case, supra note 2, to the “controversial subject of homosexuality” (at 455-6) and his incredulous tone in reciting the “thesis” of the Gay Tide newspaper that “homosexuality is a valid and legitimate form of human sexual and emotional expression in no way harmful to society or the individual and completely on a par with heterosexuality” (at 450). See also Nielsen v. Canada, [1992] 2 F.C. 561 (T.D.), where Muldoon J. reacted with similar incredulity to the “polemical” nature of the argument in the plaintiff’s factum regarding the relationship of heterosexuality to gender inequality (at 573), and commented that “[i]t is a well-known fact, of which the Court takes notice, that Canadian society is deeply riven over the question of homosexual behaviour....” (at 577).} Adherents of these competing perspectives may more easily agree on providing protection to individual gay men and lesbians from being deprived of their rights to services, homes or jobs solely because of their sexual orientation. Such protection can be squared, grudgingly, with a conservative morality that under pressure from gay and lesbian resistance will yield some compassion for “the sinner” so long as “the sin” remains condemned. However, achieving agreement on human rights protections for gay and lesbian relationships is more difficult precisely because it entails a measure of acceptance and recognition of relationships founded in part on acts of same-sex eroticism.

Unlike his colleague L’Heureux-Dubé J., Lamer C.J. preferred to postpone engaging in these highly contested political/legal debates to another day. However, the legal escape route he chose does at least provide support to the view that disadvantaging treatment of gay and lesbian couples constitutes discrimination on the basis of sexual orientation. Lamer C.J. argued that:

Mr. Mossop’s sexual orientation is so closely connected with the grounds which led to the refusal of the benefit that this denial could not be condemned as discrimination on the basis of “family status” without indirectly introducing into the CHRA the prohibition which Parliament specifically decided not to
include in the Act, namely the prohibition of discrimination on the basis of sexual orientation.43

Lamer C.J. went on to quote with approval Marceau J.A.’s view that “sexual orientation is really the ground of discrimination involved” in the case.44 Implicit in this analysis is the view that sexual orientation discrimination encompasses discrimination against lesbian and gay relationships. Indeed, Lamer C.J. went on to reject the argument that the status of being in a same-sex relationship could somehow be severed from the issue of sexual orientation.45

Thus, while Brian Mossop’s complaint ultimately failed, Lamer C.J.’s decision does offer real hope of success to gay and lesbian litigants in future challenges to laws or policies that exclude their relationships, if those challenges are brought under the Charter or anti-discrimination laws in which sexual orientation is a prohibited ground of discrimination.46

3. L’Heureux-Dubé J.’s Contribution to the Interpretation of Family Status Discrimination

L’Heureux-Dubé J.’s dissent ought to be more influential than the typical dissent, since it represents the views of the only three members

43 Supra note 1 at 580. In his short concurring opinion, La Forest J. also relied on the absence of legislative history indicating that “Parliament intended to cover the situation of a same-sex couple.” Id. at 586. He believed that, in the absence of such a legislative intent, the question of requiring the extension of bereavement leave (and presumably other employment benefits) on equal terms to same-sex couples was “an issue for Parliament to address.” Id.

44 Id. at 581.

45 Id. at 581.

46 A recent ruling of the Public Service Staff Relations Board supports this view of the state of federal anti-discrimination law after Haig and Mossop. An adjudicator ruled that the federal government’s refusal to provide family leave and bereavement leave to a gay employee, David Lorenzen, constituted discrimination on the basis of sexual orientation prohibited by the Canadian Human Rights Act and the anti-discrimination clause in the federal government’s collective agreement with the Public Service Alliance of Canada. See M. Philp, “Ottawa ordered to grant same-sex family leaves” Globe and Mail (2 October 1993) A3; “Ruling backs homosexual couples” Toronto Star (2 October 1993) A16. The new federal government has decided to abandon an application for judicial review of this ruling. Se M. Philp, “Ottawa Acquiesces on Gay Spousal Leave”, Globe & Mail (15 April 1994) A1. Similarly, in Canadian Post Corporation v. P.S.A.C. (March 8, 1994), arbitrator Stephen Kelleher ruled that the denial of spousal medical benefits to the gay partner of a postal worker constituted prohibited discrimination.

The Supreme Court’s first opportunity to address the rights of lesbian and gay couples under the Charter will be on the appeal of the Egan ruling, supra note 32. In the meantime, the Court’s disposition of another Charter challenge to a legislative definition of spouse will no doubt be revealing: see Miron v. Trudel (1991), 83 D.L.R. (4th) 766 (Ont. C.A.) (exclusion of unmarried heterosexual couples from spousal insurance benefits does not violate s.15 of the Charter), leave to appeal to the Supreme Court of Canada granted, June 4, 1992.
of the Court to turn their minds to the issue of gay family status in a manner that is relevant under the present state of the CHRA.

Her judgment is animated by a pluralistic and egalitarian conception of families. She rejected in strong language the argument that the "dominant" or "traditional" conception of family exhausts the meaning of the term.\(^\text{47}\) She discussed the social reality of Canadian familial diversity, and noted that the way many people in Canada currently experience family does not necessarily fit with the dominant model of a man and a woman and their children.\(^\text{48}\) She recognized that family structures have proven to be fluid and dynamic over time, that "there is no consensus as to the boundaries of family" and the meaning of family may vary depending upon the context or purpose for which the definition is desired.\(^\text{49}\) She illustrated these points by drawing on the insights of a wide range of feminist and lesbian theory. All of these features of her judgment are consistent with the work of other Canadian scholars who have argued for the need to develop an "anti-essentialist" understanding of family.\(^\text{50}\)

L’Heureux-Dubé J. supported the functional approach to the definition of family adopted by the Tribunal. On her characterization of this approach, one measures a relationship against a "cluster of variables that may be commonly found in families"\(^\text{51}\) to determine whether that relationship possesses enough of those same variables, or performs enough of the same functions, to qualify as familial. The difficulty with this approach is that it appears to accord familial recognition to relationships to the degree that they conform to accepted or dominant family forms.\(^\text{52}\) A functional approach conceptualized in this way compromises to some extent L’Heureux-Dubé J.’s commitment to an egalitarian and pluralistic conception of the family. While not unmindful of these difficulties,\(^\text{53}\) she did not feel the need to resolve them

\(^{47}\) Supra note 1 at 624.

\(^{48}\) Id. at 628.

\(^{49}\) Supra note 1 at 626.

\(^{50}\) See the work of Cossman, Freeman and Duclos (Iyer) cited in supra note 3.

\(^{51}\) Supra note 1 at 637.

\(^{52}\) The assimilationist tendencies of the functional approach are discussed by Freeman, supra note 3 at 63-74. My own view is that a functional approach is unavoidable, but that the functions or attributes necessary to family status must not be defined by reference to dominant conceptions of family but rather by reference to the purposes of the law or policy in question. For example, since the purpose of bereavement leave is to respect the need to mourn the loss of loved ones, the presence of a strong emotional tie to the deceased (or a person mourning the loss of the deceased) is the only attribute of a relationship that is relevant. Since the possibility of inquiries into the validity of an employee’s emotions is a grotesque one, it follows that the only solution that respects an equality and diversity of intimate relationships is one that allows employees themselves to determine which of their relationships should count for the purposes of bereavement leave. The possibility of abuse could be limited by capping each employee’s entitlement, as proposed in the factum of EGALE et al, paras. 57-9.

\(^{53}\) L’Heureux-Dubé J. acknowledged the potentially assimilationist tendencies and invasive aspects of a functional approach to defining family. See her discussion, supra note 1 at 637-8.
because it was enough that the functional approach chosen by the Tribunal was a reasonable one.

A laudable feature of L’Heureux-Dubé J.’s judgment is the care she took to counter some of the illogic, myths, and stereotypes that have plagued lower court decisions dealing with the equality rights of gay and lesbian couples. Thus, for example, she rejected the myths that only heterosexual people can be good parents or have loving and caring relationships.\textsuperscript{54} She also clearly rejected the argument that the capacity for procreation is a necessary element of a family relationship.\textsuperscript{55} And she enlisted “true family values” in support of her position.\textsuperscript{56}

\section*{IV. PRINCIPLES OF INTERPRETATION OF HUMAN RIGHTS LEGISLATION}

We have seen that the majority judgment of Lamer C.J. does not establish a precedent that is likely to hamper the struggle of gay men and lesbians for legal recognition of their relationships, and indeed has helped advance that struggle in recent cases.\textsuperscript{57} Let us now turn to an analysis of the approach taken by the majority judges to the interpretation of anti-discrimination legislation. Here I will seek to demonstrate that the heavy reliance placed on a presumed legislative intent by Lamer C.J. in the principal majority judgment, and by La Forest J. in his short concurrence, is an approach that departs from the general principles that the Court has developed to guide the interpretation of human rights legislation. If followed in future cases, this approach could seriously limit what has hitherto been a significant positive contribution by tribunals and courts to the development of anti-discrimination law. While it is too early to say with any certainty, the early evidence suggests that the \textit{Mossop} case is an aberration, likely explained more by the Court’s lack of understanding of sexuality as a human rights issue than a retrenchment from its support of anti-discrimination law generally.

Before examining the majority judgments in \textit{Mossop} on this point, a brief overview of the interpretive principles the Court has brought to bear on anti-discrimination legislation is warranted.

\subsection*{1. The Quasi-Constitutional Nature of Anti-Discrimination Legislation}

In a series of judgments over the past decade, the Supreme Court has fashioned a distinct theory of interpretation for anti-discrimination statutes. This theory can be summed up in the Court’s characterization of anti-discrimination legislation as “quasi-constitutional” in nature. Lamer J. launched this development in his 1982 judgment in \textit{Heerospink}, in which he commented that anti-discrimination laws are “fundamental”, considered by the people to be, “save their constitutional
laws, more important than all others." Since then, the Court has variously described anti-discrimination statutes as "public and fundamental law of general application," as declaring "public policy regarding matters of general concern," as being "of a special nature, not quite constitutional but certainly more than ordinary," as incorporating "certain basic goals of our society," as "intended to give rise, amongst other things, to individual rights of vital importance," and as "often the final refuge of the disadvantaged and disenfranchised."

The Court has attached a number of interpretive consequences to the quasi-constitutional status of anti-discrimination laws. One is the primacy of such laws over other legislation, even in the absence of an explicit clause to that effect. In the case of inconsistency with other validly enacted legislation, human rights laws will prevail, unless the legislature says otherwise "in express and unequivocal language." Another is that parties cannot contract out of the requirements of human rights legislation. And, most importantly for our purposes, the Court has repeatedly emphasized that narrow and literal interpretations are to be eschewed in favour of large, liberal and purposive interpretations that best advance the broad policy against discrimination. This approach accounts for the Court's recognition that the concept of discrimination must encompass unintentional forms of discrimination, including "systemic" and "adverse effect" discrimination, if the goals of the legislation are to be achieved. The prohibited grounds of discrimination are also defined by reference to this broad and purposive approach. Another corollary of the liberal and purposive approach to interpretation is that exceptions to prohibitions against discrimination are to be interpreted narrowly. More gener-

60 Id.
65 Heerspink, supra note 58 at 158. See also Craton, supra note 59 at 156.
68 Simpsons Sears, supra note 61; Action Travail des Femmes, supra note 63. As Dickson C.J. commented in the latter case, the rejection of the necessity to prove an intent to discriminate, and the adoption of the concept of adverse effect discrimination, "is the result of a commitment to the purposive interpretation of human rights legislation" (at 1137).
70 Bhinder, supra note 67 at 569; Zurich, supra note 64 at 339.
ally, the Court has said that protection against discrimination cannot be diminished by the legislature absent "clear legislative pronouncement".\(^7\)

2. The *Mossop* Majority: Introducing Legislative Intent

Lamer C.J.'s judgment in *Mossop* made no reference to the large, liberal and purposive approach that the Court has adopted in interpreting human rights legislation, nor did he explain how his interpretation squared with that approach. He apparently believed that the clarity of Parliament's intent to exclude gay families from family status rendered such a discussion unnecessary. La Forest J. agreed, and added that neither the "ordinary meaning" of family status, nor evidence of Parliament's intent in adding family status as a prohibited ground of discrimination in 1983, suggested that the term ought to include a "relationship dependent on a same-sex living arrangement."\(^7\)2

La Forest J. did acknowledge that "the statute should be interpreted generously with a view to effect its purpose".\(^7\) However, rather than look at the "broad" or "dominant" purposes of the legislation as has been the Court's practice,\(^7\)4 La Forest J. narrowed the inquiry to Parliament's purpose (or intent) in amending the CHRA to add family status as a prohibited ground of discrimination in 1983. The use of the same word "purpose" to describe these two types of reasoning should not obscure the fundamental difference in approach. La Forest J. did not seek to define the vague language of the statute by reference to the need to advance its overall or dominant purpose of promoting equality

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\(^7\) Craton, *supra* note 59 at 156. See also *Bhinder, supra* note 67 at 571 (reduction of protection of the individual from discrimination "would require clear and explicit words to that effect."). These statements have to be updated to reflect developments in the jurisprudence since the equality rights of the *Charter* came into force. It now appears that, once passed, much of the content of anti-discrimination statutes is constitutionally mandated rather than a discretionary exercise of legislative power. In cases like *Re Blainey* (1986), 54 O.R. (2d) 513 (C.A.), *Haig, supra* note 22, *Leshner, supra* note 32, and *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, courts and tribunals have suggested that the scope of protection against public and private discrimination afforded by human rights legislation must be at least co-extensive with that provided against discriminatory government action by s.15 of the *Charter*. If human rights legislation that does not go "far enough" in protecting against discrimination violates equality rights, then it would seem to follow that any attempt to amend or repeal human rights legislation so as to provide less protection than that afforded by s.15 against government action would be similarly unconstitutional. Cf. *Reitman v. Mulkey* (1967), 387 U.S. 369 (state attempt to repeal anti-discrimination statute violates the equal protection clause of the U.S. Constitution). In such circumstances, the "clear and explicit" statutory language referred to in *Craton* would not be constitutionally capable of accomplishing a limiting legislative intent unless the legislature also had resort to the notwithstanding clause in s.33 of the *Charter*.

\(^7\)2 *Supra* note 1 at 586.

\(^7\)3 *Id*.

\(^7\)4 For example, *Simpsons Sears, supra* note 61 at 547; *Bhinder, supra* note 67 at 568; *Action Travail des Femmes, supra* note 63 at 1133; *Robichaud, supra* note 62 at 89; *Berg, supra* note 67 at 370.
by overcoming the most socially destructive and prevalent forms of discrimination.

On a purposive approach to family status discrimination, one would ask what kinds of domestic living arrangements have given rise to social, economic or legal penalties unrelated to the quality of the relationships involved. Those are precisely the kinds of relationships that ought to be protected by the inclusion of “family status” in human rights legislation. Persons in socially-stigmatized family relationships are likely to be denied the dignity and equal respect that it is the overall purpose of human rights legislation to foster. In short, the meaning of personal characteristics that are prohibited grounds of discrimination should be defined in a manner that identifies and seeks to overcome patterns of group-based disadvantage associated with those characteristics.75

On a purposive approach, the problem with a reliance on the “ordinary meaning” of family status should be apparent: it is likely to limit protection to the dominant or most privileged family forms. Rather than placing the overcoming of disadvantage associated with family status at the heart of anti-discrimination law, it risks leaving out disadvantaged family forms altogether. The Tribunal decision in Mossop was attuned to these concerns in its rejection of the “majoritarian aspects” of a test of “general understanding” in favour of an interpretation more consistent with the fact that “the Act is intended to address group stereotypes.”76

In place of an interpretation consonant with the dominant purpose of anti-discrimination law, the majority judgments place great reliance on a presumed intent of Parliament to exclude gay couples from family status. The intent thus relied on can only be a presumed or attributed intent: no reliable evidence of Parliament’s intention exists. Parliament chose not to define family status when it was added as a prohibited ground of discrimination in 1983. Family status was then, and still is, a relatively new addition to anti-discrimination law that lacks a settled jurisprudential meaning in that context. There was not, and still is not, a body of jurisprudence dealing with the question of whether gay families have family status.77 Moreover, the available legislative history is inconclusive. If anything, it suggests that Parliament’s intent was to have tribunals and courts determine the precise meaning of family status in the usual evolutionary, case-by-case basis. The Minister of Justice, when pressed to explain why the government had chosen not to define family status in the Bill, explained that it was the government’s preference to have the courts and the Human Rights Commission perform that interpretive task, as is the case with other undefined grounds of discrimination.78 The evidence simply does not

76 Supra note 4 at D/6092 and D/6094.
77 The only decisions on point are from Manitoba: see Vogel #1 and Vogel #2, supra note 38.
78 See the discussion of this evidence by the Tribunal, supra note 4 at D/6081-4, and
support the majority judges’ contention that the responsibility for the interpretation they adopted was Parliament’s rather than their own. In these circumstances, deferring to a presumed Parliamentary intent to exclude gay couples from protection seems to be a disingenuous ratiﬁcation of majoritarian understandings and an abdication of the Court’s commitment to a generous and dynamic interpretation of anti-discrimination statutes.

3. Dwelling on the “Quasi” Side of Quasi-Constitutional: The Relevance of Legislative Intent

Apart from the difficulties of knowing whether the majority read Parliament’s mind accurately, it is striking that neither Lamer C.J. nor La Forest J. found it necessary to discuss the legitimacy of reliance on legislative intent in interpreting anti-discrimination legislation. This is not an issue that is addressed directly in the Court’s human rights jurisprudence, perhaps because legislative intent has not ﬁgured so prominently as the basis for any of the Court’s previous decisions in the area. Of course, the relevance of legislative intent can be taken for granted in interpreting ordinary statutes. But, as the Court has repeatedly emphasized, anti-discrimination laws are not ordinary statutes. The manner and degree to which legislative intent should be relevant in interpreting a quasi-constitutional document, if it is relevant at all, is not self-evident.

Most of the Court’s decisions involving anti-discrimination law since 1982 have emphasized the similarities between constitutional and statutory human rights. The result has been a nearly complete convergence of interpretive principles in the two domains. In other words, prior to Mossop, the Court had little to say about the implications of the “quasi” side of the quasi-constitutional status of anti-discrimination statutes. The majority judgments in Mossop, on the other hand, seem to dwell completely on the “quasi” side.

by L’Heureux-Dubé J., supra note 1 at 620. The majority judges did not discuss this evidence.

79 This is not to say that legislative intent has played no role in the Court’s decisions in this area. Occasional references to legislative intent, always in the context of interpreting express statutory language, can be found in the Court’s human rights jurisprudence: see, e.g., Bhinder, supra note 67 at 571 per Dickson C.J. and at 579 per Wilson J.; Zurich, supra note 64 at 337 per Sopinka J. Indeed, it should be acknowledged that even the Court’s theory that anti-discrimination law is quasi-constitutional in nature is an extrapolation from the legislative intent to create fundamental rights. See Action Travail des Femmes, supra note 63 at 1134 per Dickson C.J. (“Human rights legislation is intended to give rise ... to individual rights of vital importance”).

80 For example, the interpretive approach taken to the Charter of Rights in cases like Hunter v. Southam, [1984] 2 S.C.R. 145, dovetails with the one taken to anti-discrimination statutes, described above in the text accompanying notes 58-71. However, the convergence in approach has not been total. For example, the Court has applied the principle of dynamic interpretation, as embodied in the “living tree” metaphor, to the Charter but has yet to do so explicitly with human rights statutes. But see L’Heureux-Dubé J.’s views in Mossop, supra note 1 at 621.
The weight given to legislative intent in *Mossop* is starkly at odds with the Court's rejection of historical intent as a guide to constitutional interpretation. The Supreme Court has stated that the *Charter of Rights*, like the *Constitution Act 1867*, is a "living tree" capable of growth and development over time.\(^1\) A corollary of the principle of interpretive dynamism embodied in the "living tree" metaphor is that the intentions of the framers of the *Charter* are accorded very little weight in interpretation. This is not because those intentions (if they could be discovered) are necessarily wrong-headed, but simply because they are static and incomplete. In the *Motor Vehicle Reference*,\(^2\) Lamer J. argued that the *Charter* must not be "frozen in time to the moment of adoption with little or no possibility of growth". "Care must be taken", he said, "to ensure that historical materials ... do not stunt its growth."\(^3\)

The question that arises, of course, is whether the principle of interpretive dynamism embodied in the living tree metaphor ought to apply with the same force to the interpretation of anti-discrimination statutes deemed to be of quasi-constitutional significance. Is it not important that all rights deemed fundamental, regardless of their source, be capable of growth and adaptation over time? If so, then an argument exists that evidence of legislative intention should not prevail over the results of a dynamic, purposive and generous interpretation.

On the other hand, we cannot ignore the fact that human rights statutes are, after all, just statutes. They came into being through the ordinary legislative process in each of the thirteen Canadian jurisdictions. The simple reason why these anti-discrimination statutes are only *quasi*-constitutional is that they are not formally part of the Constitution of Canada. Thus, unlike constitutional provisions, human rights codes can be altered through the ordinary legislative process. It follows, then, that the judiciary need not treat human rights legislation as a "living tree" capable of outgrowing the original intent of the en-

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\(^3\) Id. at 509. I do not want to suggest that the Court has adhered consistently to a rejection of the framers' intention as a guide to *Charter* interpretation. For example, the language of intention infuses the reasoning in *A.G. Quebec v. Quebec Protestant School Board*, [1984] 2 S.C.R. 66 and in *Dolphin Delivery v. R.W.D.S.U.*, [1986] 2 S.C.R. 573. My point is simply that in theory the Court has acknowledged that original intention should be accorded little weight in constitutional interpretation.
acting legislature, because the legislature is always free to pass amending legislation expanding the scope of human rights legislation. The Mossop majority judges were probably on solid ground in assuming that legislative intent ought to constrain the interpretation of anti-discrimination statutes.

However, there are several considerations which suggest that the Court should be extremely cautious about allowing arguments from legislative intent to set the outer limits of human rights protections.

One such consideration is that the “quasi” side should not be allowed to easily overwhelm the “constitutional” side of anti-discrimination statutes. That is, given the fundamental nature of the rights promoted by anti-discrimination law, a generous and dynamic interpretation should be pursued in the absence of a clear legislative direction to the contrary.84

Furthermore, the fact that anti-discrimination statutes are only quasi-constitutional cuts both ways in assessing whether the principle of interpretive dynamism should be applied to the task of giving meaning to their language. We have already noted that the judiciary need not feel the same responsibility for dynamic interpretations as it should in the constitutional context, because the legislature can advance statutory protection from discrimination through the ordinary legislative process. But for the same reason, there is less reason to be wary of embarking on interpretations that the legislature may not have intended. In the statutory context, the judiciary is relieved of the burden of supremacy and finality that accompanies its constitutional decisions. As L’Heureux-Dubé J. pointed out in dissent,85 the legislature can always reverse judicial interpretation of a statute by passing amending legislation.

In sum, because anti-discrimination statutes take the form (although not the substance) of ordinary legislation, their interpretation is properly informed by legislative intent. However, the fundamental nature of the rights involved, and the possibility of legislative alteration of undesired interpretations, suggest that evidence of legislative intention should be clear and explicit before it is relied upon to curtail statutory anti-discrimination protection.

4. Legislative Intent Before Mossop

An examination of the case law prior to Mossop reveals that the Supreme Court had consistently followed the approach outlined in the previous paragraph in interpreting anti-discrimination laws. The Court has stated that only by “express and unequivocal language”86 or “clear legislative pronouncement”87 will the legislature be permitted to diminish the protection afforded by anti-discrimination statutes.

For example, in Simpsons Sears, the Court made clear that arguments relying on imputed legislative intent would be rejected if they would have the effect of undermining the ability of human rights leg-
islation to sanction discriminatory practices. In that case, a provision of the Ontario Human Rights Code prohibited unintentional discrimination on certain grounds, but did not include religion. An amendment to the Code passed after the litigation commenced made clear that unintentional religious discrimination was prohibited. Relying upon these provisions, the Ontario courts reached the not unreasonable conclusion that the legislature did not intend to cover unintentional religious discrimination in the earlier version of the Code at issue.\(^8\) McIntyre J., speaking for the Court, disagreed. Placing the advancement of the broad purposes of the Code at the centre of his analysis, he found that unintentional religious discrimination was prohibited.\(^8\)

Further evidence of the rejection of a reliance on imputed legislative intention as a guide to interpretation can be found in Janzen v. Platy Enterprises.\(^9\) At issue in that case was a provision of the Manitoba Human Rights Code that did not expressly prohibit sexual harassment. Other provincial legislation did expressly prohibit sexual harassment, as did a newly enacted version of the Manitoba legislation. Obviously an argument existed in these circumstances along the lines accepted by the majority in Mossop; that is, that the legislature could not have intended sexual harassment to be prohibited in the earlier version of the statute. But the Supreme Court held that the Manitoba Court of Appeal was wrong to infer "that in the absence of such express legislation a prohibition against sex discrimination could not embrace sexual harassment."\(^9\)

Similarly, in Brooks v. Canada Safeway Ltd.,\(^9\) the Court found that pregnancy discrimination was included in Manitoba's prohibition on sex discrimination. This was so even though the Supreme Court had previously held in Bliss\(^9\) that pregnancy discrimination was not sex discrimination, and even though Manitoba, unlike several other provinces, had not amended its human rights legislation to overcome Bliss and explicitly prohibit pregnancy discrimination. Dickson C.J. rejected the argument that the legislature's inaction amounted to evidence of an intention not to prohibit pregnancy discrimination.\(^9\) Rather, he chose to advance the law, taking advantage of "a decade of hindsight and ten years of experience with claims of human rights discrimination and jurisprudence arising therefrom ...".\(^9\)

\(^8\) In Re OHRC v. Simpsons Sears (1982), 133 D.L.R. (3d) 611 (Ont. Div. Ct.), Southey J. for the majority concluded that in light of the wording of the Code he could not hold that "the Legislature intended the Code as now worded..." to cover unintentional religious discrimination (at 616). The Ontario Court of Appeal agreed with Southey J.'s analysis: (1982), 138 D.L.R. (3d) 133.

\(^9\) Supra note 61 at 547. See also the dissenting judgment of Dickson C.J. (Lamer J. concurring) in Bhinder, supra note 67 at 571: "such reduction of the protection of the individual from adverse effect discrimination under the Act would require clear and explicit words to that effect."


\(^9\) Id. at 1286.

\(^9\) Supra note 67.


\(^9\) Supra note 92 at 1250.

\(^9\) Id. at 1243.
In short, the Court has indeed treated anti-discrimination law as a “living tree” capable of growth and expansion over time. This expansion has been accomplished by reference to the overall purposes of anti-discrimination legislation as the guide to interpretation. Unlike the constitution, the growth of human rights statutes is ultimately constrained by legislative intention, but that intention will be permitted to diminish the scope of protection against discrimination only when it is clear and explicit. Arguments based on an imputed or presumed limiting legislative intent, derived from legislative silence or inaction, have been repeatedly rejected prior to the Mossop case.

5. Legislative Intent After Mossop: The Berg Decision

It is too early to say whether the majority decision in Mossop is an aberration or a signal that the Court is embarking on a more restrictive approach to the interpretation of human rights legislation. The early indications suggest that the former interpretation will turn out to be correct.

In U.B.C. v. Berg, Lamer C.J. stated that courts and tribunals should give a prohibition on discrimination “a liberal and purposive construction, without reading the limiting words out of the Act or otherwise circumventing the intention of the legislature.” The underlined words represent the legacy of Mossop: the Court may be willing to find a limiting legislative intention in something other than the explicit language of the Act itself. Nevertheless, in Berg, the Court went on to give a purposive interpretation to the disputed phrase “services customarily available to the public” in upholding the tribunal’s decision that the complainant had suffered discrimination on the grounds of mental disability. Lamer C.J. rejected the “overly restrictive” interpretation of public services offered by the British Columbia Court of Appeal. He characterized the similarly narrow approach taken by the Supreme Court in the 1979 Gay Alliance decision as “subversive of the purpose of human rights legislation.” In concluding, Lamer C.J. commented that:

The Act must be allowed its full scope of application, and its particular operation in situations such as this, if undesirable, is a matter for legislative attention. The recent amendments to the Act show that such responses are always possible.

Thus, the Berg decision represents a return to a conception of the relationship between the courts and the legislatures typical of the pre-Mossop case law: the courts will advance dynamic and generous interpretations, and the legislatures are free to disagree by passing clear and explicit limiting language. Of course, gay men and lesbians will

96 Supra note 67.
97 Id. at 371 (emphasis added).
98 Id. at 394.
99 Id. at 394.
100 Id. at 381.
101 Id. at 381.
find little comfort in the knowledge that the restrictive interpretations emerging from the Court's two gay rights cases, *Gay Alliance* and *Mossop*, do not appear to be unduly hampering the Court's development of anti-discrimination jurisprudence as a whole.

6. Interactive Discrimination

Interactive discrimination is a term used by scholars to describe discrimination that cannot be analyzed adequately through the lens of a single prohibited ground of discrimination. This is because a person's identity, and the way he or she is perceived by others, is frequently a product of multiple characteristics that are inseparably part of the whole person. As Jody Freeman has argued, "[d]iscrimination may have no "core" motivation or effect; it may emanate from shifting and multiple sites, and have complicated effects."\(^{102}\) Thus, if we are to fully grasp the effects of discriminatory practices on those experiencing them, we need to incorporate into anti-discrimination jurisprudence a recognition that grounds of discrimination overlap and interact in complex ways. As the intervenors EGALE et al. put it in their factum, "[t]he experience of discrimination is not neatly divisible into watertight compartments."\(^{103}\)

For example, in her thorough study of Canadian race and sex discrimination case law, Nitya Iyer found that tribunals and courts effectively ignore the reality of combined race and sex discrimination experienced by racial minority women.\(^{104}\) She noted that interlocking racial and sexual stereotypes are often responsible for discriminatory practices experienced by racial minority women, yet courts and tribunals have tended to view the problem through the sole lens of either sex or race discrimination. As a result, racial minority women are made to "disappear" from the jurisprudence. She concludes that:

> The current categorical approach to the grounds of discrimination leads to depictions of the experience of discrimination that are seriously inadequate in a significant number of cases.\(^{105}\)

She urges that we need "a legal description that is sophisticated enough to correspond to the lived experience of discrimination" in order to "build an antidiscrimination law that truly begins to redress it."\(^{106}\) This will involve a "consideration of the complex interactions of race, sex, and the various other grounds of discrimination that are so much a part of the lived experience (as opposed to the legal analysis) of discrimination."\(^{107}\)

The assertion that the *Mossop* case was "really" about sexual orientation, rather than family status, is a classic example of the flawed

\(^{102}\) Freeman, supra note 3 at 80.

\(^{103}\) At para 15. L'Heureux-Dubé J. adopted this perspective in her dissent in *Mossop*, supra note 1 at 645-7.


\(^{105}\) Id. at 36.

\(^{106}\) Id. at 50.

\(^{107}\) Id. at 40. Iyer develops these ideas further in her article “Categorical Denials: Equality Rights and the Shaping of Social Identity” (1993) 19 Queen's L.J. 179.
categorical approach to discrimination identified by Iyer and other scholars. As Freeman has stated, this "categorization game" enabled the Federal Court of Appeal and the Supreme Court majority "to avoid considering family status entirely, as if, because Mossop is gay, non-recognition of his family ceases to be an issue."\(^{108}\) It also may be a reflection of the broader tendency in this culture to define gay men and lesbians solely in terms of their sexuality, as if there are no other meaningful dimensions to their lives.

It is hard to understand the assertion that Mossop's complaint was not "really" about family status discrimination. Mossop, after all, was denied an employment benefit because of non-recognition of relationships he considered familial. His relationship to Popert Sr. obviously developed in the context of his relationship to his lover, Popert Jr. But the relationship between Mossop and Popert Jr. should not be reduced solely to its sexual dimension, which is what the Court risks doing by saying the case is really only about sexual orientation. For the purposes of bereavement leave, it is the nature of the emotional connections between persons that is most relevant, rather than whether those connections originate in a relationship that has a sexual dimension or not.

At the same time, we cannot ignore that the definition of family in the collective agreement excluded all same-sex couples, and that this non-recognition is closely, indeed inseparably, connected to discriminatory attitudes to gay men and lesbians that lead to the denial of the reality and value of their relationships. The discrimination experienced by Mossop can best be understood as resulting from the interaction of both his family status and his sexual orientation. It can also be understood, although incompletely, as resulting from either his family status or sexual orientation alone.

The judgment of Lamer C.J. is problematic not only because he adopted the questionable tactic of labelling Mossop's complaint as really only about sexual orientation, but also because he used a recognition of the interaction of the grounds of discrimination to subtract from the scope of protection provided by human rights statutes. The following diagram, while overly simplistic, may help illustrate this point:

1-Sexual Orientation 2-Family Status

![Venn Diagram]

Circle 1 represents the sphere of activities prohibited by sexual orientation discrimination. Circle 2 represents the sphere of activities prohibited by family status discrimination. Thus, area A represents discrimination

\(^{108}\) Freeman, *supra* note 3 at 74.
against gay men and lesbians as individuals; area C represents discrimination against the family relationships of persons for reasons unrelated to their sexual orientation; and area B represents the area of overlap and interplay, namely discrimination against gay and lesbian families.

In his judgment in Mossop, rather than employing the usual interpretive approach to give all of circle 2 a generous and purposive interpretation, Lamer C.J. found a Parliamentary intent to shrink the scope of family status by excluding area B from the coverage of the Act. On a strict categorical approach to grounds of discrimination, Parliament’s exclusion of sexual orientation discrimination would be irrelevant to the interpretation of family status discrimination. Here, however, Lamer C.J. recognized that the two grounds of discrimination overlap. This recognition enabled him to rely on Parliament’s failure to include sexual orientation discrimination as a reason to diminish the scope of prohibited family status discrimination.\(^{109}\)

The difficulty of this reasoning is that it looks at only one side of the contradictory Parliamentary signals sent out with respect to area B, the zone of overlapping discrimination. On the one hand, Parliament has excluded all of circle I from the coverage of the Act. On the other hand, it has included all of circle 2 (without express qualification) within the Act. On what basis is it possible to conclude that Parliament clearly intended to exclude all complaints that fall within area B? Why should a result that inhibits the achievement of the objects of the Act be selected in the face of such contradictory signals? Lamer C.J. argued that any other result would be “somewhat surprising; while homosexuals who are not couples would receive no protection under the Act, those who are would be protected.”\(^{10}\) But it is no less surprising that heterosexual families receive protection under the Act, while gay or lesbian families receive none.

The Mossop majority provides support for the following proposition: the omission of a ground of discrimination from human rights legislation has the effect of diminishing other grounds of discrimination by removing from their scope all areas of interactive or overlapping discrimination with the missing ground. This “subtractive” thesis is one that if followed could have alarming consequences for anti-discrimination law. This is because, as L’Heureux-Dubé J. stated in dissent, “though multiple levels of discrimination may exist, multiple levels of protection may not.”\(^{111}\) For example, in jurisdictions where the Mossop situation is reversed, that is, where sexual orientation discrimination is prohibited but family status discrimination is not,\(^{112}\)

\(^{109}\) The good news is that the meaning of family status may expand once sexual orientation is added to the Act, as it now appears to be. Lamer C.J. stated that “if Parliament had decided to include sexual orientation in the list of prohibited grounds of discrimination, my interpretation of the phrase ‘family status’ might have been entirely different and I might perhaps then have concluded that Mr. Mossop’s situation included both his sexual orientation and his ‘family status’”, \(supra\) note 1 at 582.

\(^{110}\) \(Id.\) at 581.

\(^{111}\) \(Id.\) at 646.

\(^{112}\) This is the case under the New Brunswick legislation, and also in B.C. with respect to discrimination in real estate transactions.
could it be argued that the legislature intended to exclude discrimination against gay and lesbian couples? Could it be argued that since the *Criminal Code* hate propaganda section prohibits inciting hatred against groups distinguished by certain characteristics including race, but excluding sex,\(^{113}\) that Parliament did not intend to capture persons inciting hatred against racial minority women? The dangers of Lamer C.J.'s "subtractive" approach once again underline the need to insist that judges find a legislative intent to limit the scope of anti-discrimination statutes only in cases where the legislature has made its intention clear and unequivocal.

V. THE STANDARD OF JUDICIAL REVIEW OF HUMAN RIGHTS TRIBUNALS

1. The *Mossop* Judgments on the Standard of Review

The majority judgments in *Mossop* held that the Court should show no deference, on a judicial review application brought pursuant to s.28 of the *Federal Court Act*, to decisions on questions of law made by a Canadian Human Rights Tribunal. Six members of the Court held the Tribunal to a "correctness" test; that is, the Tribunal result could stand only if the judges agreed with it. L'Heureux-Dubé J. was alone in favouring the deferential "patently unreasonable" test; that is, she would defer to the Tribunal's interpretation of the *Act* unless it could be shown to be "patently unreasonable".

La Forest J. wrote the principal opinion for the 6-1 majority of the Court in *Mossop* on the standard of review issue.\(^{114}\) He noted that, even in the absence of a privative clause, the courts do show deference to administrative tribunals on questions involving tribunal members' specialized expertise. Thus, the absence of a privative clause in the *CHRA* was not the decisive factor in determining the standard of review. The crucial question, rather, was defining the sphere of expertise possessed by human rights tribunal members. In La Forest J.'s view, human rights tribunals have no special expertise in giving meaning to the language of anti-discrimination statutes. "These", he said, "are ultimately matters within the province of the judiciary, and involve concepts of statutory interpretation and general legal reasoning which the courts must be supposed competent to perform."\(^{115}\)

L'Heureux-Dubé J. was the only member of the Court who dissented from this approach. In her view, the interpretation of the prohibited grounds of discrimination in the *Act* "is a matter that lay at the heart of the Tribunal's specialized jurisdiction and expertise".\(^{116}\) She would only interfere with tribunal decisions on such questions if they were "patently unreasonable".\(^{117}\) She concluded that the Tribunal decision was not at all unreasonable, because it accorded with "the pro-

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\(^{114}\) In their separate judgments, Lamer C.J. (at 578), Cory J. (at 648) and McLachlin J. (at 648-9) all agreed with La Forest J. on the appropriate standard of review.

\(^{115}\) *Supra* note 1 at 585.

\(^{116}\) *Id.* at 635.

\(^{117}\) *Id.* at 647.
per interpretational approach and considered the purpose of the Act and the values at the base of the protection of families”.

2. Getting It Right: The Adoption of the Correctness Standard of Review in Mossop, Zurich, Dickason and Berg

The Mossop decision was the third of four Supreme Court decisions decided in the past two years that have thrown a close net of judicial supervision around the decisions of human rights tribunals. These decisions as a whole represent a sweeping dismissal of the possibility that human rights tribunals might be better placed than the courts when it comes to interpreting anti-discrimination statutes.

In the first decision, Zurich Insurance Co. v. Ontario, a majority of the Court found that the courts should not defer to the legal findings of Boards of Inquiry when hearing a statutory appeal from a Board decision. This was not a particularly surprising result in light of the structure of the Ontario Human Rights Code. The Code contains no privative clause, nor any other provision signalling a legislative intent to insulate Board of Inquiry rulings from judicial interference. Moreover, the appeal provision of the Code is broadly worded, permitting an appeal on questions of “law or fact or both”, and specifying that the appellate court “may substitute its opinion for that of the Board”. Sopinka J. concluded that there should be no curial deference to findings of law “in which the Board has no particular expertise”. As in Mossop, L’Heureux-Dubé J. dissented. She asserted a broader conception of curial deference based on her acceptance of the superior expertise of Boards of Inquiry in human rights matters.

In Dickason v. University of Alberta a 4-3 majority of the Court carried its interventionist approach a step further. Like the Ontario legislation, the Alberta Individual’s Rights Protection Act contains a provision expressly contemplating an appeal on the law or facts from a Board of Inquiry decision. Cory J. stated that curial deference was unwarranted because board members lacked specialized skill and knowledge. Even on findings of fact, he held that a Board is owed “no particular deference” by an appellate court. The dissenting judgments of Sopinka and L’Heureux-Dubé JJ. argued in favour of the usual rule of deference to the findings of triers of fact. L’Heureux-Dubé J. argued that the majority’s “sweeping dismissal of the role of

118 Id. at 635.
119 Supra note 64.
121 Section 42(1).
122 Section 42(3).
123 Supra note 119 at 338.
124 Id. at 360-3, 377.
125 Supra note 66.
127 Section 33.
128 Supra note 66 at 1126.
the Board"129 overlooks the "signal advantage"130 that courts of first instance and administrative tribunals have in assessing evidence.

The judgments in Zurich and Dickason established that, where anti-discrimination statutes contain broadly worded appeal clauses, the court will review the legal findings of a tribunal on a correctness test. Indeed, given the posture of the Court in these two cases, it is safe to assume that the correctness standard will be used on appeals from legal decisions of human rights tribunals where two conditions are met: 1) the human rights legislation contains an appeal clause on questions of law; and 2) the legislation contains no privative or finality clause indicating a legislative intent to insulate the legal findings of tribunals from judicial interference. Thus, in addition to Alberta and Ontario, the Zurich and Dickason decisions likely mean that the correctness standard will apply to decisions of law made by tribunals in Saskatchewan,131 Nova Scotia,132 Newfoundland,133 the Northwest Territories,134 and the Yukon.135 For reasons to be discussed below,136 Quebec is the only jurisdiction in the country where some deference is likely to be shown on appeals of a human rights tribunal’s legal findings.

The Zurich and Dickason cases did not resolve the question of whether the standard of review ought to be different in anti-discrimination statutes that do not contain appeal clauses. In that situation, tribunal decisions are subject only to the ordinary supervisory jurisdiction of the courts on judicial review applications. As the Court has remarked on another occasion, there is a "basic difference" between an appeal and judicial review: "jurisdiction of a court on appeal is much broader than the jurisdiction of a court on judicial review."137 An appeal clause, after all, is a fairly clear indication by the legislature that it intended the courts to closely scrutinize the legal decisions of a tribunal. By contrast, if there is no appeal clause, and thus judicial review is the sole supervisory mechanism, the legislature appears to be signalling that it is the tribunal that ought to have primary responsibility for the interpretation of its constitutive legislation.

Thus, in a statute like the CHRA, where there is no appeal clause, there is reason to believe that Parliament intended a narrower scope of judicial supervision than in the jurisdictions where appeal clauses are included in human rights legislation. In this regard, the quite understandable lack of deference the Court extended to the legal decisions of tribunals on the appeals in Zurich and Dickason should not

129 Id. at 1148.
130 Id.
132 Human Rights Act, R.S.N.S. 1979, c.214, s.36(1) (appeal on question of law).
133 Human Rights Code, R.S.N. 1990, c.H-14, s.31 (appeal on question of fact or law).
134 Fair Practices Act, R.S.N.W.T. 1988, c.F-2, s.8 (appeal by trial de novo).
135 Human Rights Act, R.S.Y. 1986, c.11, s.26(1) (appeal on question of law).
136 Infra note 154 and accompanying text.
137 Bell Canada v. Canada (CRTC), [1989] 1 S.C.R. 1722 at 1745 per Gonthier J. for a unanimous Court.
have automatically led to the adoption of the same correctness standard in *Mossop*. Yet the majority opinions do just that, obliterating the distinction between an appeal and judicial review. Indeed, this aspect of the majority decisions seems at odds with their apparent sensitivity to evidence of Parliamentary intent in the substantive portions of their judgments.

L'Heureux-Dubé J. did give adequate weight to the structure of the CHRA, and thus was able to distinguish the earlier holdings in *Zurich* and *Dickason*. Nevertheless, her adoption of the patently unreasonable test seems too deferential given the lack of a privative clause in the legislation and the ad hoc nature of human rights tribunals. It is hard to understand why the pendulum could not settle somewhere between the extremes of the correctness and patently unreasonable tests.

Finally, in *U.B.C. v. Berg*, the Court ratified the approach adopted in *Mossop*. The British Columbia Human Rights Act, like the CHRA, contained no appeal clause and no privative clause. Tribunals were subject to the ordinary supervision of the courts under the B.C. Judicial Review Procedure Act. Lamer C.J., writing for a unanimous Court on this point, followed *Mossop* in holding that the tribunal had no particular expertise on “general questions of law with wide social implications”. L'Heureux-Dubé J. finally gave up the ghost: she abandoned her lonely defence of the expertise of human rights tribunals by joining Lamer C.J.'s opinion.

The decisions in *Mossop* and *Berg* thus extend the correctness standard of review on legal questions to jurisdictions in which antidiscrimination statutes contain neither an appeal clause nor a privative or finality clause. In addition to the B.C. legislation and the federal CHRA, the P.E.I. legislation falls into this category. The Manitoba and New Brunswick statutes have no appeal clause, yet the inclusion of finality clauses suggest that some degree of curial deference is warranted on judicial review proceedings.

138 Lamer C.J. said that the *Zurich* reasoning “should have put the matter to rest” in the *Mossop* case as well (supra note 1 at 578). He made no comment indicating a lesser standard of review in judicial review proceedings generally.

139 Id. at 609.

140 See, for example, the “reasonableness” standard proposed by Gonthier J. in *Bell Canada*, supra note 153 at 1746, and by the Ontario Court in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (1993) 12 Admin. L.R. (2d) 300 (Ont. Div. Ct.). See also the criticism of the radical differences in the levels of judicial review in Janisch, “Towards a More General Theory of Judicial Review in Administrative Law” (1989) 53 Sask. L. Rev. 327 at 329-30.

141 Supra note 67.

142 S.B.C. 1984, c.22. The Act at issue in *Berg* was substantially amended in 1992 (S.B.C. 1992, c.42), but still contains neither an appeal clause nor a privative or finality clause.

143 R.S.B.C. 1979, c.209.

144 Major J. dissented on other grounds.

145 Supra note 141 at 369.


147 In Manitoba, under the *Human Rights Code*, S.M. 1987-88, c.45 (C.C.S.M.,
In sum, the four recent Supreme Court decisions set out a sweeping policy of judicial intervention with respect to the legal decisions of human rights tribunals. With the probable exceptions of Quebec, Manitoba and New Brunswick, the legal decisions of human rights tribunals across the country will be upheld by the courts on appeal or judicial review only if they "got it right", that is, only if the courts agree with them.

The Court has made clear that, in its view, human rights tribunals fall on the weak end of the spectrum of Canadian administrative bodies. Significant constraints have thus been placed on the development of an autonomous body of jurisprudence by human rights tribunals. And persons bringing complaints under human rights statutes, already facing intolerable delays in the processing of complaints in many jurisdictions, have to contend with the further delays resulting from appeals and judicial review applications encouraged by the Supreme Court's policy of judicial intervention.

3. The Weaknesses of the Current Tribunal System of Adjudication

In fairness to the Supreme Court, the main responsibility for the lack of respect it has accorded to the legal decisions of human rights tribunals has to rest with Canadian legislatures. None of the thirteen Canadian anti-discrimination statutes contains a strong privative clause and, as we have seen, most include appeal clauses. Moreover, tribunals are appointed on an ad hoc basis to adjudicate particular disputes. Adjudicators are drawn from a list of part-time appointees, and are most commonly practicing lawyers or law professors. While they may well have great experience with and sensitivity to human rights issues, the legislation typically makes no attempt to ensure that adjudicators possess such qualifications. Indeed, with the exception of the Quebec legislation, Canadian anti-discrimination statutes con-
tain no qualifications whatsoever for appointment to the list of potential adjudicators.

The 1992 Report of the Ontario Human Rights Code Review Task Force (the Cornish Report)\(^\text{149}\) has many useful recommendations for legislative correction of the weaknesses in the current structure of human rights adjudication. The Task Force makes clear that it does not share the view of the Supreme Court that courts are better situated to interpret human rights legislation. On the contrary, the Task Force argues that human rights tribunals were established "precisely because the courts demonstrated a lack of knowledge and understanding of human rights."\(^\text{150}\) Nevertheless, the Report does identify a number of weaknesses in the current tribunal system. For example:

Since Board of Inquiry members are only involved part-time and on a transitory basis with no certainty as to how much work they will be assigned, they usually have other full-time jobs. This causes problems in scheduling hearings with resulting unacceptable delays, as well as difficulty in building consistency, expertise and training among adjudicators.\(^\text{151}\)

The Cornish Report recommended that the "unstructured, ad hoc manner of setting up human rights hearings" be replaced by a "permanent expert Tribunal" with "a permanent panel of trained, qualified human rights Adjudicators".\(^\text{152}\) The Report further recommended that tribunal decisions be protected from judicial interference by a strong privative clause in order to minimize uncertainties, delays and expenses associated with inexpert interference by the courts.\(^\text{153}\)

A fundamental reconsideration of the structure of adjudication under human rights legislation is a matter deserving legislative attention. Thus far, only the Quebec legislature has created a stronger administrative tribunal system.\(^\text{154}\) The Quebec Charter of Human Rights and Freedoms now establishes a tribunal composed of seven members who hold office for a period of five years (s.101). The President must be a judge of the Superior Court. The Charter sets out specific qualifications for eligibility for appointment to the Tribunal: arbitrators and tribunal members must have "notable experience and expertise in, sensitivity to and interest for matters of human rights and freedoms" (ss.62, 101 and 103). Section 109 ousts judicial review by the Superior Court except on questions of jurisdiction. Section 132 provides that any final decision of the Tribunal may be appealed to the Court of Appeal if leave is granted. Notwithstanding the availability of appellate and jurisdictional review, the provisions regarding expertise

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150 Id. at 94.
151 Id. at 108-9.
152 Id. at 109.
153 Id. at 149. See also the Canadian Human Rights Commission, Annual Report 1989 (Ottawa: Minister of Supply and Services, 1990) at 60, where a recommendation is made for similar changes to the the structure of adjudication under the federal Act.
should entitle Quebec tribunal decisions to a higher degree of deference than those of human rights tribunals elsewhere in the country.

4. The Question of Relative Expertise

Despite the obvious deficiencies in existing Canadian legislation, it is nonetheless difficult to build the case that human rights tribunals are less qualified to interpret anti-discrimination statutes than the Courts. The question of deference, after all, is essentially a question of relative expertise: who is better placed to decide these questions? When the legislature has sent no clear signals about its own views on these questions — as in the case of the CHRA — judges are necessarily cast in the role of experts on the question of relative expertise. The self-interested nature of judicial inquiry on this issue ought to call for a certain degree of humility. When Supreme Court justices decide not to accord any deference to tribunal decisions, they are saying that “we judges have superior expertise here”. But are judges better equipped, so that, as La Forest J. put it, anti-discrimination law should fall within “the province of the judiciary”? What is the basis of this judicial claim to expertise superior to that of human rights adjudicators on discrimination law?

Most adjudicators are likely to be quite similar to judges in terms of their legal training and experience. However, all judges must have substantial legal training and experience to qualify for appointment to the bench; human rights adjudicators, on the other hand, may have no legal experience whatsoever. While other kinds of experience and a sensitivity to human rights issues may be equally or more important qualifications than legal experience, there is no guarantee in jurisdictions other than Quebec that human rights adjudicators will possess those qualifications either. As a result, the range in the competence of human rights adjudicators is likely to be a large one (the same could also be said of the range of judicial competence on human rights issues). Nevertheless, if we are willing to take a leap of faith and assume a measure of rationality in the appointments processes, perhaps we could conclude that adjudicators should be more likely than judges to have specialized knowledge and expertise on human rights matters. Judges, after all, are appointed for general legal knowledge and expertise, while adjudicators are appointed to deal with a specialized body of human rights law. Yet it is true that the part-time, ad hoc nature of appointments means that adjudicators have limited opportunities to accumulate expertise. Judges, of course, now have greater opportunity than they previously did to develop expertise on discrimination law.

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155 Such a leap of faith may not be justified. For example, the authors of the review of Canadian tribunal members set out in (1990) 6(9) Can. Hum. Rights Adv. 1-8 argue that patronage, gender bias and a lack of care in ensuring the sensitivity of tribunal members are prominent features of the appointments process. See also Planagan, Knopff and Archer, “Selection Bias in Human Rights Tribunals: An Exploratory Study” (1988) 31 Can. Pub. Admin. 483, in which the authors express doubts about “the neutrality of a system that required ad hoc, external appointment of adjudicators by the political executive” (at 499).
since the coming into force of the Charter equality rights provisions in 1985.

Weighing all these factors, it does not seem that a comparison of human rights adjudicators and judges is likely to yield a conclusion one way or the other on the question of superior relative expertise. One is left wondering exactly how the Court would sustain its assertion that the judiciary has superior expertise on anti-discrimination law relative to human rights adjudicators. It seems likely that ultimate judicial responsibility for the interpretation of the Charter, and the s. 15 equality rights in particular, is a large part of the explanation for the Court’s new-found sense of institutional confidence on discrimination law.156 It also seems likely that one of the reasons the Supreme Court judges have little confidence in the quality of decision-making by human rights adjudicators is the lack of any guarantees that adjudicators will have sensitivity to or expertise on questions of discrimination. We do not know for sure because the judges asked us to take on faith their simple assertion of superior relative expertise on “general questions of law”.

In this sense, the Supreme Court decisions on the standard of review of human rights tribunals appear to rest ultimately on a kind of legal fundamentalism. That is, law is law, policy is policy, and discrimination law is law not policy. Law is a matter of right answers; policy entails choices between competing goals. Legal decisions require a generalist legal training, while policy decisions require a more specialized knowledge, expertise or sensitivity. Despite the obvious difficulties of unravelling the legal and policy elements of human rights adjudication, something like this set of assumptions must underlie La Forest J.’s assertion that a tribunal’s superior expertise “does not extend to general questions of law such as the one at issue”157 in Mossop. The possibility that adjudicators may have an advantage in interpreting their “home statute” by virtue of their specialization in the area of human rights thus need not be discussed, for they have no special claim to expertise in the “general law” of which anti-discrimination law is said to be a part.158

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156 See the prescient comments of Alison Harvison Young in “Keeping the Courts at Bay: The Canadian Human Rights Commission and Its Counterparts in Britain and Northern Ireland: Some Comparative Lessons” (1993) 43 U.T.L.J. 65. Writing before the Mossop and Berg decisions, she noted that the Charter encourages the courts to think of themselves as the “guardians and watchdogs of human rights” and that “[t]his development may turn out to be another example of the remarkable historic tendency of the ordinary courts to sustain and enlarge their roles” (at 72). See also Young, “Human Rights Tribunals and the Supreme Court of Canada: Reformulating Deference” (1993) 13 Admin. L.R. (2d) 206.

157 Supra note 1 at 585.

158 It is not unusual for the Court to deny that tribunals have expertise on questions of general law. See, e.g., McLeod v. Egan, [1975] S.C.R. 517; Dayco (Canada) Ltd. v. CAW, [1993] 2 S.C.R. 230 (labour arbitrator has no special expertise on common law concepts; only entitled to deference when interpreting “home territory”). What is unusual is for the Court to say that the specialized statute under which a tribunal operates is part of the “general law” on which no deference is warranted.
Mossop and the other three decisions dealing with the standard of review of human rights tribunals may be part of a larger phenomenon of legal fundamentalism creeping interstitially back into the Court’s administrative law jurisprudence. As administrative law scholars have pointed out, the 1979 C.U.P.E. decision signalled the abandonment of the view that interpretative techniques could “provide the uniquely “correct” meaning of legislation”. The denial of the interweaving of law and policy, and the insistence on a single correct interpretation of the meaning of “family status”, are features of the Mossop decision that signal the persistence of the legal fundamentalism dominant in the pre-C.U.P.E. era administrative jurisprudence.

5. Homosexuality in “the Province of the Judiciary”

Finally, I want to conclude with some comments on the Court’s assertion that the specific issues in Mossop are ones that fall within the larger realm of the judiciary’s superior expertise on “general questions of law”. In particular, does the Supreme Court’s institutional record in cases involving gay and lesbian rights or litigants support the majority’s claim to special institutional competence? An examination of the record reveals that any expertise possessed by the Supreme Court in this area is a peculiar form of expertise indeed.

Consider, for example, the Court’s 1967 decision in Klippert. In that case, a 3-2 majority of the Supreme Court upheld the sentencing of a gay man to an indefinite prison term for no crime other than engaging in acts of consensual oral sex with adult men, and for honestly (and naively as it turned out) admitting that he was likely to do so again in the future. The majority judgment of Fauteux J. found that this behaviour and admission properly qualified Klippert as a “dangerous sexual offender”. As in Mossop, the majority disclaimed any interpretive responsibility for the result; it was simply a matter of giving effect to Parliamentary intent. In Fauteux J.’s judgment, the intent and object of the Act could be found in its “clear provisions”; all he could do was “interpret and apply laws validly enacted.” In his dissenting judgment, Cartwright J. made the quite sensible suggestion that the dangerous sexual offender definition should be limited to persons likely to commit further sexual offences “involving an element of danger to another person.” He was pleased to be able to arrive at this result for, unlike the majority, he did not want to impute to Parliament the intent to lock up indefinitely “a sexual offender who is not dangerous”. This was because “however loathsome” gay sexuality

162 Id. at 835.
163 Id. at 836.
164 Id. at 831.
165 Id.
“may appear to all normal persons, I think it improbable that Parliament intended such a result.”

In the 1979 *Gay Alliance* case, the Supreme Court overturned a Board of Inquiry decision that had found that the Vancouver Sun had violated the B.C. *Human Rights Code* by refusing to print a classified advertisement for a “gay lib paper”. The B.C. legislation contained a general prohibition on discrimination without “reasonable cause”. The Sun had refused to run the ad on the grounds that “homosexuality is offensive to public decency”, the ad “would offend some of its subscribers”, and the paper “had a duty to protect the morals of the community.” The British Columbia Court of Appeal held that these reasons constituted “reasonable cause” for the Sun’s actions. On appeal, the Supreme Court was thus presented with an excellent opportunity to clearly refute the proposition that heterosexist attitudes justify heterosexist practices, a rather alarming proposition for the interpretation of anti-discrimination statutes. Instead of seizing this opportunity, the Supreme Court majority decided that the prohibition on discrimination did not apply to a newspaper’s provision of classified advertising services. Even if it did, Martland J. seemed to suggest that the Sun was free to take a position on “the controversial subject of homosexuality” and reject the ad on the basis of its opposition to equal rights for gay men and lesbians. In his opinion, the Sun’s refusal of the ad “was not based upon any personal characteristics of the person seeking to place that advertisement, but upon the content of the advertisement itself.” Only Laskin J., in his dissenting judgment, was willing to make the obvious point that the view that bias against homosexuals justifies discrimination is “destructive” of the policy embodied in human rights legislation.

Finally, in the 1986 decision of *R. v. Hill*, both the majority and...
minority opinions of the Supreme Court accepted without comment the notion that an accused charged with murder should be entitled to raise a provocation defence if the murder followed a "homosexual advance" by the deceased. As Mison has argued:

The continued use and acceptance of this defense sends a message to juries and the public that if someone makes a homosexual overture, such an advance may be sufficient provocation to kill that person. This reinforces both the notions that gay men are to be afforded less respect than heterosexual men, and that revulsion and hostility are natural reactions to homosexual behaviour.173

In sum, a review of the Supreme Court decisions reveals that they have been characterized by a failure to challenge or even comment upon the discrimination experienced by gay men and lesbians, by the repetition of stereotypical attitudes to gay men and gay sexuality, and by the tacit or explicit approval of heterosexist legal rules. Thus, the Mossop majority’s assertion of judicial expertise on questions of discrimination against gay men and lesbians is not borne out by an examination of the Supreme Court’s institutional record. The most powerful message sent out by that record thus far, including the majority judgments in Mossop, is that the Court is disinclined to take on the responsibilities that such asserted expertise ought to entail. It appears that “the province of the judiciary” is a realm in which gay men and lesbians are not yet welcomed as equal citizens.

173 Mison, “Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation” (1992) 80 Cal. L. Rev. 133, 135-6. For a discussion of thirteen cases in which the homosexual advance defence was entertained by Canadian courts, see Eaton, Theorizing Sexual Orientation (LL.M. Thesis; Queen’s Univ., 1991) at 63-8.