Interpreting *Bostock* for Canadian lawyers

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This summer, in the middle of Pride Month, the Supreme Court of the United States issued a historic judgment recognizing protection for LGBTQ employees under Title VII of the Civil Rights Act of 1964. Almost six decades after the statute's enactment, a six-to-three majority of the Court found that employment discrimination on the basis of sexual orientation or gender identity is prohibited discrimination "because of sex."

The decision in *Bostock v Clayton County* is a huge legal victory for the LGBTQ community and its advocates. Although legislative protection is not the end of the fight for workplace equality in the United States, this decision is a meaningful step away from a status quo in which employers (like those in *Bostock*) were free to openly and unapologetically discriminate against LGBTQ employees.

As a significant shift in the law so long after enactment, it is not surprising that the majority's interpretation in *Bostock* would give rise to strong dissenting opinions touting the rule of law and separation of powers. But what's particularly interesting here is that the new meaning of Title VII came not from reading the words in light of the prevailing context – the type of judicial activism which one would usually expect to garner such criticism – but from an extraordinarily textualist approach that expressly refutes the relevance of contextual factors.

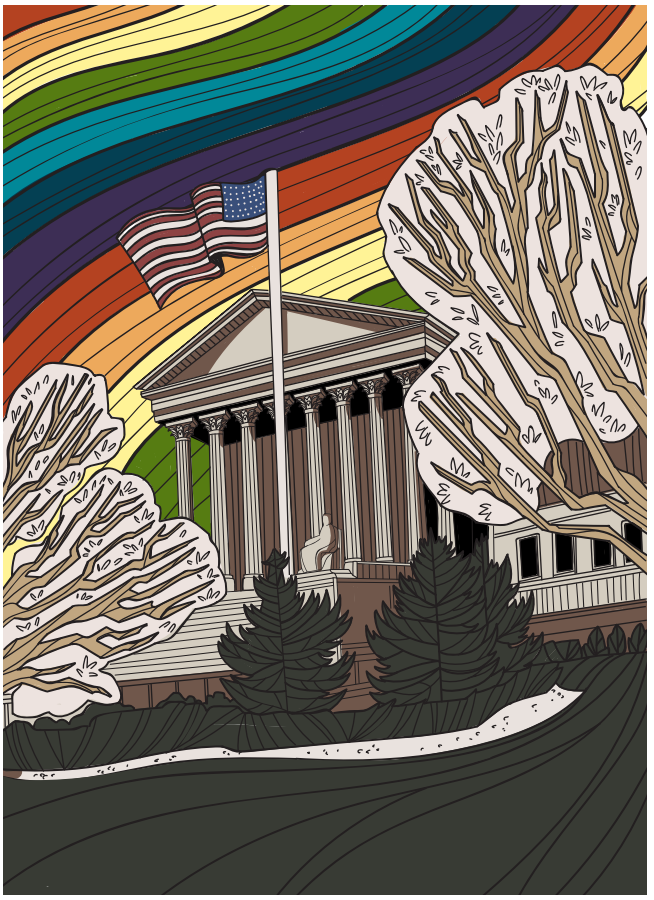
As a Canadian lawyer, I am steadfastly devoted to purposive and contextual interpretation. Yet I found myself in agreement with the majority's analysis, and not just because I don't think anyone should lose their job for being who they are.

Justice Neil Gorsuch's majority opinion is so straightforward, it's hard to argue with. The statute prohibits discrimination "because of sex." The employers in the case expressly fired their employees because they were gay or transgender, characteristics inherently bound up with sex. Justice Gorsuch succinctly captures the entire analysis in his introductory paragraph:

> An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.

Leaving aside his outdated use of the term "homosexual," this makes perfect sense to me. Of course it is sex discrimination when an employer fires someone because the person doesn't adhere to the employer's gender stereotypes. Discriminating against a man who is sexually attracted to men is based on sex, because the employer would have no issue with that characteristic in a woman. Likewise, an employer quite obviously discriminates based on sex when he fires a transgender woman because she expresses her gender in a way he considers to be at odds with her sex.

For Justice Gorsuch, this interpretation is so obvious that there's no need to look beyond the words of the statute to interpret the provision. When the text is this clear, it's "no contest."



This is where I start to worry. I firmly believe that context is what gives language meaning. Don't we need to read the words in their entire context, harmoniously with the scheme of the Act, the purpose of the Act, and the intention of Parliament – er, Congress?

And, to be sure, there are contextual factors in this case that are not exactly helpful to the majority. For one, there is the long history of unsuccessful legislative attempts to add "sexual orientation" and "gender identity" to the list of protected grounds in the Civil Rights Act. For another, there's that distasteful historical anecdote suggesting that the ground of "sex" was originally added in as a poison pill designed to kill the legislation altogether. This is surely one of the greatest political backfires of all time (especially when viewed in light of the outcome in *Bostock*). Is it not also evidence that the legislative drafters couldn't possibly have intended to protect

LGBTQ employees from discrimination at work? Can the Court adopt an interpretation of statutory text that is completely at odds with what legislators in 1964 would have intended or even expected?

These are the concerns raised by the three dissenting justices. In his opinion, Justice Samuel Alito (joined by Justice Clarence Thomas) has no shortage of harsh words for Justice Gorsuch's suggestion that this is a case where the text is so clear that we can ignore this congressional intent and legislative history. He calls Justice Gorsuch's analysis a "pirate ship" that "sails under a textualist flag." In a separate dissenting opinion, Justice Brett Kavanaugh writes that the majority's "literalist" interpretation departs from the ordinary meaning of sex discrimination as it would have been commonly understood by the public at the time (and maybe even today). Justice Kavanaugh also draws on the historical distinction between the women's and gay rights movements to argue that it would be wrong to collapse sex discrimination and sexual orientation discrimination into one. (I find this argument somewhat ironic given that Justice Kavanaugh declines to discuss transgender discrimination, and instead notes in a footnote that his analysis of sexual orientation discrimination would apply to discrimination on the basis of gender identity "in much the same way.")

So are the dissenters right? All three opinions are applying textualist interpretation which seeks out the "ordinary meaning" of the statutory language. But the dissenting justices still highlight the importance of context in discerning that ordinary meaning. As Justice Kavanaugh explains, ignoring these extratextual markers of congressional intent undermines the rule of law, separation of powers, and democratic accountability.

Or does it? For Justice Gorsuch, giving effect to the broad language of Title VII is a complete interpretive answer. It doesn't matter what was in the minds of the particular congressional representatives on the day the legislation was drafted, even if one could extract such subjective intention from the historical record. Nor does it matter why subsequent legislators attempted to pass amendments to add express references to sexual orientation and gender identity to the Act. Neither of these factors could be sufficient to override the statute's broad, clear prohibition on discrimination because of sex. "[W]hen Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule."

This is a textualist argument. But if you think about it, it's really not all that different from the purposive interpretations that Canadian courts routinely give human rights statutes. Justice Gorsuch is essentially saying that Congress enacted a broad prohibition on discrimination, and it's the Court's job to give effect to that broad prohibition – even if its boundaries extend beyond what was subjectively foreseen at the time.

Interestingly, you can find a very similar analysis in Justice Claire L'Heureux-Dubé's famous dissent in *Canada (Attorney General) v Mossop*, [1993] 1 SCR 554. This decision is particularly noteworthy here because it is more or less Canada's *Bostock* – except that the applicants lost. Rather than interpreting the ground of "sex," the Supreme Court of Canada was considering whether the ground of "family status" in the *Canadian Human Rights Act* precluded policies treating same-sex couples differently from heterosexual couples. The majority ruled that it did not, a decision that turned on evidence that "sexual orientation" was not added to the Act at the same time as "family status," in the face of a recommendation from the Canadian Human Rights Commission that it be included.

In her dissent, Justice L'Heureux-Dubé argued that the Court should uphold the Canadian Human Rights Tribunal's interpretation of the Act as protecting same-sex couples. In doing so, she focused not on the plain and undeniable meaning of "family status," but on Parliament's choice to enact a broad and undefined term and leave its interpretation to the Tribunal. She also wrote that human rights legislation should be given a purposive interpretation, and that "[c]oncepts of equality and liberty which appear in human rights documents are not bounded by the precise understanding of those who drafted them."

This idea of legislative meaning as distinct from legislators' subjective intentions is directly paralleled in Justice Gorsuch's reasons. It's basically his thesis, set out in the very first lines of the opinion: "Sometimes small gestures can have unexpected consequences. Major initiatives practically guarantee them." Later in the reasons he returns to this concept to hammer it home: "Congress's key drafting choices – to focus on discrimination against individuals and not merely between groups and to hold employers liable whenever sex is a but-for cause of the plaintiff 's injuries – virtually guaranteed that unexpected applications would emerge over time. This elephant has never hidden in a mousehole; it has been standing before us all along."

For Justice Gorsuch, an expanded interpretation is demanded by the broad and unambiguous text of Title VII. For Justice L'Heureux-Dubé, it is demanded by the overarching purpose of the statute, which is to eradicate discrimination. Despite the wildly different interpretive theories at play, both are prioritizing *legislative* intention over *subjective* intention.

This distinction answers the question that Justice Kavanaugh poses at the outset of his reasons: "Who decides?" Although the dissenters characterize the majority as usurping Congress's role, the larger problem would be abdicating the judicial function to the musings and motivations of individual legislators, who have no legitimate interpretive authority in the constitutional order. The legislative branch speaks with one voice through statutory language. The judiciary gives effect to that legislative voice through statutory interpretation. When judges give effect to broad statutory language, it is not judicial activism – the legislation advocates for itself.

And let's not forget that abdicating the judicial role where the law feels too "political" carries with it a real and significant harm to those entitled to the benefit of the law. It's difficult to talk about the victory in *Bostock* without acknowledging that two of the three applicants, Donald Zarda and Aimee Stephens, died during the lengthy legal battle that led to the Court's decision in June. In Canada, after the Supreme Court denied the appeal in *Mossop*, same-sex couples had to wait five more years for the Court to declare that excluding protection on the basis of sexual orientation from human rights legislation violated equality rights under section 15 of the *Charter* (*Vriend v Alberta*, [1998] 1 SCR 493). And while Canadian human rights tribunals began to adopt interpretations prohibiting gender identity discrimination on the grounds of sex (and/or "disability") in the early 2000s, protections on the basis of gender identity and/or gender expression were not enacted into every Canadian human rights statute until 2017 (the federal Act was the last to be amended, on June 19, 2017).

So, yes, even as a Canadian purposivist, I'm okay with Justice Gorsuch's reasoning in *Bostock*. I still think that words must be understood in their context. But the context here is that Congress thought workplace discrimination based on sex should be banned. And after *Bostock*, it finally is.