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Trans Competent Lawyering

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I. Trans Competent Lawyering

Trans people face unique legal issues because of their gender identities and expression. These challenges are compounded if they also face other social barriers, such as poverty, racialization, and criminalization.¹ At the same time, some of trans people's experience with the law has little to do with their gender identities or gender histories. They may seek access to legal services for a myriad of needs. All lawyers should expect to work with trans people at some point in their practice, whether as clients, as another party on a file, or as opposing counsel or co-counsel. Professional codes of conduct call upon lawyers to treat clients and other parties with courtesy and civility.² These codes also require that lawyers respect human rights laws,³ which protect trans people from discrimination on the grounds of sex and under the more recently added grounds of gender identity and gender expression.⁴

Lawyers require a general understanding of how to serve trans people so as to meet their legal and professional obligations. Practitioners should be familiar with the legal issues facing trans people in their areas of practice. The family lawyer recognizes the stigma that trans people may encounter in seeking access to and custody of their children, and the increasing number of disputes relating to gender creative and trans youth. A real estate or estate planning lawyer knows that a client may have a different legal name and gender history than the name and gender currently used. The criminal lawyer understands the history of trans marginalization and that a trans person's gender identity and gender history may be an important consideration in custody, sentencing,

- 1 This chapter draws in part from research on the evolution of trans rights in Canada conducted for the Canadian Human Rights Commission; see Samuel Singer, "Trans Rights, Gender Identity, and Gender Expression in Canada" Canadian Human Rights Commission (2017).
- 2 See e.g. Law Society of Ontario, *Rules of Professional Conduct* (1 November 2000; amendments current to 26 April 2018), ss 3.2-1, 5.1-5, 7.2-1, online: <<https://lso.ca/about-lso/legislation-rules/rules-of-professional-conduct>> [LSO RPC]; The Law Society of British Columbia, *Rules of Professional Conduct* (1 January 2013; amendments current to 2015), ss 2.1-3(d), 2.1-4(a), 5.1-5, 7.2-1, online: <<https://www.lawsociety.bc.ca/support-and-resources-for-lawyers/act-rules-and-code/>> [LSBC RPC]; Barreau du Québec, *Code of Professional Conduct of Lawyers*, (amendments current to 1 November 2018) RLRQ, c B-1, r 3.1, ss 4, 112 <<http://legisquebec.gouv.qc.ca/en/showdoc/cr/B-1,%20r.%203.1/>> [BQ CPCL].
- 3 See e.g. LSO RPC, s 6.3.1; LSBC RPC, s 6.3; BQ CPCL, r 3.1, preamble.
- 4 See *Canadian Human Rights Act*, RSC 1985, c H-6; *Charter of Human Rights and Freedoms*, CQLR, c C-12; *Human Rights Code*, RSO 1990, c H19; *Human Rights Code*, RSBC 1996, c 210; *Alberta Bill of Rights*, RSA 2000, c A-14; *Human Rights Act*, RSPEI 1988, c H-12; *Human Rights Act*, RSNB 2011, c 171; *Human Rights Act*, SNL 2010, c H-13.1; *Human Rights Act*, RSNS 1989, c 214; *Human Rights Act*, SNu 2003, c 12; *Human Rights Act*, RSY 2002, c 116; *The Human Rights Code*, CCSM 1987, c H175; *The Saskatchewan Human Rights Code*, RSS 1979, c S-24.1; *Human Rights Act*, SNWT 2002, c 18. Trans people have been found to be protected under the ground of disability as well as under the ground of civil status in Quebec. See Singer, *supra* note 1.

and corrections. More generally, all lawyers should be ready to respect their clients' gender identity and gender expression. This includes advocating for their clients to be referred to by their chosen name and gender wherever possible, regardless of the subject matter of the file.

A. The Legal Tour

To help lawyers deepen their understanding of trans legal issues, this chapter provides a brief overview of certain key areas in the legal system with which trans people frequently interact. It addresses both procedural matters, such as client identification in law practice and in court, and substantive areas, including changing identity documents, human rights protections, immigration law, criminal law, and family law.

Other chapters in this book more comprehensively cover some of the topics addressed in this chapter, such as Chapter 2, Cultural Competency; Chapter 3, Human Rights; Chapter 10, Immigration; and Chapter 12, Criminal Law. Please consult those chapters for a more in-depth examination of those legal topics.

This chapter begins by discussing client identification and verification requirements, and the need to respect trans people's chosen name and gender while complying with lawyers' ethical obligations. It also discusses trans people's use of their chosen name and gender before courts and tribunals, providing case citations to assist lawyers in better advocating for their trans clients. This chapter then introduces the labyrinth of provincial and federal law governing changes to legal identity, and provides practical guidelines. This is followed by a review of developments in human rights protection for trans people with reference to key cases in Canadian trans jurisprudence. A brief discussion of criminal and immigration law highlights key trans legal issues in each practice area. The chapter concludes by touching on developments in family law: from trans parents' access to and custody of their children to recent cases involving trans and gender creative youth.

II. Use of Name and Gender

A. Client Identification

Lawyers have professional obligations to identify their clients and, in certain circumstances, to verify their client's identity.⁵ Human rights obligations require respect for trans people's gender identity and gender expression, and protect trans people from

5 Law Society of Ontario, *By-Law 7.1*, Part III, "Client Identification and Verification" (amendments current to 26 April 2018), online: <<https://lso.ca/about-lso/legislation-rules/by-laws/>>; LSBC RPC, ss 3-98 to 3-109; *Règlement sur la comptabilité et les normes d'exercice professionnel des avocats*, RLRQ, c B-1, r 5, ss 13-27 (amendments current to 1 November 2018), online: <<http://legisquebec.gouv.qc.ca/en/ShowDoc/cr/B-1,%20r.%205>>.

discrimination.⁶ Privacy law may also protect trans people from disclosure of their personal information.⁷

Trans people may use names in their daily lives that do not match their legal name and that express their gender differently than their legal designation of sex. They may also face legal barriers to changing their name and sex. Note that some cisgender people also use names in their daily lives that differ from their legal names.

1. Human Rights Recommendations

The Ontario Human Rights Commission recommends using a trans person's chosen name and gender on all documents and in all systems, unless a bona fide and reasonable requirement applies.⁸ Lawyers should evaluate their professional obligations and consider where a client's legal identity must be recorded, and how that information is protected and secured. Many institutions and service providers find that there are far fewer occasions that a client's legal name and gender must be used than originally assumed.

The following is an excerpt from Ontario Human Rights Commission's "best practice checklist" in its *Policy on Preventing Discrimination Because of Gender Identity and Gender Expression*:

Privacy and confidentiality

- Maximize privacy and confidentiality of any information related to a trans person's gender identity, or to the extent the trans persons wishes. This includes information that directly or indirectly identifies that a person's sex is different from their gender identity.
- Keep a person's transgender history and medical information private and confidential, and limited to only relevant information and people directly involved in helping to meet the person's needs.
- All information should remain exclusively with designated personnel (such as the human resources person) in a secure filing system to protect the person's confidentiality.

Identification documentation and records

- Recognize a trans person's preferred name and gender in all administrative systems and documents (including hard copies and electronic).

6 See e.g. LSO RPC, s 6.3.1; LSBC RPC, s 6.3; BC CPCL, r 3.1, preamble. See also *Vanderputten v Seydaco Packaging Corp*, 2012 HRTO 1977 at paras 65-68 [*Vanderputten*].

7 *Order F2016-26, Edmonton Public School District No 7*, 2016 CanLII 82100 (Alta OIPC) [*Edmonton Public School*].

8 Ontario Human Rights Commission, "Appendix C: Best Practices Checklist" in *Policy on Preventing Discrimination Because of Gender Identity and Gender Expression* (14 April 2014), online: <<http://www.ohrc.on.ca/en/policy-preventing-discrimination-because-gender-identity-and-gender-expression/appendix-c-best-practices-checklist>> [Best Practices].

- Show how any requirement for a person’s “legal” name and gender is legitimate (reasonable and *bona fide*) in the circumstances.
- Undertake system reviews to identify how electronic databases, IT systems and other relevant information processes can be modified to recognize a person’s chosen name and gender when it does not match legal documents.

Collecting data on sex and gender

- Consider whether there is a legitimate need to ask for and collect information about sex/gender. If yes, provide options beyond the binary of male/female or man/woman.
- To the greatest extent possible, allow people to self-identify their sex or gender identity. The option of a blank box, for example, is the most inclusive.
- Protect any information indicating transgender status as confidential.⁹

2. Privacy Law Considerations

Privacy law obligations must also be considered when determining best practices for working with client identification information. For trans people, where their legal names and/or sex differs from the names they use and their gender identity, privacy law may impose restrictions on unauthorized disclosures of this information.

In *Edmonton Public School*,¹⁰ a trans student filed a complaint against her school district under the *Freedom of Information and Protection of Privacy Act*,¹¹ on the basis that when her teachers called out or displayed her legal (male) name, it constituted an unauthorized disclosure of her personal information. The student and her family had advised the school that she was transgender and the school had agreed to keep her legal identity information private. For attendance, her teachers used a paper list that contained her chosen name. The complaints concerned incidents in which teachers (often supply teachers) called out names for attendance using records from a computer system instead of the paper list. The computerized list was also at times visible to the whole class via a projector.

The adjudicator found that the disclosure of the student’s legal name and gender history (due to her name being typically male) constituted an unauthorized breach of the *Privacy Act*. The school district agreed and had a draft policy prepared to address the concerns raised in the complaint. The adjudicator found the draft policy to be appropriately responsive.¹²

⁹ *Ibid* (citations omitted).

¹⁰ *Edmonton Public School*, *supra* note 7 at paras 1-7.

¹¹ RSA 2000, c F-25 [*Privacy Act*].

¹² *Edmonton Public School*, *supra* note 7 at paras 19-26.

3. Practical Steps for Law Firms

There are many ways for law firms to meet their ethical obligations to know and, where necessary, to verify the identify of their client while ensuring protection of a trans person's privacy and human rights. Intake forms should address the possibility that a person's daily identification information may be different from their legal identity.

Law firms and institutions should institute an explicit policy about client identification and verification that carefully considers what information is actually required, and their obligation to prevent unnecessary disclosures of personal information. Identification information may also need to be corrected subsequent to a legal change of identity and changed systemically to the full extent possible.

Procedures and policies should be evaluated to ensure that the approach is cohesive and considers how protected personal information may be disclosed, even inadvertently, including through information technology systems. Successful policy initiatives will include consultations with the relevant staff members (e.g. intake, billing, payroll) and with trans people with lived experience using those systems to ensure the best possible design and implementation.

B. Identification in Courts and Tribunals

Lawyers should be prepared to advocate for the use of their client's chosen name and pronoun in hearings, and to do so with appropriate discretion, where possible. Such advocacy should follow from the client's instructions.

Interventions may be through discussions with other counsel and requests made to the judge or other decision-maker. Counsel may find it helpful to cite social science evidence about the significant difference it makes for trans people to be referred to by their chosen name and gender.¹³ Counsel may also wish to refer to other decisions in which a court or tribunal has explicitly used a trans party's preferred pronoun and/or name on the record.¹⁴ For example, in 2004, the Canadian Human Rights Tribunal noted the complainant's preference to be referred to by female pronouns, and its decision to respect that preference, stating:

The Respondent did not present any position, one way or the other, regarding this question. The Complainant, on the other hand, explained that she wishes to be referred to by the female gender. Under the circumstances, I see no reason to deny the Complainant's

13 See e.g. Greta R Bauer et al, "Intervenable Factors Associated with Suicide Risk in Transgender Persons: A Respondent Driven Sampling Study in Ontario, Canada" (2015) 15:525 BMC Public Health, online: <<https://doi.org/10.1186/s12889-015-1867-2>>.

14 *CF v Alberta (Vital Statistics)*, 2014 ABQB 237 [CF]; *Montreuil c National Bank of Canada*, 2004 CHRT 7 [*Montreuil 2004*]; *XY v Ontario (Government and Consumer Services)*, 2012 HRTO 726 [XY].

request. The Complainant is therefore referred to by the female gender throughout this decision.¹⁵

In *Dawson v Vancouver Police Board (No 2)*, the style of cause uses the trans complainant's chosen name, and her legal name is only listed later in the judgment.¹⁶

In *Children's Aid Society of Toronto v CS*,¹⁷ the Ontario Court of Justice referred to a youth who did not use male or female pronouns by gender neutral pronouns, and noted this in the judgment:

X. identifies as gender fluid and is therefore referred to by gender neutral pronouns in this ruling.¹⁸

Lawyers may also need to apply to change a client's name and/or gender on record where a legal change of identity has occurred, with advance notice where appropriate.¹⁹

III. Legal Changes to Identity Information

Access to identity documents for trans people is a quickly changing legal area in Canada. Human rights law has shifted significantly, both removing some barriers to changing legal sex and name, and recognizing the duty to accommodate trans people by changing identification information without requiring legal changes first.

Two successful human rights challenges, the first decided in 2012 in Ontario and the second in Alberta in 2014, removed the surgery requirements to change sex designations (or gender markers) on a birth certificate.²⁰ A settlement with the federal government also resulted in the removal of surgical requirements for a change of sex on a citizenship certificate and, as a result, on various federal government documents.²¹

Surgery requirements have since been removed as a barrier to legal changes of sex in many jurisdictions.²² Further advocacy efforts have also led to the addition of the

15 See *Montreuil 2004*, *supra* note 14 at para 6. For other cases in which courts and tribunals have used the legal name and/or pronoun of the trans party rather than their chosen name and/or pronoun see *Montreuil v Canadian Forces Grievance Board*, 2007 CHRT 53 [*Montreuil 2007*]; *Montreuil v Canadian Forces*, 2009 CHRT 28 [*Montreuil 2009*]; *Protection de la jeunesse—0968*, 2009 QCCQ 3146; *Patterson v Canada (Minister of Justice)*, 2018 BCCA 493.

16 2015 BCHRT 54 at para 2 [*Dawson*].

17 2017 ONCJ 271.

18 *Ibid* at para 4.

19 See e.g. *Cook v The Queen*, 2017 TCC 188 at para 2.

20 *XY*, *supra* note 14; *CF*, *supra* note 14.

21 *Chédor v Canada (Citizenship and Immigration)*, 2016 FC 1205 [*Chédor*].

22 See e.g. *SB v Newfoundland and Labrador*, 2015 CanLII 153582 (NLHRC); Alberta, *Vital Statistics Information Amendment Regulation*, OC 41/2015 (2015) A Gaz II 27 (*Vital Statistics Act*); Quebec, *An Act to amend the Civil Code as regards civil status, successions and the publication of rights*, OC 781-2015, (2015) GOQ, 2204.

sex designation option of “X,” along with “F” (female) and “M” (male) on some documents, as well as the removal of sex identification information in some cases or the option to omit it.²³ Other cases seeking to remove the requirement to list sex on certain identity papers and to revise the collection of data on gender are currently under way.²⁴

A. A Jurisdictional and Procedural Maze

The key issues when assisting a trans client with changing an identity document are to determine the jurisdiction that applies, the applicable rules in that jurisdiction, and the rules that apply to that particular identification document. The requirements for changing sex or name on a Canadian passport may be different than the requirements for changing a birth certificate, a provincial health card, or a high school diploma. The ability to apply for such changes may differ depending on whether the client was born in the province where they reside, or outside of the province or country. Different procedures may be in place for minors, and for people without permanent residence or citizenship in Canada.

It is difficult to capture the complexity for trans people trying to change identity documents in Canada. The available options on identity documents are quickly changing as a result of human rights challenges and policy changes. Lawyers should be sure to research the most current governing legal framework. This chapter is unable to cover the many different types of identity documents that a trans person may seek to change, and the intricate rules for each, whether under federal or the applicable provincial or territorial law. Instead, this section provides examples from several jurisdictions as the

23 See Gender-Free ID Coalition, “What’s Happening—Current Cases,” online: <<http://gender-freeidcoalition.ca/happeningnow.html>>; for information about *Milloy v ESDC*, see Government of Canada, “Employment and Social Development Canada Settlement Agreement on Gender Information Collection” (25 January 2017), online: <<https://www.canada.ca/en/employment-social-development/news/2017/01/employment-social-development-canada-settlement-agreement-gender-information-collection.html>>; and see Immigration, Refugees and Citizenship Canada, “Identity Management: Change of Sex Designation for Reasons Other than a Clerical or Administrative Error” (31 August 2017), online: <<http://www.cic.gc.ca/english/resources/tools/id/designation/request.asp/>> [Identity Management]; *Saskatchewan Human Rights v Saskatchewan*, 2018 SKQB 159 [*Saskatchewan Human Rights*]; Gender Free ID Coalition and the Canadian Human Rights Commission, “Joint News Release—Trans Activist Settles Human Rights Case About Gender Collection” (25 January 2017), online: <<https://chrc-ccdp.gc.ca/eng/content/joint-news-release-trans-activist-settles-human-rights-case-about-gender-collection-1>>. See also Joshua M Ferguson, *Me, Myself, They: Life Beyond the Binary* (Toronto: House of Anansi Press, 2019).

24 See Barbara Findlay, “Vital Statistics Responds to Human Rights Complaint” (10 November 2015), online (pdf): <http://www.barbarafindlay.com/uploads/9/9/6/7/9967848/20151110_for_immediate_release_final2.pdf>; *Centre for Gender Advocacy v Québec (Attorney General)*, 2015 QCCS 6026 [*Centre for Gender Advocacy*] and associated cases. The trial is pending. Note that the author of this chapter is a co-plaintiff.

law currently stands, to convey the hurdles to changing legal identity. Many procedural details are excluded. The section concludes with some practical guidelines for lawyers assisting trans people with changing their legal identity.

B. Change of Sex in Ontario

In Ontario, a trans person can apply for a change of sex on their birth registration with a supporting statement from a psychologist or physician.²⁵ A minor aged 16-17 years old has the ability to apply on their own or to have their parent apply on their behalf. If the applicant is 15 years or younger, a parent must apply for them. The sex listed on the Ontario birth registration can be changed to “female (F),” “male (M),” or “non-binary (X),” or the applicant can request that no sex information appear.²⁶

If the trans person was born outside of Ontario, they will need to apply to their jurisdiction of birth to change their birth certificate. That person could, however, still apply to change their sex on their Ontario driver’s licence through different procedures.²⁷ The sex on an Ontario driver’s licence can be changed to “F,” “M,” or “X,” but there is no option to remove the sex listed. Sex designations are no longer listed on Ontario health cards.²⁸

C. Change of Name in Ontario

A person need not be born in Ontario to apply to change their name if they meet the 12 month residency requirement and are 17 years or older.²⁹ For minors, different procedural requirements apply, and those with “lawful custody” of the minor must consent to the name change or a court order is required.³⁰ In *KAB v Ontario (Registrar General)*, the Ontario Court of Justice provided a roadmap for interpreting “lawful custody” where the parent of a trans minor is not supportive of their child’s transition.³¹

25 See ServiceOntario, “Changing Your Sex Designation on Your Birth Registration and Birth Certificate,” online: <<https://www.ontario.ca/page/changing-your-sex-designation-your-birth-registration-and-birth-certificate/>>; ServiceOntario, “Gender and Sex Information on Government IDs and Forms,” online: <<https://www.ontario.ca/page/consultation-gender-and-sex-information-government-ids-and-forms>>.

26 *Ibid.*

27 ServiceOntario, “How Do I Change the Sex Designation on My Driver’s Licence?,” online: <<https://www.ontario.ca/faq/how-do-i-change-sex-designation-my-drivers-licence>>.

28 Ontario, Ministry of Government and Consumer Services, “Gender on Health Cards and Driver’s Licences” (29 June 2016), online: <<https://news.ontario.ca/mgs/en/2016/06/gender-on-health-cards-and-drivers-licences.html>>.

29 ServiceOntario, “Change Name,” online: <<https://www.ontario.ca/page/change-name>>.

30 *KAB v Ontario (Registrar General)*, 2013 ONCJ 684 [*KAB*].

31 *Ibid.*

D. Rapidly Changing Laws and Jurisdictional Differences

The legal landscape around gender on identity documents and the collection of data on gender is rapidly changing. The available options must be assessed based on each client's circumstances, the current law in the relevant jurisdiction, the designation sought, and the identity document being changed.

In British Columbia, the designation of "X" is available on birth certificates as of November 1, 2018.³² In May 2018, the Queen's Bench of Saskatchewan ordered the province of Saskatchewan to allow birth certificates to be issued without a sex designation.³³ In Quebec, a trans person without Canadian citizenship cannot apply to change their sex or name through the province. That restriction is currently being challenged, as is the requirement to designate parents as "mother" or "father," and the obligation to list gender on civil status documents.³⁴

While Ontario health cards do not list sex identification information, health cards in British Columbia and Quebec continue to list such information, although British Columbia now allows BC Services Cards to be issued that list either "F," "M," or "X." A request to change one's gender designation in British Columbia must be accompanied by a supporting declaration by a physician or psychologist, but no such declaration from a health professional is required by an adult changing their sex designation in Quebec.

E. Changing Immigration Documents

Surgery is no longer required to change sex on federal identification documents, such as permanent resident cards, passports, and citizenship certificates.³⁵ The option of listing an "X" designation rather than "F" or "M" will soon be available.³⁶ For more information on changing immigration documents, see Chapter 10, Immigration.

32 British Columbia, "Change of Gender Designation on Birth Certificates," online: <<https://www2.gov.bc.ca/gov/content/life-events/birth-adoption/births/birth-certificates/change-of-gender-designation-on-birth-certificates>>.

33 *Saskatchewan Human Rights*, *supra* note 23.

34 These citizenship requirements, among other issues, are currently the subject of the human rights case in *Centre for Gender Advocacy*, *supra* note 24. Note that as of April 1, 2019, it is now possible to request a certificate without the designation of sex listed on a certificate; see Directeur de l'état civil, "New Terms and Conditions with Respect to Certificates," online: <<http://www.etatcivil.gouv.qc.ca/en/news.html>>. Note that the author of this chapter is a co-plaintiff.

35 Identity Management, *supra* note 23.

36 Immigration, Refugees and Citizenship Canada, "Change the Sex on Your Passport or Travel Document" (31 August 2017), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/services/canadian-passports/change-sex.html>>.

Note that lawyers should carefully consider and advise their clients of any potential immigration status implications of requesting changes to a client's identity documents.

F. Practical Guidelines

As illustrated above, there are many jurisdictions with differing rules governing identity documents. Changing all of one's identity information, from federal and provincial government documents to institutional identification, can feel like a labyrinth. Once a birth certificate is changed, for example, identification information still needs to be changed on many other identity cards, from a person's passport to their student or employee identification card. Banks, utilities companies, and many other institutions also need to be informed, with each entity having its own policies and decision-makers determining what steps are necessary to accomplish the identity change.

Lawyers working with trans clients seeking to change their legal identity should assess, among other considerations:

- which documents or identifying information their client wants changed;
- what particular information their client wants changed—both ideally and in light of available options;
- what the procedural options and applicable rules are for obtaining the changes on each respective document or in each institutional system;
- the legal implications of the procedures to seek such changes and the legal implications of the actual changes sought; and
- if the identification information is successfully changed, what other steps are required to change the person's legal identity wherever else they want to or must do so, including with banks, employers, schools, and other institutions.

G. Accommodation of Use of Name and Pronoun

The human rights duty to accommodate trans people includes using a trans person's chosen name and gender in most circumstances, as discussed above.³⁷ Where trans people have not yet legally changed their identification documents, or cannot or do not wish to do so, lawyers may assist their clients in seeking accommodation from employers, institutions, and others to change their client's identification information wherever possible.

³⁷ See e.g. Best Practices, *supra* note 8; Dawson, *supra* note 16.

IV. Human Rights Protections

A. Sex and Disability

Trans people are protected from discrimination historically under the ground of sex, as well as under disability. Case law establishing that these protections apply to trans people date back to the late 1990s.³⁸

In *Québec (Commission des droits de la personne et des droits de la jeunesse) c Maison des jeunes A-Ma-Baie inc.*,³⁹ the court found that a trans woman was unlawfully discriminated against on the ground of sex when her employer fired her because of her transition. In *Sheridan v Sanctuary Investments Ltd.*,⁴⁰ the BC Human Rights Tribunal determined that a nightclub's policy that only those who are anatomically female can use the women's washroom was discriminatory against transsexuals based on the grounds of sex and disability.

The tribunal explained why discrimination against transsexuals falls under the protected ground of sex, as follows:

Society in general, and the law in particular, assumes that sex is a bipolar characteristic and that an individual is either a male or a female. In British Columbia, legislative acknowledgement of transsexualism is found in section 27 of the *Vital Statistics Act*, R.S.B.C. c. 479, which allows a transsexual, after sexual reassignment surgery, to change the sex designation on his or her birth certificate.

The medical profession is more able to address the complexity of the male-female continuum, perhaps because it is a profession which deals with human beings as they actually are, with all their ambiguities and contradictions. Dr. Robinow's evidence made it clear that in some individuals there is a lack of congruence between the various indicators of sex. In the case of transsexuals, there is a complete disassociation between their physical sex and their subjective experience of their masculinity or femininity.

In my view, given the large and liberal interpretation which the Supreme Court of Canada has emphasized must be applied to human rights legislation, I am satisfied that discrimination against a transsexual constitutes discrimination on the basis of sex. Whether the discrimination is regarded as differential treatment because the transsexual falls outside the traditional man/woman dichotomy (as in *P v. S. ...*), or because male-to-female transsexuals are regarded a subgroup of females (and vice versa) (as in *Maffei ...*), the result is the same: transsexuals experience discrimination because of the lack of congruence between the criteria which determine sex.

38 In Quebec, a 1982 decision established that transsexuals were protected from discrimination under the ground of civil status; see *Québec (Commission des droits de la personne) c Anglsberger*, 1982 CarswellQue 358 (Qc CP) [*Anglsberger*].

39 1998 CanLII 28 (Qc TDP) [*Maison des jeunes*].

40 1999 BCHRT 4.

Therefore, I conclude that discrimination against a transsexual constitutes discrimination because of “sex.”⁴¹

Subsequent case law continued to recognize that discrimination against trans people is prohibited under the ground of sex, as well as disability when it was claimed.⁴²

B. Gender Identity and Gender Expression

Calls to add grounds to human rights instruments that explicitly protect trans people date back as early as 1996, in a report prepared by lawyer Barbara Findlay for the Vancouver High Risk Project.⁴³ Subsequent consultations and advocacy efforts continued to emphasize the need for amendments to human rights acts to add the trans explicit grounds of “gender identity” and “gender expression.”⁴⁴

The Northwest Territories established “gender identity” as a protected ground in its human rights legislation in 2002. Eventually, all other jurisdictions in Canada followed suit, with most adding “gender expression” as well. Alberta, British Columbia, Newfoundland and Labrador, New Brunswick, Nova Scotia, Nunavut, Ontario, Quebec, Prince Edward Island, Yukon, and the federal human rights legislation now protect from discrimination based on “gender identity” and “gender expression.” Manitoba, Saskatchewan, and the Northwest Territories list only “gender identity” in their human rights legislation.

To date, case law on discrimination claims under the grounds of gender identity and/or gender expression has drawn on existing jurisprudence under the ground of sex. In *Browne v Sudbury Integrated Nickel Operations*,⁴⁵ when considering a claim

41 *Ibid* at paras 88-91 (citations omitted).

42 For a more detailed exploration of the history of trans people’s protection under human rights grounds, see Singer, *supra* note 1; and see *Ferris v OTEU, Local 15*, 1999 BCHRT 55; *Mamela v Vancouver Lesbian Connection*, 1999 BCHRT 51 [*Mamela*]; *Kavanagh v Canada (AG)*, 2001 CanLII 8496 (CHRT) [*Kavanagh*]; *Canada (Attorney General) v Canada (Human Rights Commission)*, 2003 FCT 89; *Nixon v Vancouver Rape Relief Society*, 2002 BCHRT 1, rev’d 2003 BCSC 1936, aff’d 2005 BCCA 601; *Waters v BC Medical Services Plan*, 2003 BCHRT 13 [*Waters*]; *Montreuil 2004*, *supra* note 14; *Hogan v Ontario (Minister of Health & Long-Term Care)*, 2006 HRTO 32 [*Hogan*]; *Magnone v British Columbia Ferry Services Inc*, 2008 BCHRT 191; *Montreuil 2009*, *supra* note 15; *Vanderputten*, *supra* note 6; *Salsman v London Sales Arena Corp*, 2014 HRTO 775 [*Salsman*].

43 Barbara Findlay et al, *Finding Our Place: Transgendered Law Reform Project* (Vancouver: High Risk Project Society, 1996).

44 See e.g. Margaret Denike, Sal Renshaw & cj Rowe, “Transgender and Women’s Substantive Equality: Discussion Paper, Consultation Paper, Biography, Case Summaries, 2003” (Ottawa: National Association of Women and the Law, September 2003), online: <http://www.nawl.ca/ns/en/documents/Pub_Report_Trans03_en.doc>. For a detailed exploration of the terms “gender identity” and “gender expression, see Kyle Kirkup, “The Origins of Gender Identity and Gender Expression in Anglo-American Legal Discourse” (2018) 68:1 UTL 80.

45 2016 HRTO 62.

alleging discrimination based on the new ground of “gender expression,” the tribunal emphasized the need to consider case law relating to the ground of sex, even though the ground of sex discrimination was not claimed. The tribunal stated:

I appreciate that the applicant did not allege discrimination because of sex when he filed his Application. However, in my view, it is important to consider the issue of whether the “clean shaven policy” is capable of amounting to discrimination against the applicant because of sex, if only to provide a backdrop for consideration of the issue of whether this policy is capable of amounting to discrimination because of “gender expression,” particularly since sex has been a protected ground under the *Code* since 1972 while “gender expression” was only added as a protected ground in 2012 and has not yet been extensively considered in the case law.⁴⁶

New claims under gender identity and/or gender expression should consider whether the claim could also be made under the additional ground of sex.⁴⁷ If applicable, this will reduce the splitting of trans-related case law between the ground of sex and the new grounds of gender expression and/or gender identity. It also explicitly brings before the decision-maker the lengthy case law and protections for trans people associated with the ground of sex.

C. Human Rights Tools for Lawyers

The addition of new explicit grounds to protect trans people has provided counsel with some practical tools. These legal changes are leading to increased internal reflection by government bodies, businesses, and institutions about systemic and individual discrimination against trans people. More resources are now available to assist in educating individuals and entities about their human rights obligations, such as school board policies and workplace guidelines.⁴⁸ The Ontario Human Rights Commission’s *Policy on Preventing Discrimination Because of Gender Identity and Gender Expression* and

⁴⁶ *Ibid* at para 20.

⁴⁷ See e.g. Singer, *supra* note 1.

⁴⁸ See e.g. Alberta, Minister of Education, “Education, Guidelines for Best Practices: Creating Learning Environments that Respect Diverse Sexual Orientations, Gender Identities and Gender Expressions” (2016), online (pdf): <<https://education.alberta.ca/media/1626737/91383-attachment-1-guidelines-final.pdf>>; Conseil scolaire de Montréal, “Lignes directrices relatives au soutien des élèves transgenres de la Commission scolaire de Montréal” (Montréal: Conseil Scolaire de Montréal, 2016), online (pdf): <<http://csdm.ca/wp-content/blogs.dir/6/files/lignes-directrices-transgenres.pdf/>>; Nova Scotia, Department of Education and Early Childhood Development, “Guidelines for Supporting Transgender and Gender-Nonconforming Students” (2014), online (pdf): <https://studentservices.ednet.ns.ca/sites/default/files/Guidelines%20for%20Supporting%20Transgender%20Students_0.pdf>.

its Best Practices Checklist is a frequently cited resource.⁴⁹ Lawyers may find these documents particularly helpful in emphasizing that entities need to take steps to protect or accommodate trans people.

D. Trans Human Rights Jurisprudence

A significant body of Canadian jurisprudence has emerged that establishes trans people's protection under human rights law. In the employment context, trans people have established that they are protected from harassment, unlawful termination, and discrimination in hiring.⁵⁰ Successful claims have been made regarding discrimination in housing,⁵¹ access to services and facilities,⁵² policing,⁵³ health care,⁵⁴ and identity documents.⁵⁵ As trans people increasingly seek resolution and remedies for systemic and individual discrimination, trans jurisprudence will continue to evolve rapidly.

Based on the developing body of case law and a shifting legal landscape, a number of cases have also settled. Such settlements often lead to new policies, from allowing a trans youth to participate fully in a hockey team in his chosen gender⁵⁶ to revised correctional policies that are more respectful of trans inmates' gender identity and expression.⁵⁷

A detailed discussion of human rights law, addressing both substantive and procedural considerations, is found in Chapter 3, Human Rights.

49 Best Practices, *supra* note 8.

50 See *Vanderputten*, *supra* note 6; *Maison des jeunes*, *supra* note 39; *Montreuil 2004*, *supra* note 14; *Montreuil 2007*, *supra* note 15.

51 *McMahon v Wilkinson*, 2015 HRTO 1019.

52 *Mamela*, *supra* note 42; *Anglsberger*, *supra* note 38; *Salsman*, *supra* note 42; *Lewis v Sugar Daddy's Nightclub*, 2016 HRTO 347, 2016 HRTO 793.

53 *Dawson*, *supra* note 16; *Kavanagh*, *supra* note 42; *Canada (Attorney General) v Canada (Human Rights Commission)*, *supra* note 42.

54 *Waters*, *supra* note 42; *Hogan*, *supra* note 42.

55 *XY*, *supra* note 14; *CF*, *supra* note 14; *Chédor*, *supra* note 21.

56 Ontario Human Rights Commission, "Hockey Canada's Ontario Branches Take Important Step Towards Transgender Inclusion" (7 September 2017), online: <http://www.ohrc.on.ca/en/news_centre/hockey-canada's-ontario-branches-take-important-step-towards-transgender-inclusion/>.

57 See Nicholas Keung, "Settlement Reached on Transgender Detainee's Complaint," *The Star* (12 March 2015), online: <<https://www.thestar.com/news/queenspark/2015/03/12/settlement-reached-on-transgender-detainees-complaint.html/>>; Ontario, Ministry of Community Safety and Correctional Services, "Ontario's Policy for the Admission, Classification, and Placement of Trans Inmates" (26 January 2015), online: <<https://news.ontario.ca/mcscs/en/2015/01/ontarios-policy-for-the-admission-classification-and-placement-of-trans-inmates.html>> [Policy for Trans Inmates].

V. Criminal Law

There is much to say and much work to do about the criminalization and over-incarceration of trans people, particularly poor trans people, trans women of colour, and trans and two-spirit Indigenous people. This includes the criminalization of sex work and its disproportionate effect on trans communities.⁵⁸ Chapter 12, Criminal Law on the treatment of LGBTQ2+ people under criminal law should be consulted for a deeper discussion.

For the purposes of this chapter, some brief comments are offered for criminal lawyers representing trans clients, based on the case law and recent policy developments.

A. Sentencing, Custody, and Correctional Facilities

Lawyers preparing sentencing submissions and seeking assessments for trans clients should consider the role of the client's gender history, and possible recommendations on custody, sentencing, corrections conditions, and access to care and community support.⁵⁹ Corrections Canada and several provincial ministries have recently announced changes to their gender placement practices, with new policies more respectful of an inmate's gender identity.⁶⁰ Cases brought forward by trans people have also resulted in human rights tribunals directing police forces to revise their policies for strip searches of trans people and for identifying trans people.⁶¹ As these policies are implemented on a case-by-case basis, lawyers may need to advocate for their client's appropriate placement, treatment, and access to trans health care. Careful instructions should be taken from clients as to gender placement, treatment, and health care needs. Lawyers should anticipate that a trans person's needs and desire to disclose their gender identity may shift through different stages of proceedings and in custody.

58 See *Protection of Communities and Exploited Persons Act*, SC 2014, c 25, which amended the *Criminal Code*, RSC 1985, c C-46 in response to *Canada (Attorney General) v Bedford*, 2013 SCC 72; see also Justin Ling, "Governments Have Failed Canada's Sex Workers—And They're Running Out of Patience," *Macleans* (6 September 2018), online: <<https://www.macleans.ca/news/canada/governments-have-failed-canadas-sex-workers-and-theyre-running-out-of-patience/>>.

59 See e.g. *R v Brernton*, 2013 BCSC 1029.

60 See Policy for Trans Inmates, *supra* note 57; The Office of the Ombudsman, Province of British Columbia, "Documenting the Path for a Transgender Inmate" (2016), online: <<https://www.bcombudsperson.ca/documents/documenting-path-transgender-inmate>>; The Correctional Service of Canada, "Interim Policy Bulletin 584: Bill C-16 (Gender Identity or Expression)" (27 December 2017), online: <<http://www.csc-scc.gc.ca/acts-and-regulations/584-pb-en.shtml>>.

61 *Forrester v Peel (Regional Municipality) Police Services Board et al*, 2006 HRTO 13; *Dawson v Vancouver Police Board (No 2)*, 2015 BCHRT 54.

VI. Immigration Law

Trans people navigate a number of issues in immigration law, including obstacles to changing their legal identity, the need to establish their fear of persecution in their country of origin, and the immigration challenges created by criminalization of trans communities.

Recent developments in Canadian immigration law facilitate trans migrants' access to identity papers that match their gender identity, as discussed in further detail in Chapter 10, Immigration. That chapter also discusses the new chairperson's guidelines for the Immigration and Refugee Board on claims involving sexual orientation and gender identity and expression.⁶²

For the purposes of this chapter, the recent cases described below provide some insight into the legal challenges that trans immigrants are facing.

In a 2011 case, a trans woman was found by the Canadian Immigration and Refugee Board (the board) to still face persecution in Mexico, despite certain formal steps taken by the Mexican government to improve protections of trans people.⁶³

In 2013, a gay South Korean trans man was granted refugee status in Canada in part because to change his identity papers in South Korea, he would have to undergo surgical interventions to his reproductive organs amounting to sterilization.⁶⁴ Ontario had surgical requirements in place before the successful 2012 human rights decision in *XY v Ontario*.⁶⁵ Canadian jurisdictions subsequently amended the legal requirements for changing sex, following *XY* in the 2014 decision in *CF* and other challenges.⁶⁶ The board explained its finding that the claimant faced persecution in South Korea:

The Panel finds that the objective on South Korea shows that the country has become more progressive in terms of societal attitudes towards homosexuals. There is not much information on the societal view towards transgendered individuals. The report details a recent case where the lawyers were successful in having five individuals recognized as males without having undergone the phalloplasty procedure. ... They point out that the decision was a lower court decision that is not binding on the Superior Courts and that there is no guarantee that the claimant would find a similarly progressive judge. The claimant's unique situation that he is a transgendered homosexual make it less likely that he will be able to successfully petition the courts to change his gender.

62 Immigration and Refugee Board of Canada, "Chairperson's Guideline 9: Proceedings Before the IRB Involving Sexual Orientation and Gender Identity and Expression" (1 May 2017), online: <<https://irb-cisr.gc.ca/en/legal-policy/policies/Pages/GuideDir09.aspx>>.

63 *X (Re)*, 2011 CanLII 67655 (IRB).

64 *X (Re)*, 2013 CanLII 73865 (IRB).

65 *XY*, *supra* note 14.

66 *CF*, *supra* note 14.

The Panel finds that societal attitudes in South Korea and the state of the law today make it unlikely that the claimant will be able to legally change his gender in South Korea. The Panel finds that the test outlined by the Supreme Court in 2006 is overly onerous as it requires an individual to undergo a medical procedure essentially against their will. The Panel finds that the claimant will necessarily have to undergo the phalloplasty procedure if he wants to change his gender. The Panel finds this requirement to be persecutory by its very nature. Imposing serious and complex medical procedures in order for someone to be legally recognized as a male amounts to persecution.

The Panel also finds that the claimant will suffer severe discrimination in South Korea as a result of his decision not to undergo the phalloplasty. The Report once again outlines some of the challenges and problems that the claimant will likely face in South Korea.⁶⁷

In *Namwo v Canada (Public Safety and Emergency Preparedness)*, a trans woman was facing a removal order for misrepresentation, because she failed to disclose her former gender identity and name to Canadian immigration authorities.⁶⁸ Although the board found that there was a misrepresentation, it concluded that the appellant should be allowed to stay in Canada for humanitarian and compassionate reasons. Her misrepresentation was determined not to be for immigration purposes.⁶⁹

VII. Family Law

A. Family Formation and Parental Identification

In some provinces, struggles for accurate legal recognition of trans parents continue. This includes whether a trans birth parent can be registered as a father or parent (rather than as the legal birth “mother”), and whether a trans parent can change their gendered parental designation after transitioning.⁷⁰

This echoes historical issues raised by the registration of same-sex birth parents, such as those pursued in *Gill and Maher, Murray and Popoff v Ministry of Health*, in which the tribunal ordered British Columbia to allow birth registrations that do not discriminate against same-sex parents.⁷¹ In British Columbia and Ontario, family law reform has led to the recognition of more diverse families and parental arrangements.

67 *X (Re)* 2011, *supra* note 63 at paras 20-22.

68 2016 CanLII 74021 at para 3.

69 *Ibid* at paras 68-71.

70 See *Centre for Gender Advocacy, supra* note 24. For prior case law, see *JM c Québec (Directeur de l'état civil)*, 2004 CanLII 20754 (Qc CS); *M(J), Re*, 2004 CanLII 76357 (Qc CS).

71 2001 BCHRT 34.

Trans people also report discrimination in accessing fertility services and concerns about a lack of awareness amongst foster and adoption service providers.⁷² A lack of funding for fertility preservation for trans people is also an ongoing concern in some jurisdictions.

B. Custody and Access

Canadian case law establishes that the fact that a parent is trans should not by itself be relevant in considering custody and access.⁷³ In *Forrester v Saliba*, the court asserted:

I indicated at the beginning of the trial to both parties and their counsel that the applicant's transsexuality, in itself, without further evidence, would not constitute a material change in circumstances, nor would it be considered a negative factor in a custody determination. ... The moving party has to demonstrate that there were other factors in addition to the applicant's transgenering that, in combination, created a material change of circumstances. If the applicant fails to demonstrate that there has been a material change in circumstances, notwithstanding the applicant's transgenering, then I do not need to continue with a further examination of what is currently in the child's best interests.⁷⁴

A court may nonetheless consider a trans parent's gender identity and transition, as the Ontario Superior Court did in *Boyce v Boyce*, stating that the "respondent's gender dysphoria is not relevant to the issue of custody, except to the extent that the children have been affected."⁷⁵ Through this analysis, lawyers should be watchful for social stigma factoring into arguments about the best interests of the child.⁷⁶

Lawyers representing trans people in family law should review a recent study, *Transforming Families: Trans Parents and Their Struggles, Strategies, and Strengths*, about the barriers facing trans people within Ontario family law and the recommendations it makes to better equip service providers to respond.⁷⁷ The Trans Pulse Project on trans parents is also a very helpful resource, providing data about the experiences of trans parents in Ontario.⁷⁸

72 Jake Pyne, *Transforming Family: Trans Parents and Their Struggles, Strategies, and Strengths* (Toronto: LGBTQ Parenting Network, Sherbourne Health Centre, 2012), online (pdf): <<http://lgbtqpn.ca/wp-content/uploads/2014/10/Transforming-Family-Report-Final-Version-updated-Sept-30-2014-reduced.pdf/>>.

73 *Forrester v Saliba*, 2000 CanLII 28722 (Ont Ct J).

74 *Ibid* at para 19 (citations omitted).

75 *Boyce v Boyce*, 2004 CanLII 11602 (Ont Sup Ct J) at para 26.

76 See e.g. Johanne Clouet, "Commentaire de jurisprudence: transsexualité et droit de garde" (2015) 117:1 R du N 217, in which the author considers two cases involving trans parents, and questions whether stigma may have influenced the decision-maker in one of the cases.

77 Pyne, *supra* note 72.

78 Jake Pyne, Greta Bauer & Kaitlin Bradley, "Transphobia and Other Stressors Impacting Trans Parents" (2015) 11:2 J GLBT Fam Stud 107.

The Trans Family Law Project in Ontario has created a number of tools to assist legal professionals in working with trans people in family law, including a webinar and legal backgrounder.⁷⁹

For a detailed discussion of family law considerations and trans people, see Chapter 6, Family Law.

C. Trans Youth

A growing number of trans youth are experiencing the intersection of family law and youth protection issues. In some cases, parental conflict is involved, such as disagreements as to appropriate approaches to the youth's gender identity and/or access to medical treatments. In *NK v AH*, such a conflict led to the appointment of a litigation guardian for a trans child.⁸⁰

In *AB v CD and EF*, a trans youth's father opposed the youth's access to hormone treatments.⁸¹ Medical professionals had determined that the youth had the capacity to consent to testosterone hormone therapy, and the court agreed, declaring that the youth could consent to trans medical treatments on his own behalf.⁸² The court further declared that the father's refusal to respect the youth's gender identity and his attempts to dissuade the youth from medically transitioning constituted "family violence" under the BC's *Family Law Act*.

Trans minors in conflict with their families may also need to turn to the courts to obtain the right to change their identity, as one trans youth successfully did in *KAB v Ontario (Registrar General)*.⁸³ Trans youth in the youth protection system may also seek help from their legal counsel to obtain access to trans health care and support.⁸⁴

VIII. From Big Cases to Daily Practice

Some of the cases that lawyers take on for trans clients have the potential to establish groundbreaking new case law and policies that significantly improve trans people's quality of life. Both the clients and history will remember the care that was taken with those cases—perhaps the types of cases that motivated some lawyers to attend law

79 These can be found on the LGBTQ Parenting Network's website, online: <<http://lgbtqpn.ca/trans-parenting>>.

80 *NK v AH*, 2016 BCSC 744. See also Phillip Epstein, "Judge Appoints Litigation Guardian to Represent Interests of Transgender Child in Recent Decision" (26 July 2016), online (blog): *Epstein's This Week in Family Law* <<http://www.westlawnextcanada.com/blog/insider/epsteins-this-week-in-family-law-transgender-child-706/>>.

81 *AB v CD and EF*, 2019 BCSC 254. See also *AB v CD and EF*, 2019 BCSC 604; *AB v CD and EF*, 2019 BCSC 1057. The case is on appeal to the British Columbia Court of Appeal at the time of publication; see *AB v CD*, 2019 BCCA 256; *AB v CD and EF*, 2019 BCCA 297.

82 *AB v CD and EF*, 2019 BCSC 254 at para 70.

83 *KAB*, *supra* note 30.

84 *Protection de la jeunesse*, *supra* note 15.

school in the first place. Cases may require lawyers to consider issues unique to trans people, such as the placement of a trans person in custody, and privacy concerns about a trans person's legal name and gender history. More widely, some encounters with trans people may be yet another interaction in the daily life of a trans person and a law practitioner, in which, like with all clients, the lawyer seeks to treat the client with courtesy and respect. For trans people frequently stigmatized and excluded by systems and service providers, lawyers' efforts to be respectful and responsive to a trans client's legal needs can carry great importance.

PERSONAL REFLECTION

THE POWER OF SEEING ME ON MY ID AND THE GLOBAL MOMENTUM FOR NON-BINARY GENDER DESIGNATIONS

Joshua M Ferguson

I was born into a system that sexed and gendered me at birth. We all were. Only two possible ways of being. This socio-medical model of assigning our sex and gender at birth categorizes people on the reductive basis that every one is either male or female—a notion widely disproved by contemporary science.⁸⁵

When gender self-determination is stripped away from trans, non-binary, and gender non-conforming (GNC) people, we are raised in a world of assumptions and expectations. The damage inflicted by the automatic assignment of our sex and gender, often before we're even born, and the prescribed roles that are expected and assumed of us can contribute to the erasure of our sense of identity.

Identity is determined by our ideas, concepts, and language in dialogue with our changing culture and society. We've always created words to describe our experiences and who we are. So why can't the way we describe our identities evolve over time? And why shouldn't the evolution of our identities be given legal recognition to match how we feel?

In my early thirties, I came out as a non-binary trans person. I'm neither a woman nor a man. I have never felt like a boy/man or girl/woman. I knew that reclaiming my identity meant that I would have to work to help redefine a system that excluded people who identify beyond the binary, from official legal recognition.

Born in Ontario and residing in Vancouver, I realized that advocating for the correct sex designation of "X" on my forms of identification would

85 See e.g. Azeen Ghorayshi, "1,600 Scientists Just Signed a Letter Opposing a Legal Definition of a Gender Binary," *Buzzfeed News*, (1 November 2018), online: <<https://www.buzzfeednews.com/article/azeenghorayshi/scientists-vs-gender-binary>>.

involve three separate administrative regimes: Canada, for my passport; Ontario, for my birth certificate; and British Columbia, for my driver's license and health card.

First, I received my passport in August 2017 when the federal government introduced an interim measure to add an X observation on passports until a full marker is made available. Then, with the involvement of the media and the support of lawyers, Mika Imai, Michelle Thomarat, and Frances Mahon, I filed applications in Ontario and British Columbia. After an initial delay, my Ontario case successfully resolved in May 2018 when Ontario became the first jurisdiction in the world to introduce a policy for birth certificates providing residents with four options: "M," "F," "X," or no marker at all.⁸⁶ My British Columbia application was rejected and then the matter was successfully resolved after filing a human rights application with the BC Human Rights Tribunal.

My path to getting my correct forms of identification wasn't easy. It was hard fought and I was one of many people across the country who advocated for them. Some advocates around the country are still fighting for legal recognition. Seven provinces in Canada (Newfoundland and Labrador,⁸⁷ Ontario,⁸⁸ Saskatchewan,⁸⁹ Nova Scotia,⁹⁰ Alberta,⁹¹ British Columbia,⁹²

86 See e.g. Ariel Jao, "Gender 'X': Ontario Issues Its First 'Nonbinary' Birth Certificate," *NBC News* (9 May 2018), online: <<https://www.nbcnews.com/feature/nbc-out/gender-x-ontario-issues-its-first-ever-non-binary-birth-n872676>>.

87 See e.g. Newfoundland and Labrador, *Gender Neutral Birth Certificate Application Forms Now Available Online* (News Release), (14 December, 2017), online: <<https://www.releases.gov.nl.ca/releases/2017/servicenl/1214n05.aspx>>.

88 See e.g. Ontario, Ministry of Government and Consumer Services, *Gender and Sex Information on Government Ids and Forms*, online: <<https://www.ontario.ca/page/consultation-gender-and-sex-information-government-ids-and-forms>>.

89 See e.g. "Mark an X—Gender No Longer Required on Saskatchewan Driver's Licence," *The Toronto Star* (25 March 2019), online: <<https://www.thestar.com/news/canada/2019/03/25/mark-an-x-gender-no-longer-required-on-saskatchewan-drivers-licence.html>>.

90 See e.g. Keith Doucette, "Nova Scotia to Allow 'X' as Gender Option on Birth Certifications," *The Globe and Mail* (19 September 2018), online: <<https://www.theglobeandmail.com/canada/article-nova-scotia-to-allow-x-as-gender-option-on-birth-certificates-2/>>.

91 See e.g. Emily Mertz, "Albertans Can Now Choose 'X' Gender Marker on ID Cards, Documents," *Global News* (8 June 2018), online: <<https://globalnews.ca/news/4262797/alberta-identity-documents-gender-inclusive-lgbtq/>>.

92 See e.g. British Columbia, "'X' Gender Identity Now Recognized on Government ID" (News Release), (2 November 2018), online: <<https://news.gov.bc.ca/releases/2018HLTH0079-002116>>.

and Prince Edward Island⁹³) as well as the Northwest Territories⁹⁴ have non-binary (also referred to as gender-neutral) markers available as of late 2018.

The developments in Canada are part of a global movement for non-binary legal recognition, or gender-neutral recognition, that increases our visibility and supports gender diversity and inclusion. Since 2007, eight countries, in addition to Canada—Nepal,⁹⁵ Australia,⁹⁶ New Zealand,⁹⁷ India,⁹⁸ seven jurisdictions in the United States,⁹⁹ the Netherlands,¹⁰⁰

93 See e.g. “Islanders to Be Able to Choose X or Blank as Gender on Driver’s Licence,” *CBC News* (30 November 2018), online: <<https://www.cbc.ca/news/canada/prince-edward-island/pei-gender-drivers-licence-non-binary-1.4927355>>.

94 See e.g. Northwest Territories, *GNWT Introduces Changes to the Vital Statistics Act*, (News Release), (28 July 2017), online: <<https://www.gov.nt.ca/newsroom/news/news-release-gnwt-introduces-changes-vital-statistics-act>>.

95 See e.g. Kyle Knight, “Nepal’s Third Gender and the Recognition Gender Identity,” *Huffpost* (2 February 2016), online: <https://www.huffingtonpost.com/kyle-knight/nepal-third-gender_b_1447982.html>.

96 See e.g. Australian Government, Department of Foreign Affairs and Trade, “Sex and Gender Diverse Passport Applicants: Revised Policy,” online: <<https://web.archive.org/web/20111019035814/https://www.passports.gov.au/web/sex-genderapplicants.aspx>>; Kirsten Lawson, “New Laws Will Allow for Sex Change to be Made to Birth Certificates,” *The Canberra Times* (21 March 2014).

97 See e.g. Simon Collins, “X Marks the Spot on Passport for Transgender Travellers,” *New Zealand Herald* (5 December 2012), online: <https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10852012>; Rosanna Price, “NZ Introduces ‘Gender Diverse’ Options,” *Stuff* (17 July 2015), online: <<https://www.stuff.co.nz/national/70335912/nz-introduces-gender-diverse-option>>.

98 See e.g. “India Recognises Transgender People as Third Gender,” *The Guardian* (15 April 2014), online: <<https://www.theguardian.com/world/2014/apr/15/india-recognises-transgender-people-third-gender>>.

99 The US jurisdictions are Oregon, Washington, Washington DC, California, Minnesota, Colorado and New York City. See e.g. Christopher Mele, “Oregon Court Allows a Person to Choose Neither Sex,” *The New York Times* (13 June 2016), online: <<https://www.nytimes.com/2016/06/14/us/oregon-nonbinary-transgender-sex-gender.html>>.

100 See e.g. Rosie Gizauskas, “Going Dutch: Holland Has Issued Its First Ever Gender Neutral Passport—Marked ‘X’ Instead of ‘Male’ or ‘Female,’” *The Sun* (19 October 2018), online: <<https://www.thesun.co.uk/travel/7536039/holland-has-issued-its-first-ever-gender-neutral-passport-marked-x-instead-of-male-or-female/>>.

Austria,¹⁰¹ and Germany¹⁰²—have introduced policies, passed legislation or have had successful court cases favouring the explicit recognition of non-binary or third-gender people. In some countries, “X” is used as a designation for non-binary people, in India the word is *hijra*, and Austria is considering the word *divers* (miscellaneous) or *offen* (open).

Our identities don’t need to be validated by the state, or by the law for us to exist. We are valid as we are. But, it is powerful to be seen, to be counted, and to be officially recognized by a system that excluded us, perpetuating the notion that our erasure is justifiable. Seeing myself now reflected on my ID makes me feel less alienated by a society that still predominantly sees gender as binary.

I have heard from numerous trans, non-binary, and GNC people, their families, and even cis-people who are thankful that my advocacy work has contributed to visibility and the move to explicitly recognize members of our community. I remain hopeful that legal recognition will, in part, challenge the transphobia that our community faces and contribute to the dismantling of our erasure and invisibility. We’ve always been here. It’s just that society hasn’t always recognized us according to our own terms.

101 See e.g. “Austrian Court Moves to Recognise Third Gender,” *The Local* (30 June 2018) online: <<https://www.thelocal.at/20180630/austrian-court-moves-to-recognise-third-gender>>.

102 See e.g. “Germany Paves Way for ‘Third Gender’ Option at Birth,” *SBS News* (15 August 2018), online: <<https://www.sbs.com.au/news/germany-paves-way-for-third-gender-option-at-birth>>.

PERSONAL REFLECTION

SOCIAL JUSTICE AND THE FORCED LEARNING OF LAW

Rosalyn Forrester

It’s amazing how fast things can change in one’s life.

I had a consent order for equal time and joint custody. It was my ex-partner’s access day. She asked me if I would keep our child since she had an appointment she needed to attend and could not cancel. She said she would come later in the afternoon to pick up our child for her weekend. I had lost the job I loved, working with the children and families as program director at the Before Lunch and After School program, because of who I am. I would be at home; I said of course I would do it.

Days after, I learned what the appointment really was and by then the damage was done. My ex had gone to the courthouse to file an emergency

motion for sole custody. She said in her court documents that my phone had been cut off, I was not employed, I was depressed, and, of course, what I think sealed the deal, I was transsexual. An order was made that she was to have immediate sole custody.

My ex left me a voicemail, reading from the court order that had been granted, without emotion and without explanation. I was numb. It made no sense. How would I explain this to my other daughter? I could not explain it to myself.

I went to the daycare to see my child, just so she knew I had not disappeared. She was so young, just three years old. I feared she would think I was angry with her. I wanted her to know I loved her. My heart broke as I told her I had to sort some things out and would see her soon. I found a free legal clinic and saw some friends. I made a plan to resume contact with my daughter.

But there was another wrinkle. I was about to start my overnight shift at a pharmacy, when I realized that the store was surrounded by cops. Fortunately, the store was closed so the doors were locked. That gave me time to make the calls I needed to make. I feared what might happen to me if no one knew where I was or what was going on. Being surrounded by police was terrifying; I am black, a woman who is transsexual, and it was midnight. Once the calls were made, I unlocked the door and walked out so I could be arrested. My ex-partner had not only taken my child; she had made a groundless criminal complaint against me.

Many times since this event, I find myself reliving that night—that police ignorance and brutality in my mind. It’s always there. It will never go away. I don’t like to think about those experiences, but that’s hard because I pass that same police station twice a day going to and from work. My job is to support abused women and so it’s the same every time I go to the court with a client. I’m reminded of the cells and the “treatment” I was to endure in them. It is still so traumatic. It’s not something I speak about often.

I can say that because of what my community goes through, I’m lucky. I could have spiraled further into depression. Instead I got angry about what was happening. My older daughter, my friends / chosen family stood by me, and they allowed me the space to vent and figure out what to do next. I happened to read an article in the local gay paper talking about the *M v H* court case¹⁰³ that named the Toronto lawyer involved. “That’s who I need to get,” I thought. Fortunately, at that time, I wasn’t aware that a legal aid certificate pays very little or I likely wouldn’t have thought she’d take me on and I wouldn’t have tried.

I arrived at the towering gold building at Front and Bay Street, with my legal aid certificate in hand, and met with Martha McCarthy. She listened to

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what I had to say, explained why using her might not be the best use of the legal aid certificate, and introduced me to her associate Joanna Radbord.

Once Joanna accepted the case, she did something I didn't expect. She took steps to make me feel comfortable, respected, and valuable. She allowed me to play a very active role in working on my case, even if that isn't what usually happens. I spent many hours at her office reading through documents, helping to transcribe notes, and searching for similar family law cases. During this period, I got to understand just how much behind-the-scenes work good lawyers do that people don't see. I began to feel hope.

We had a lot of work on our hands in stopping my ex from taking away my status as an equal parent. We also had to get parenting time started again. However, the criminal complaint created issues. When we first went to court, I was given supervised access at my mother's home every weekend, all due to the criminal complaint and my being on bail. Next step was for my criminal lawyer to get the bail conditions varied to allow me to be away from my surety from Friday night to Sunday night so I could be with my child.

My ex-partner decided that our child should be assessed by Dr. Ken Zucker, a doctor notoriously controversial for his work at a child and youth gender clinic. Joanna argued that there was no concern about our child's identity and there was nothing to show that being transsexual was contagious. Unfortunately, the judge disagreed and our child was unnecessarily put through an assessment.

After I dealt with the criminal charges, Joanna was able to bring a motion to let me see my child in my own home. I was granted unsupervised access every other weekend. One of the stipulations, though, was that I was not to bring our daughter to any location known to be frequented by transsexuals. I wondered how a judge could think that made sense. Our child would be in my home, the home of a transsexual ... but at least I was spending time with my child.

I did not want to go to trial, but I didn't really have a choice. I wanted to go back to shared custody; my ex-partner wanted sole. I was already impressed with how much work went into my case, but preparing for the trial was something else. Finally, the court would have the full picture. Luckily, even after I was fired, I kept up my friendships with some of the staff, at the school I worked out of, who saw me making changes in the lives of the children I worked with—children we shared on a daily basis. I asked a few of the school staff members to testify on my behalf and they agreed. They confirmed that I was a great parent.

At the beginning of the trial, my ex's lawyer came up and suggested that neither side should focus on the financial statements. We agreed. And when she was cross-examining my ex, Joanna didn't focus on the financial statements. Instead, she got my ex-partner to talk about how I slept every night with our baby on my chest to calm her and how I had always been a great

parent. After my evidence, though, my ex's lawyer grilled me about misstating the amount of my phone bill. It's too bad some lawyers don't honour agreements or focus on what is actually important.

We prepared so much before I was to testify at the trial. But no one can prepare someone for what giving evidence will be like. I could not talk to Joanna anymore once I went into the witness box. Nobody can explain that isolation. It was very difficult.

I don't believe any other lawyer could have done what was done in my custody case. The time, the passion, Joanna's belief in me. That is why we had the ruling we did. The court decided that I would continue as a full and equal parent to my child and that my transition was not a material change. Joanna became part of the family during the case.

Then there was a period of calm and I was able to focus on other things. I decided something had to be done about my mistreatment by the police. We should have rights; we did have rights. I filed a complaint with the Ontario Human Rights Commission about how the Peel Police Force dealt with me.

But then my ex-partner started up again, for reasons unknown. First there was a call to the Children's Aid Society and next to the Peel Police who would again treat me horribly. Again, I needed a family lawyer and a criminal lawyer. The third and final time this happened, the judge made an order that my ex could not continue to come to court. She would be fined if she did this again.

I did not have the same success with the lawyers in my human rights case. The Human Rights Commission lawyers never explained that they were not my lawyers but lawyers for the commission, something I now know. The Human Rights Commission lawyers also didn't explain that I could disagree when they told me that I should proceed with a complaint about only one of the three incidents I experienced with the police.

I started working with a well-known community human rights lawyer. He was recommended and gladly accepted my case. I thought he'd help. What happened instead was that he used my case for his law students to work on. That wouldn't be bad, but the students constantly changed and I'd have to explain the painful facts all over again. It took several years but we finally had the tribunal hearing. I met up with "my lawyer" at the firm and went through the preparation of my testimony. Then I was informed that he wouldn't be at the hearing and his student would be away too. I was on my own.

When I was being cross-examined, I was called a liar for not knowing that discovery materials had been shared with my human rights lawyer. It was also suggested that I was lying about my case because I decided to drop two of the claims. When I explained that I was told to do so by the lawyer at the commission, the commission's lawyer just sat there saying nothing. I was again called a liar. I survived that cross-examination, but I was very battered and was looking not so great.

The Human Rights Commission lawyer confirmed that my law firm had been sent the discovery documents. I could not believe it. At the end of the day, I called the law firm and learned that yes, indeed, they did have the discovery documents. I stopped by on my way home, picked the box up, and went away fuming.

The next day at the tribunal, I started having discussions with the commission lawyer about my witnesses. One of my witnesses was there after working overnight and would have to go back to work that night. There was no consideration for their needs. I had a perfect question to ask one of the police officers who was on the stand testifying. I told the commission lawyer he needed to ask the question and he refused. I needed him to ask the cop, what happens to his gun when he is in the sally port? I knew the answer would show that there was no fear of me possibly grabbing a gun from one of them.

While Joanna had worked collaboratively with me, this lawyer left me out of my own case.

I realized then that if I did have my own lawyer, the right questions would be asked. But even without a lawyer, I wanted the opportunity to have the questions put to the officers. No one else wanted it to happen, but the Chair of the Tribunal asked for written arguments from all parties on the matter. I had to read up on how to do this. My written submission won out: I could have direct input in the case. This meant I could cross-examine the cops. I lay in my bed with the box of discovery materials I picked up from the law firm spread out all around me. I read all the police notes, making questions for each officer.

After, closing arguments were to be written. I researched how to write closing arguments, wrote them, figured out the right number of copies to make, and got it done. In the end, in 2006, the decision showed I won the case, *despite* the commission counsel and the human rights law firm. Police throughout Ontario must now treat people from the transsexual community with respect and dignity, giving them the choice between a female and male cop during searches.

I am grateful for what I have learned about how to use the law. I just wish that I lived in a society where I didn't need to learn it.