

**REDRAWING THE BOUNDARIES: APPLYING THE NEW
HUMAN RIGHTS LEGISLATION LOCALLY**

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I. INTRODUCTION

Recent changes to the BC *Human Rights Code* provide explicit protections against discrimination on the grounds of gender identity or expression. Local governments have a legal duty and responsibility to maintain a discrimination and harassment free environment. Due to their relatively unique position at the forefront of many types of local service delivery, local governments will necessarily be at the forefront of implementation of the steps necessary to ensure the functional protection of this newly enumerated ground.

To support local governments in ensuring their operations are compliant with the updated BC *Human Rights Code*, this paper presents an overview of the jurisprudence in which discrimination on the basis of gender identity or expression has been considered, and commentary on likely future directions in BC under the new *Human Rights Code* provisions. Focusing on the gender identity and expression issues that have received the most consideration before Tribunals and the Courts, this paper addresses identification documents, gender-segregated facilities (i.e., washrooms and changerooms), privacy and data collection, and the duty to accommodate in the workplace.

II. GENDER IDENTITY, GENDER EXPRESSION, AND DISCRIMINATION

Gender identity is defined as an individual's internal sense of being female, male, neither, or something in between. As opposed to the traditional male/female dichotomy, gender is now recognized as existing upon something of a sliding scale, creating room for individuals to decide where they personally fall upon this spectrum. Gender expression refers to external characteristics and behaviours which are socially defined as masculine or feminine, such as dress, grooming, mannerisms, speech patterns and social interactions.

Sex, as distinct from gender, refers to assignment as male, female or intersex on the basis of physical characteristics such as reproductive systems, hormones, and chromosomes. Sexual orientation is also distinct from gender identity.

"Trans" is a term used which describes people with diverse gender identities and gender expressions, including people who identify as transgender, transsexual, cross dressers or gender non-conforming (gender variant or gender queer). Trans people may or may not undergo medically supportive treatments, such as hormone therapy and a range of surgical procedures, to align their bodies with their internally felt gender identity.

Discrimination on the basis of gender identity is still very common in Canada. Research on the impact of social exclusion and discrimination on the health of trans people in Ontario shows that, on the basis of their gender identity or gender expression, 73% of trans people have been made fun of, 39% have been turned down for a job, 26% have been assaulted, and 24% have even been harassed by police.¹

The *Human Rights Code* provides a tribunal system allowing individuals to seek remedies against organizations, employers, and government bodies who discriminate. Historically, discrimination against transgendered people has been addressed by classifying it as discrimination on the basis of disability, sex or both.² While transgender issues may overlap with historical enumerated grounds, including sexual orientation, there are also certain issues that are unique to transgendered people that are better addressed by the inclusion of the terms “gender identity and expression”.³ By explicitly acknowledging these types of claims, the Human Rights Tribunal is better able to provide support for trans people.⁴

A local government has a legal duty and responsibility to maintain a discrimination and harassment free environment. Remaining unaware or failing to address potential or actual human rights violations does not excuse liability for violating the *Human Rights Code*. Section 2 of the *Human Rights Code* clearly states that “[d]iscrimination in contravention of this Code does not require an intention to contravene this Code.”⁵ Local governments must take initiative to prevent and respond to actual or potential violations of the *Human Rights Code*.

¹ Greta Bauer and Ayden Scheim, “Transgender People in Ontario, Canada”, *Trans PULSE Project* (1 June 2015) at p 3. [*TransPULSE*]

² For example: *Hogan v. Ontario (Health and Long-Term Care)*, 2006 HRTO 32 (CanLII) (Gender Identity Disorder found to be “disability”); *Vancouver Rape Relief v. BC Human Rights*, 2000 BCSC 889 (CanLII), at para. 59, as cited in *Hayes v. Barker*, [2005] BCHRTD No. 590, at para. 31-32 (sex); *MacDonald v. Downtown Health Club for Women*, 2009 HRTO 1043 (CanLII), 2009 HRTO 1043 (sex); *Kavanagh v. Canada (Attorney General)*, [2001] C.H.R.D. No. 21, at para. 135 (sex and disability); *Sheridan v. Sanctuary Investments Ltd. (c.o.b. B.J.’s Lounge)*, [1999] BCHRTD No. 43, at para. 97 and 110 (sex and disability).

³ Paisley Currah and Shannon Minter, “Transgender Equality – A Handbook for Activists and Policymakers,” *Policy Institute of the National Gay and Lesbian Task Force, National Center for Lesbian Rights* (2000), at p 9.

⁴ Ontario Human Rights Commission, “Policy on preventing discrimination because of gender identity and gender expression”, (31 January 2014).

⁵ *Human Rights Code*, RSBC 1996, c 210, s 2.

III. THE UPDATED BC HUMAN RIGHTS CODE

The changes to the *Human Rights Code* came into effect on July 28, 2016 after the passing of *Bill 27, Human Rights Code Amendment Act, 2016*. As a result of this Bill, “gender identity or expression” is now among the protected grounds covered by the BC *Human Rights Code*. These amendments bring clarity to the protections for transgendered people provided by the *Human Rights Code*.

The changes also provide greater consistency in human rights legislation across the country. Ontario (in 2012), Nova Scotia (in 2013), Newfoundland and Labrador (in 2013), Prince Edward Island (in 2013), and Alberta (in 2015) have already amended their human rights legislation to include gender identity and expression as prohibited grounds of discrimination.

IV. JURISPRUDENCE

As those who do not know history may be doomed to repeat it, a review of historical cases is influential in evaluating how local governments can ensure compliance with the spirit and the letter of the changes to the BC *Human Rights Code*. Focusing on the gender identity and expression issues that have received the most consideration before tribunals and courts in this and other jurisdictions, this paper addresses case law regarding gender designation, gender-segregated facilities (ie: washrooms and changerooms), data collection, and the duty to accommodate in the workplace.

A. Gender Designation Is Not Based On Physical Anatomy

Jurisprudence and legislation regarding identification documents that require a gender designation have recognized that a person’s gender should not be determined by physical anatomy. In *XY v Ontario (Government and Consumer Services)*, 2012 HRTO 726 and *CF v Alberta (Vital Statistics)*, 2014 ABQB 237, provincial Human Rights Tribunals found that sex reassignment surgery should not be required in order to change a gender designation on a person’s birth certificate.

In these two cases, human rights complaints were filed against the provincial governments, challenging the legislative requirement in the applicable vital statistics acts that a trans person have and certify that they had “transsexual surgery” in order to obtain a birth certificate which accorded with their gender identity.

In both cases, the Tribunals found that the legislation was discriminatory toward transgendered people. Requiring people to surgically alter their bodies and then certify to the government that they had done so prevented transgendered persons who did not wish to or were unable to have surgery, or who had not yet had surgery, from obtaining a birth certificate that was consonant with their gender identity.

These decisions have had a significant impact on gender-based requirements for provincial identifications. Ontario and Alberta have amended their *Vital Statistics Act* to remove the requirement for proof of surgery to change the gender on birth certificates. In Ontario, the province now issues health cards without sex information displayed on the front of the card, and in 2017, drivers will be able to select an 'X' instead of a 'M' for male or 'F' for female on their licences.

BC has followed suit. In 2014, the BC *Vital Statistics Act* was amended to allow changes to the gender designation on a person's birth certificate without undergoing "transsexual surgery."⁶ An alternative option to a 'M' or 'F' designation on BC identification has not been established.

The BC Human Rights Tribunal has held that reliance on legal documents to determine a person's gender can result in discrimination against trans people. In *Dawson v. Vancouver Police Board (No. 2)*, 2015 BCHRT 54, the Vancouver Police Department arrested a transgender woman who had recently undergone sex reassignment surgery. Despite the complainant's requests to be treated in accordance with her lived gender, VPD staff members referred to the complainant by her legal name, which indicated a male gender, and male pronouns. The VPD attempted to justify their refusal to identify the complainant in a manner that was consistent with her lived gender with the need for offence charging documents to reflect her legal status. Nursing staff at the jail where she was held overnight also refused to provide her with necessary post-operative care for her recent surgical site.

The Tribunal found that the VPD's treatment of the complainant was not only discriminatory but reflective of a systemic discrimination against trans people. The Vancouver Police Board was ordered to pay monetary compensation as damages for injury to dignity, feelings and self-respect, and to adopt policies to allow identification of trans people without discrimination and train officers in implementation of these policies, within one year.

For local governments, the legislation and case law establishes that criteria for changing a name or sex on designated identity documents need not be medically based. Any data collection in relation to gender should be done on an as-needed basis, and in a respectful, non-intrusive manner. Where a gender designation is necessary, it is recommended that any data collection related to gender identity provide a range of options beyond 'male' and 'female'.

B. Self-Identified Gender Should Determine Access to Gender-Segregated Facilities

Since 1999, human rights tribunals across the country have endorsed the understanding that gender identity is determined by the person's lived experience of their gender, rather than how their gender is perceived by others. In *Sheridan v Sanctuary Investments (BJ's Lounge)*, [1999] BCHRTD No 43, the BC Human Rights Tribunal established that people in transition who are living as members of their desired sex should be considered to be members of that sex for the

⁶ RSBC 1996, c 479, s 27.

purposes of the *Human Rights Code*. In this case, a trans woman was prevented from using the women's washroom by staff at a bar. The complainant brought a claim against the bar on the grounds of sex discrimination.

The Human Rights Tribunal found that the complainant had been discriminated against by being refused access to the women's washroom. The nightclub's arguments that it had received complaints from its other patrons about trans women using the women's washroom were not a defence to the complaint of discrimination. The Tribunal also held that, if any inquiries about a person's sex are needed, these inquiries must be made in a dignified, private, and non-confrontational matter, and keep in mind the immediate nature of the service required.

More recent cases have continued to endorse this understanding. In *Lewis v Sugar Daddy's Nightclub*, 2016 HRTO 347, the Ontario Human Rights Tribunal found that a security guard's removal of a trans man from the men's washroom at a nightclub qualified as discrimination on the basis of gender identity and expression. In this case, the complainant identified as a transgender neutral questioning transgender male. While he was using the men's washroom at a nightclub, the security guard forced open the bathroom cubicle being used by the complainant and dragged him out. The security guard then physically removed the complainant from the nightclub while making demeaning and derogatory comments about the complainant's gender, and physically assaulted him to the extent that medical treatment was required.

The Ontario Human Rights Tribunal found that this treatment constituted discrimination on the basis of gender identity and expression, and awarded the complainant monetary compensation for injury to dignity, feelings and self-respect. The nightclub was also ordered to provide human rights training to its employees, management, and staff, including security guards, officers or bouncers, specifically on the issues of gender expression, gender identity and sexual orientation.

Many of the cases involving a refusal to recognize and respect an individual's preferred gender have resulted in financial compensation for the complainants, as well as mandatory training on gender identity issues for the respondents. In a 2013 Ontario decision involving hockey changerooms, tribunal orders led to the development of a more positive organizational response to understanding that self-identification of gender should be determinative in the use of a gendered facility. In *J.T. v. Hockey Canada et. al*, a trans youth filed a human rights complaint at the Human Rights Tribunal of Ontario against Hockey Canada alleging discrimination in services based on gender identity. As an amateur hockey player, the complainant was denied access to the boys' locker room, which he alleged "outed" him as a trans person and exposed him to harassment and bullying.⁷

7 Ontario Human Rights Commission, "Access to locker rooms for trans amateur hockey players: *J.T. v. Hockey Canada et. al*". Available online at: <http://www.ohrc.on.ca/en/access-locker-rooms-trans-amateur-hockey-players-jt-v-hockey-canada-et-al>.

As outlined by the Ontario Human Rights Commission, a full party intervenor in the case, the matter was resolved with a settlement agreement between the complainant and Hockey Canada. As a result of this agreement, Hockey Canada adopted new policies on gender identity and expression, including a policy that amateur hockey players have access to their choice of dressing room in accordance with their gender identity. The revised policy *states that players:*

- Have the right to use a dressing room that corresponds with their self-identified gender identity;
- Will be addressed by their preferred name and referred to by pronouns corresponding with their gender identity; and
- Are entitled to privacy and confidentiality about their trans status.

The Agreement also established that Hockey Canada would provide training to all Ontario coaches and trainers on:

- Gender identity and expression;
- Discrimination and harassment related to gender identity and expression; and
- The amended *Co-Ed Dressing Room Policy* and the Ontario Human Rights Commission's *Policy on preventing discrimination because of gender identity and gender expression*.

Hockey Canada also now provides information about the amended policy to other staff, volunteers, parents/guardians, and players as appropriate.

These cases demonstrate how organizational policies that restrict access to a facility on the basis of a person's perceived gender, including the gender noted in official identification documents, can discriminate against trans people. The outcomes of these cases indicate that gender should be properly understood as a self-identified concept, in which the person accessing a gender-based facility establishes which gendered facility is the most appropriate for them.

Local governments should review any organizational policies regarding access to gender-based facilities, including washrooms, locker rooms, or changerooms, to ensure that they are consistent with the *Human Rights Code*.

Instituting a practice of facility access on the basis of gender self-identification is one way an organization can mitigate discrimination against trans people. The current approach taken by Hockey Canada in Ontario is a good model for establishing a discrimination-free environment for trans people in recreational sports. Developing new physical facilities in a neutral fashion has also been utilized as a way to prevent discrimination against trans people. Schools Boards in Vancouver and North Vancouver, for example, have implemented policies endorsing the presence of 'gender-inclusive' washrooms in schools.⁸

C. Gender is Information Protected by the *Freedom of Information and Protection of Privacy Act*

Compliance with the *Human Rights Code* includes mitigation and prevention of situations in which a person may be discriminated against. The collection and use of information referring to a person's gender should be done in a manner that protects privacy and promotes a climate of understanding and mutual respect.

In *Re: Edmonton Public School District No 7*, Order F2016-26, the Alberta Office of the Independent Privacy Commissioner found that a school district breached the Alberta *Freedom of Information and Protection of Privacy Act* (the Alberta *FIPPA*) by disclosing information that indicated a student was a transgender person.

In this decision, a transgender student had received assurances that accommodations and security arrangements would be implemented in her school to protect her personal information. At the time of the incidents, her legal name had not been changed and reflected the fact that she was born male; however, she did not want her status as a trans person disclosed to other students. On a number of occasions, the complainant's legal name was displayed on a screen at the front of her classroom and was visible to the entire class. On two of these occasions, a teacher also called out or had another student call out attendance from the screen, announcing the complainant's legal name to the other students in the class. On one occasion, a substitute teacher loudly discussed with the complainant the process to have her name changed.

⁸ Ashley Judd, "Motion passes for genderless bathrooms in Vancouver schools" *Global News* (16 June 2014). Online: <http://globalnews.ca/news/1398131/motion-passes-for-genderless-bathrooms-in-vancouver-schools/>.

At the hearing, it was found that the school district had disclosed the complainant's personal information in breach of the Alberta *FIPPA*. The Tribunal agreed that the complainant's legal name disclosed her gender identity as different from her sex at birth, which is information about an identifiable individual. The Tribunal found that, whenever the complainant's legal name was displayed or called out in front of her class, her personal information was therefore disclosed by the school. The Adjudicator also found that the school board had failed to make proper security arrangements to prevent such incidents from occurring.

Although this case was not considered by a human rights tribunal, the decision and analysis remain relevant to the new protections against discrimination on the basis of gender identity and expression under the *Human Rights Code*. In BC, disclosing information that indicates a person's gender, such as a legal name that suggests a different birth gender, may be a breach of a trans person's privacy rights under the *Freedom of Information and Privacy Protection Act*, RSBC 1996, c 165, (*FIPPA*), in addition to contributing to a discriminatory environment in violation of the *Human Rights Code*.

As discussed above, trans people can face significant challenges in ensuring that their identity documents accurately reflect their gender. An organization's inability to manage discrepancies between 'official' documents and a person's lived gender can exacerbate systemic barriers, disadvantages, and safety risks experienced by trans people. Under *FIPPA*, a local government is only able to collect information that relates directly to and is necessary for a program or activity. A local government should review whether the collection of gender-based information is necessary for a program or activity. The reason for collecting and using personal information should be established before collecting any information that identifies a person's gender.

It is also recommended that where collection of such information is necessary, local governments implement practices to protect information that may reveal personal information about a trans person. Where such information is stored, parallel systems for including preferred pronouns and given names should be included, similar to the process of name changes resulting from marriages and divorces. From meeting minutes to name tags to registration lists, organizations should review their data collection practices for names and gender to ensure compliance with the *Human Rights Code* and *FIPPA*.

D. Duty to Accommodate

Discrimination in employment practices has a disproportionate burden on trans people, including both high unemployment and underemployment.⁹ Employers are not permitted to discriminate on the basis of gender identity or expression in hiring, training or promoting trans workers and cannot fire trans employees because they transition or make their trans status public. Employers, including local governments, must accommodate trans workers up to the

⁹ TransPULSE, *supra* note 1, at p 4.

point of undue hardship. Unions also have obligations to ensure the protection of trans employees, and a proactive approach to engaging with union representatives when creating policies and procedures can avoid many future issues. In turn, trans employees must communicate with the union and employer, supply job-relevant medical information where necessary, and cooperate and assist in identifying and implementing appropriate accommodation. Like any other ground of accommodation, perfection is not required, and there may be some compromise on the employee's part as well as the employer's.

In *Vanderputten v. Seydaco Packaging Corp.*, 2012 HRTO 1977, an employee began transitioning from male to female and requested that they be treated as a woman and permitted to use female facilities at work. The employer refused to do so without legal or medical evidence and documentation of the employee's male status. The Tribunal found that the employee suffered from a poisoned work environment due to harassment, and awarded \$22,000 for injury to dignity, feelings and self-respect, plus lost wages payable to the employee. The employer was also required to retain a human rights expert to develop and implement a human rights and anti-harassment policy, upon which all management staff were to be trained within 6 months.

In *Salsman v. London Sales Arena Corp.*, 2014 HRTO 775, the four applicants were operating a candle booth at a farmers' market. Three of the four identified as transgender women. Management complained that the applicants were dressed inappropriately, and gave the candle booth an ultimatum to either remove those workers or the booth from the market. The Tribunal awarded \$40,000 in damages, and directed to the farmers' market operators to take Human Rights training, post Human Rights Code cards at the market and train management staff on discrimination prevention. The market owner and management were also ordered to ensure that all trans people had access to washroom facilities that matched their gender identity.

When hiring, disciplining, or dismissing workers, local governments must ensure that trans employees are treated fairly and that their trans status is not the cause of such discipline or dismissal, either directly or indirectly. Part of the local government's responsibility to maintain a discrimination-free workplace includes ensuring that other employees are not harassing trans employees. Management training and proactive communication of official policies on matters such as facility use should help to prevent such incidents. Local governments may also wish to create employee policies which specifically address such transgender related issues, such as plans for accommodation of time off for medical procedures, reintegration strategies which respect the employee's desire for privacy and communication of their new status in a positive and respectful way, and resources for other employees or patrons who may have questions on the best way to interact respectfully with their trans co-workers and staff members.

V. UPCOMING TRENDS

In May 2016, the federal government introduced *Bill C-16 - An Act to amend the Canadian Human Rights Act and the Criminal Code*. This legislation would amend the Canadian *Human Rights Act* to add gender identity and gender expression to the list of prohibited grounds of discrimination. The Bill was read for a second time on October 18, 2016, and is currently before the Standing Committee on Justice and Human Rights.

The proposed Bill would also update the *Criminal Code* to extend hate speech laws to include gender identity and expression. This amendment would make it a hate crime to target someone because of their gender identity or gender expression. Judges would have to consider this as an aggravating factor in deciding what sentence to impose for any charges.

The revisions to the federal legislation indicate that improving the protections for trans people is a priority for multiple levels of government. By reviewing any policies that may have a disproportionate effect on trans people, local governments can ensure that their operations are compliant with the human rights legislation at the provincial and federal levels.

VI. CONCLUSION

The inclusion of “gender identity or expression” among the protected grounds covered by the BC *Human Rights Code* brings some clarity to the protections for transgendered people. Human Rights Tribunals across the country have held that gender designation is not based on physical anatomy, self-identified gender should determine access to gender-segregated facilities, and that information that reveals a person’s transgender status is protected by the *Freedom of Information and Protection of Privacy Act*.

Local governments should take proactive steps to accommodate a range of gender identities and expressions by employees and patrons, by removing unnecessary gender barriers from public facilities, collecting the minimum amount of gender information necessary for a particular program or purpose, (and where collecting such information, take steps to ensure its security from disclosure), and creating transparent and universally applicable policies for employees who may be transgender or transitioning, so that all employees have certainty as to expectations and requirements.

Terms and Definitions

As defined in the Ontario Human Rights Commission, “Policy on preventing gender discrimination because of gender identity and gender expression” (2014):

Sex: the classification of people as male, female or intersex. Sex is usually assigned at birth and is based on an assessment of a person’s reproductive systems, hormones, chromosomes and other physical characteristics.

Sex and gender: whereas “sex” is a person’s physical characteristics, “gender” is about what it means to be a man or woman in society. It is the expectations and stereotypes about behaviours, actions and roles linked to being a “man” or “woman.” Social norms related to gender can vary depending on the culture and can change over time.

Gender expression: how a person publicly presents or expresses their gender. This can include behaviour and outward appearance such as dress, hair, make-up, body language and voice. A person’s chosen name and pronoun are also common ways people express their gender. Others perceive a person’s gender through these attributes.

All people, regardless of their gender identity, have a gender expression and they may express it in any number of ways. For trans people, their chosen name, preferred pronoun and apparel are common ways they express their gender. People who are trans may also take medically supportive steps to align their body with their gender identity.

Trans or transgender: an umbrella term that describes people with diverse gender identities and gender expressions that do not conform to stereotypical ideas about what it means to be a girl/woman or boy/man in society. “Trans” can mean transcending beyond, existing between, or crossing over the gender spectrum. It includes but is not limited to people who identify as transgender, transsexual, cross dressers or gender non-conforming (gender variant or gender queer).

“Trans” includes people whose gender identity is different from the gender associated with their birth-assigned sex. Trans people may or may not undergo medically supportive treatments, such as hormone therapy and a range of surgical procedures, to align their bodies with their internally felt gender identity.

People who have transitioned from one gender to another may simply identify as female or male. Others may also identify as trans, as a trans woman or a trans man. Some people may identify as trans and not use the labels “female” or “male.” Others may identify as existing between male and female or in different ways beyond the binary of male/female.

Trans people may identify their gender in many ways. There is no single or universal experience of what it means to be trans. As a result, different trans people face distinct forms of discrimination in society, and this may relate to whether they identify as male, female, a person with a trans history, a person in the process of transitioning, a trans man, trans woman, transsexual, or gender non-conforming.

Transsexual: a person whose gender identity differs from their sex assigned at birth. They may or may not undergo medically supportive treatments to align their bodies with their gender identity, such as hormone therapy, sex reassignment surgery or other procedures. They may also undertake other changes to align their external attributes and appearance with their gender identity.

Transitioning: refers to a host of activities that some trans people may pursue to affirm their gender identity. This may include changes to their name, sex designation, dress, the use of specific pronouns, and possibly medically supportive treatments such as hormone therapy, sex-reassignment surgery or other procedures. There is no checklist or average time for a transition process, and no universal goal or endpoint. Each person decides what meets their needs.

Gender non-conforming/gender variant/gender queer: individuals who do not follow gender stereotypes based on the sex they were assigned at birth. They may identify and express themselves as “feminine men” or “masculine women” or as androgynous, outside of the categories “boy/man” and “girl/woman.” People who are gender non-conforming may or may not identify as trans.

Gender identity: each person’s internal and individual experience of gender. It is a person’s sense of being a woman, a man, both, neither, or anywhere along the gender spectrum. A person’s gender identity may be the same as or different from their birth-assigned sex.

For most people, their sex and gender identity align. For some, it does not. A person may be born male but identify as a woman, or born female but identify as a man. Other people may identify outside the categories of woman/man, or may see their gender identity as fluid and moving between different genders at different times in their life.

Trans man and trans woman: A person whose sex assigned at birth is “female” and identifies as a man may also identify as a trans man (female-to-male FTM). A person whose sex assigned at birth is “male” and identifies as a woman may also identify as a trans woman (male-to-female MTF).

NOTES