Transsexuals in Canadian prisons: An equality analysis

prepared for TransAction from the Justice and Equality Summit June 1999
presented at Lavender Law 1999 and at West Coast LEAF Forum

barbara findlay

This booklet contains general legal information. It is not legal advice. The information is accurate as of May 4, 2000. But the law changes frequently. You should consult a lawyer for information about your particular situation.

Introduction

This paper is written for two audiences: a panel on transsexuals in prison for lesbian gay bisexual and transgender lawyers at the Lavender Law 1999 conference in Seattle Wa in October 1999., and a panel on transgendered people and the law at the Legal Education and Action Fund (LEAF) conference in Vancouver, B.C., Canada in November 1999. The former audience is familiar with transgender experience and transgender legal issues; the latter audience is familiar with Canadian equality law. I hope this paper will inform both audiences without boring either.

The paper is also part of a larger work, the legal analysis of issues arising out of the Trans/Action Justice and Equality Summit, the first Canadian conference on trans legal issues, held in Vancouver in June 1999.

I dedicate this paper to Synthia Kavanagh, for her courage and her perseverance and her wicked sense of humor; and to my friends and colleagues in the transgender liberation movement.

1. Legacy of trans activism in British Columbia

British Columbia is Canada's California; Vancouver is Canada's San Francisco. Political activism on transgendered issues is farther ahead in Vancouver and in British Columbia than in any other part of the country.

Public activism began in 1993 with the High Risk Project which developed services for trans street workers in Vancouver's skid row. From the beginning the founders of High Risk took the position that all transgendered people were entitled to services and human rights protection, whether they were drag queens and kings, transsexuals, cross dressers, two spirited people, butch lesbians, or any other gender benders.

High Risk sponsored a law reform project under the aegis of a steering committee composed of individuals and groups representing all of those communities[1]. When that report was issued, there were no Canadian human rights or equality cases about transgendered people. The conclusion of that report was that trans people were probably unprotected by any current ground in provincial or federal human rights legislation, with the possible exception of transsexuals who were likely to be protected on the grounds of 'sex' and/or 'disability'. Following the lead of San Francisco the committee recommended the addition of 'gender identity' as a ground in human rights legislation, which would protect all transgendered people from discrimination in accommodation, services or facilities customarily available to the public (including services provided by governments and the private sector).

Political lobbying for the addition of 'gender identity' in British Columbia happened in the context of a review by the B.C. Human Rights Commission, a body independent of government charged with the administration of the Human Rights Code, of the provisions of the legislation. After a series of public hearings in which members of the trans community were very visible the Human Rights Commissioner recommended among other changes that 'gender identity' be added as a prohibited ground of discrimination. After lobbying by the queer communities in the province, B.C.'s current government has promised to add 'gender identity' to its human rights legislation in its current sitting. However the government insists on including an exception for situations of 'public decency', for which there already exists an exemption for human rights protections on the basis of 'sex'.

Following upon that work, Trans/Action, an ad hoc group of trans people sponsored Canada's first

---

1 findlay, barbara "Finding Our Place: Transgender Law Reform Project" Vancouver High Risk Project 1994

conference on human rights for trans people, with workshops on poverty, racism, ability/disability, gendered spaces, prisons, employment, legal strategies, identity and documentation, health care, and youth[2]. That conference agreed:

- that all transgendered people should be able to live free from discrimination, exclusion, and harassment
- that because the world is set up in male/female categories, transgendered people need human rights protections from discrimination on the basis of their gender identity
- that a person's gender identity must be established on the basis of what that person says about themselves, and not on so called 'objective' criteria of gender

There was disagreement about whether to support the government notwithstanding its insistence on the same 'public decency' exemption as exists for 'sex'. Some people favoured supporting the inclusion of gender identity notwithstanding this limitation because the limitation would apply only in situations where people are naked together in public. Other people opposed that strategy on the basis that punishing people with 'non conforming' or 'opposite' genitals is the essence of discrimination against trans people.

Meanwhile, there have been decisions by human rights tribunals affirming the right of MtF transsexuals to (a) use women's washrooms in public places (b) to continue to work while transitioning to their new gender and (c) participate in lesbian centres.[3]

However as transgendered people have become more visible, the lobby for inclusion of 'gender identity' more effective, and human rights decisions consistently favour trans people, an anti-trans backlash has developed among some (primarily lesbian) feminists in the province. Those feminists, who include key players among the rape crisis workers and feminist equality theorists, argue that MtF transgendered people, even post operative MtF transsexuals, should not be permitted to use or to staff women's crisis services, because they will traumatize other women who themselves have been victimized by men and because they do not share the socialization as women which is the hallmark both of women's oppression and of women's organizing.

2. Canadian legal framework

a. Introduction: the constitutional and human rights protection of equality rights

The division of legislative powers in Canada is the mirror image of those in the United States, with much stronger powers in the hands of the federal government, including residual powers left to the federal rather than the provincial governments. For example, in Canada criminal law is a federal, not a provincial, matter.

In 1982 the Canadian Constitution was patriated from Britain. At the same time the "Canadian Charter of Rights and Freedoms" was incorporated into it. The guarantees in the Charter include section 15, a guarantee of equality rights, in the following terms:

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without

---

2 A legal analysis taking into account the recommendations of the conference with respect to those issues is forthcoming in the fall of 1999. Contact the author for more information.

3 Respectively, Sheridan v. Sanctuary Investments Ltd. (No. 3) (1999), 33 C.H.R.R. D/467 (B.C.H.R.T.); Québec (comm. des droits de la personne et droits de la jeunesse) v. Maison des jeunes A-Ma-Baie (No. 2) (1998), 33 C.H.R.R. D/363 (Trib. Qué.); and Mamela v Vancouver Lesbian Connection September 8, 1999 (unreported; available on B.C. Human Rights Tribunal website at http://www.bchrt.gov.bc.ca/). These decisions are discussed in detail below.

> discrimination based on race,national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The Supreme Court of Canada held, in the first case dealing with section 15, that the list of protected grounds was not closed. Equality rights could be extended to groups who, like those listed, had suffered historic disadvantage.

Section 1 of the Charter provides that the court has the responsibility to balance competing claims:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

There are human rights statutes in every provincial, territorial, and federal jurisdiction, which typically provide protection against discrimination in the provisions of goods and services customarily available to the public; in accommodation; and in employment.

b. Lesbian and gay rights: template for an equality claim

In a landmark 1998 victory for queer rights, the Supreme Court of Canada held, in a unanimous decision, that if human rights legislation exists, it must protect people from discrimination on the basis of sexual orientation[4]. At issue in that case was a judgement of the Court of Appeal in Alberta, one of Canada's most conservative provinces, which had held that the judiciary could not use section 15 of the Charter to add to provisions of legislation governing human rights, but was restricted to interpreting the provisions which already existed. Since the Individual Rights and Protection Act proscribed discrimination on the traditional bases of sex, race, ancestry, place of origin, etc; but did not proscribe discrimination on the basis of sexual orientation, the court was powerless, said the Court of Appeal. The Supreme Court of Canada disagreed. Finding that gay men and lesbians have suffered historical disadvantage on a basis analogous to those listed in the Charter, the court held that sexual orientation is also a prohibited ground of discrimination under the Charter, and human rights legislation which failed to protect people from discrimination on the grounds of sexual orientation was itself discriminatory and contrary to the Charter. The court ordered that sexual orientation be "read in" to the legislation as a protected ground.

In analyzing sexual orientation, the Supreme Court of Canada has said that although sexual orientation has not been shown to be an "immutable" personal characteristic like race, it can only be changed at "unacceptable personal cost". [5]

Vriend and the cases that followed it have cemented the equality rights of lesbians and gay men into the Canadian constitution. The importance of these decisions about sexual orientation for transgendered people is that they provide a template for the equality claims on the basis of gender identity.

---

4 *Vriend v Alberta* [1998] 1 S.C.R. 493.

5 Two other decisions have held that the relationships of lesbians and gay men must be treated at law equally to those of heterosexuals; and that partners of lesbians and gay men have the same claim to government-sponsored family benefits like pensions as do the partners of heterosexuals. (See *MvH* and *Rosenberg v Canada)*

c. Analytic steps in an equality claim under Canadian constitutional law

The analytical steps in a Canadian equality rights case are economically summarized in the headnote of Law v Canada[6]:

> The appellant, a 30-year-old woman without dependent children or disability, was denied survivor's benefits under the Canadian Pension Plan (CPP). The CPP gradually reduces the survivor's pension for able-bodied surviving spouses without dependent children who are between the ages of 35 and 45 by 1/120th of the full rate for each month that the claimant's age is less than 45 years at the time of the contributor's death so that the threshold age to receive benefits is age 35. The appellant unsuccessfully appealed first to the Minister of National Health and Welfare and then to the Pension Plan Review Tribunal, arguing that these age distinctions discriminated against her on the basis of age contrary to s. 15(1) of the Canadian Charter of Rights and Freedoms. A further appeal was made to the Pension Appeals Board, which, in a trial de novo, concluded that the impugned age distinctions did not violate the appellant's equality rights. The majority of the Board also found that, even if the distinctions did infringe s. 15(1) of the Charter, they could be justified under s. 1. A subsequent appeal to the Federal Court of Appeal was dismissed largely for the reasons of the Pension Appeals Board. The constitutional questions here queried whether ss. 44(1)(d) and 58 of the Canada Pension Plan infringe s. 15(1) of the Charter on the ground that they discriminate on the basis of age against widows and widowers under the age of 45, and if so, whether this infringement is demonstrably justified in a free and democratic society under s. 1.
>
> Held: The appeal should be dismissed...
>
> In the brief history of this Court's interpretation of s. 15(1) of the Charter, there have been several important substantive developments in equality law. Throughout these developments, although there have been differences of opinion among the members of this Court as to the appropriate interpretation of s. 15(1), there has been and continues to be general consensus regarding the basic principles relating to the purpose of s. 15(1) and the proper approach to equality analysis. The present case is a useful juncture at which to summarize and comment upon these basic principles, in order to provide a set of guidelines for courts that are called upon to analyze a discrimination claim under the Charter.
>
> It is sensible to articulate the basic principles under s. 15(1) as guidelines for analysis, and not as a rigid test which might risk being mechanically applied. Equality analysis under the Charter must be purposive and contextual. The guidelines set out here are just that -- points of reference which are designed to assist a court in identifying the relevant contextual factors in a particular discrimination claim, and in evaluating the effect of those factors in light of the purpose of s. 15(1). Inevitably, the guidelines summarized here will need to be supplemented in practice by the explanation of these guidelines in these reasons and those of previous cases, and by a full appreciation of the context surrounding the specific s. 15(1) claim at issue. As s. 15 jurisprudence evolves it may well be that further elaborations and modifications will emerge.
>
> (1) It is inappropriate to attempt to confine analysis under s. 15(1) of the Charter to a fixed and limited formula. A purposive and contextual approach to discrimination analysis is to be preferred, in order to permit the realization of the strong remedial purpose of the equality guarantee, and to avoid the pitfalls of a formalistic or mechanical approach.
>
> (2) The approach adopted and regularly applied by this Court to the interpretation of s. 15(1)

---

6 [1999] 1 S.C.R. 497

focuses upon three central issues: (A) whether a law imposes differential treatment between the claimant and others, in purpose or effect; (B) whether one or more enumerated or analogous grounds of discrimination are the basis for the differential treatment; and (C) whether the law in question has a purpose or effect that is discriminatory within the meaning of the equality guarantee. The first issue is concerned with the question of whether the law causes differential treatment.

The second and third issues are concerned with whether the differential treatment constitutes discrimination in the substantive sense intended by s. 15(1).

(3) Accordingly, a court that is called upon to determine a discrimination claim under s. 15(1) should make the following three broad inquiries:

> A. Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?
>
> B. Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?
> and
>
> C. Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of
> presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?

(4) In general terms, the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.

(5) The existence of a conflict between the purpose or effect of an impugned law and the purpose of s. 15(1) is essential in order to found a discrimination claim. The determination of whether such a conflict exists is to be made through an analysis of the full context surrounding the claim and the claimant.

(6) The equality guarantee is a comparative concept, which ultimately requires a court to establish one or more relevant comparators. The claimant generally chooses the person, group, or groups with whom he or she wishes to be compared for the purpose of the discrimination inquiry. However, where the claimant's characterization of the comparison is insufficient, a court may, within the scope of the ground or grounds pleaded, refine the comparison presented by the claimant where warranted. Locating the relevant comparison group requires an examination of the subject-matter of the legislation and its effects, as well as a full appreciation of context.

(7) The contextual factors which determine whether legislation has the effect of demeaning a claimant's dignity must be construed and examined from the perspective of the claimant. The focus of the inquiry is both subjective and objective. The relevant point of view is that of the reasonable person, in circumstances similar to those of the claimant, who takes into account the contextual factors relevant to the claim.

(8) There is a variety of factors which may be referred to by a s. 15(1) claimant in order to demonstrate that legislation demeans his or her dignity. The list of factors is not closed. Guidance as to these factors may be found in the jurisprudence of this Court, and by analogy to recognized factors.

(9) Some important contextual factors influencing the determination of whether s. 15(1) has been infringed are, among others:

> (A) Pre-existing disadvantage, stereotyping, prejudice, or vulnerability experienced by the individual or group at issue.
>
> The effects of a law as they relate to the important purpose of s. 15(1) in protecting individuals or groups who are vulnerable, disadvantaged, or members of "discrete and insular minorities" should always be a central consideration.
>
> Although the claimant's association with a historically more advantaged or disadvantaged group or groups is not per se determinative of an infringement, the existence of these pre-existing factors will favour a finding that s. 15(1) has been infringed.
>
> (B) The correspondence, or lack thereof, between the ground or grounds on which the claim is based and the actual need, capacity, or circumstances of the claimant or others.
>
> Although the mere fact that the impugned legislation takes into account the claimant's traits or circumstances will not necessarily be sufficient to defeat a s. 15(1) claim, it will generally be more difficult to establish discrimination to the extent that the law takes into account the claimant's actual situation in a manner that respects his or her value as a human being or member of Canadian society, and less difficult to do so where the law fails to take into account
> the claimant's actual situation.
>
> (C) The ameliorative purpose or effects of the impugned law upon a more disadvantaged person or group in society.
>
> An ameliorative purpose or effect which accords with the purpose of s. 15(1) of the Charter will likely not violate the human dignity of more advantaged individuals where the exclusion of these more advantaged individuals largely corresponds to the greater need or the different circumstances experienced by the disadvantaged group being targeted by the legislation. This factor is more relevant where the s. 15(1) claim is brought by a more advantaged member of society.
>
> (D) The nature and scope of the interest affected by the impugned law.
>
> The more severe and localized the consequences of the legislation for the affected group, the more likely that the differential treatment responsible for these consequences is discriminatory within the meaning of s. 15(1).

(10) Although the s. 15(1) claimant bears the onus of establishing an infringement of his or her equality rights in a purposive sense through reference to one or more contextual factors, it is not necessarily the case that the claimant must adduce evidence in order to show a violation of human dignity or freedom. Frequently, where differential treatment is based on one or more enumerated or

analogous grounds, this will be sufficient to found an infringement of s. 15(1) in the sense that it will be evident on the basis of judicial notice and logical reasoning that the distinction is discriminatory within the meaning of the provision.

Once a disadvantaged group establishes that it is entitled to the protection of section 15 of the Charter, and that ground is judicially added to the list of protections under section 15, all legislation, federal and provincial, must conform to the non-discrimination protections of the Charter. Because that includes federal and provincial human rights legislation, the Charter indirectly ensures protection from discrimination in the private sphere.

Clearly transgendered people have available to them the route of seeking protection for discrimination on the ground of gender identity' as a prohibited ground of discrimination.[7] However, there are two obstacles to overcome. First, Canadians including experts and judges know very little about the disadvantaged situation of transgendered people[8]. Second, what they do know is about transsexuals, who are understood to be "born in the wrong body", the remedy for which is to change the body to "make the gender right". That conception, shared by many transsexuals, leaves intact and unchallenged the hegemony of the binary male/female system. It may seduce the court into believing that there is no need to add another gender ground, since current grounds of 'sex' and/or 'disability' will capture and provide a remedy for discrimination — which is true, perhaps, but only for transsexuals. For these reasons, though the legal analysis of equality rights for transsexual people precisely parallels that for lesbians and gay men, it may well be premature to launch a Charter challenge based on 'gender identity'.[9]

---

7 A Federal Court action has been commenced in Vancouver by the December 9 Coalition and Deborah Brady in Federal Court, to challenge the exclusion of 'gender identity' from the Canadian Human Rights Act, after the Canadian Human Rights Commission refused a complaint from Brady that Statistics Canada, the federal census agency, denied her a service customarily available to the public in collecting data on the assumption that Canadians are all either 'M' or F': Brady and December 9 Coalition v Canadian Human Rights Commission.

8 There is almost no Canadian scholarship about the situation of transgendered people. And what there is labours under misconceptions. For example one Canadian legal commentator speculated whether, if a person changed her/his gender, a contract they had signed would remain enforceable (now that they were a different person!)

9 The experience of gays and lesbians in Canada is that it took 20 years from the first case to reach the Supreme Court of Canada till the right to protection for gays and lesbians was recognized by the Court. In a 1979 case called *Gay Alliance toward Equality v the Vancouver Sun*, the plaintiff (G.A.T.E.) argued that the provisions of the then-current Human Rights Code, which had a "basket clause" permitting new grounds to be added in a manner similar to the current Charter of Rights, protected them from the discriminatory actions of the Vancouver Sun, a daily newspaper. The Sun had refused to run a classified ad for G.A.T.E. on the grounds of public decency. The ad read, in its entirety, "Subs to Gay Tide $1.00. Gay liberation newspaper. 2146 Yew St." In

d. Canadian Legal Treatment of Gender

The assumption that there exist two and only two genders in humankind is deeply entrenched in the Canadian legal system, as it is in Canadian society. It is beyond the scope of this paper to explore how the male/female fallacy, the fallacy of the "opposite sex", became entrenched. But a cursory look at gendered legal discourse paints a backdrop for the consideration of the rights of transgendered people in the Canadian penal system.

Ranging from the mandate of the Ministry of Education which provides that one of the educational goals for children in kindergarten and grade 1 is to teach them the differences between male and female by working with baby animals, to provisions in the Criminal Code restricting the display of unmatched genitals in public spaces, to birth registration and census provisions which permit a choice only between "male" and "female", the law both reflects and reinforces the mistaken idea that human gender is come only in two variants.[10]

What I call either/orism, the insistence upon dividing the world into neat and non-overlapping categories, is, parenthetically, a gestalt of western thinking, which emphasizes the dissection of things into their component parts, and highlights difference. Compare the traditions of eastern thought which emphasize the unity of all things and the chimera of perceived differences.

Canadians' identity documents — birth certificates, drivers licence, passport —

> A trans woman had a B.C. Driver's Licence as a female (photo id) which she obtained on the strength of her letter of enrolment in the Gender Clinic. When she applied for her passport, the clerk refused to process her as a female unless she had a certificate of having completed sex reassignment surgery. As a result, she had inconsistent documentation of her gender identity when she applied for an international drivers licence.

---

order to avoid the question of whether the Sun had "reasonable cause" to discriminate, the Supreme Court of Canada ruled that the classified ad section of the newspaper was not a "public service" within the meaning of the *Human Rights Code*.. (The Charter was not yet in effect; when it was introduced sexual orientation was not included among the list of protected grounds).

10 The binary nature of gender is inextricably wound up with the idea of (hetero)sex(uality), which is the yin and yang of human experience, the natural complementarity of opposites. While this paper does not try to address the connections between either/or hegemenoy and heterosexism, it is worth pointing out that any discussion of transgenderism is against a backdrop of taboos about sex, so that the discussions often are or seem to be somewhat salacious. And it is also worth noting that many queers are gaybashed for gender nonconformity (You fucking fag/you diesel dyke) and many transgendered people are transbashed by people who think they are gay or lesbian.

both require and specify gender[11]. Why it is necessary to include gender on drivers licences and passports, which include regularly-updated photographs of the named individual, is unclear. The only way to get the 'F' changed to "M' on a birth certificate or passport is possible only after the certified conclusion of sex reassignment surgery. However the Motor Vehicle Branch will issue a drivers licence in a transsexual's target gender if s/he produces a letter to show that she is enrolled in the Vancouver Gender Clinic.

In considering questions of gender the courts combine an assumption and a prescription of two and only two gender with a deference to the medical profession's expert opinion about "which" gender a person is.

Though there is no specific provision in Canada's Marriage Act limiting marriage entitlement to two people of the "opposite" genders, the courts have held that to be an implied condition inherited from British common law. Although the hoary English case of Corbett and Corbett, which held that since essential gender was chromosomal and could not be changed by surgery, sex reassignment surgery did not invalidate a marriage, in Canada if a transsexual goes through a sex reassignment during a marriage, the marriage may be annulled on the grounds that a person was always a "latent transsexual" and unable to fulfill the requirements of a marriage at the time the marriage was contracted.[12]

Male and Female Created He Them

Queers in Canada have not litigated marriage rights as a major site of equality struggles. In fact, a meeting of leading queer Canadian legal experts was convened in Ottawa in 1993 to dissuade Beaulne and Layland from pursuing an appeal of the trial court's decision that the Charter did not operate to permit same sex marriages. The strong consensus was that other equality issues should be pursued and won under the Charter first, because marriage is such a deeply emotional heterosexual institution. However a woman who is undergoing FtM treatment and has had a pan-hysterectomy, a double mastectomy, chest reconfiguration surgery, and hormone treatment is not a "man" and therefore not entitled as a common law spouse to maintenance from his female partner.[13]

There is a complete absence in the jurisprudence of any transgendered people except transsexuals, even in human rights cases; and a similar lack of information in the public about cross dressers, drag kings/queens, intersexed people, and other gender benders. This is worrisome. Protecting transsexuals is conceptually simple, since their protection poses no threat to the categories of male and female. They are simply moving from one of those categories to the other. Even protecting preoperative transsexuals (as Mamela and Sheridan did–see below) is not a great conceptual stretch since preoperative transsexuals enrolled in a gender clinic and participating in the real life test are understood to be "on their way" across the gender divide.

In the real world of course there is nothing to distinguish a pre operative transsexual from a non

---

11 *Vital Statistics Act* R.S.B.C. 1996 c 496; *Motor Vehicle Act* R.S.B.C. 1996 c 318; *Canadian Passport Order* SI 81-86

12 North v Matheson 52 D.L.R. (3d) 280 ; Layland v. Ontario (Minister of Consumer & Commercial Relations) 14 O.R. (3d) 658 require marriages to be between people of opposite genders. M v M 1084 PEIJ No 9 deals with the annulment issue.

13 B. v. A. 1 O.R. (3d) 569 In a recent email communication Phyllis Frye has exhorted all FtMs to move to Ohio and marry a gay man--since Ohio has gender identification laws which specify that 'sex' is chromosomally determined and unalterable, so such marriages would be legal — whether or not the FtM had had bottom surgery.

operative transsexual or a cross dresser except a letter from a gender clinic. That could mean that equality victories for pre or post op transsexuals who proceed on the grounds of 'sex' or 'disability' will benefit other transgendered people. But cross dressers or non op transsexuals cannot be confident at this point that those developments would protect them too. The only case in which the issue has been considered straight on is the case of BvA outlined earlier, in which a court considering the breakup of a relationship between an FtM and a woman held that the FtM was "not a man" for the purposes of claiming maintenance as a spouse under the relevant legislation. The (il)logic of that case would apply equally to any fact situation involving transgendered or cross dressing people facing a gendered law or the application of human rights legislation to a gendered situation. This is a particularly harsh result of course for FtM's who cannot achieve a surgical transition as easily as FtM's because of the much more complex surgery required to construct a neo-penis than to construct a neo-vagina.

> At a Vancouver strategy meeting to decide what to ask for in provincial human rights legislation a major human rights organization said that asking for gender identity in the human rights course was suicidal; that claims should proceed on the ground of sex; and that "of course" cross dressers, drag kings and queens would never get human rights protection

This potential limitation of the law poses practical questions for lawyers litigating equality rights for anyone in the trans community, since the way arguments are framed for transsexuals may have inclusive or exclusive implications for other members of the trans community and vice versa. Arguments for transsexuals which proceed on the grounds of 'sex' and 'disability', while conceptually relatively unproblematic for the law, may inadvertently end up excluding other trans people who are not "changing their gender", and/or who do not "suffer from a disability" under the DSM IV. Conversely, transsexuals worry that arguments that downplay disability may inadvertently affect the entitlement of transsexuals to state-funded sex reassignment surgery, since if transsexualism is not a "disability" may not be covered by medicare programs.[14]

e. Legislated Medical Care

Every province in Canada has a state-funded universal medicare system which funds all necessary medical care in the country. Medicare is paid for with tax moneys. Most provinces also require monthly payments from the plan participants, on the order of $35 per month for an individual; this fee is covered by the state for people on welfare.

Where there are private health care facilities they generally provide services which are not covered by medicare: cosmetic surgery, non-traditional health care such as acupuncture, services beyond specified limits for care such as massage, physiotherapy, and chiropractic treatments; etc.

Though the federal government used to set national minimum standards for health care by contract with the provinces, in return for federal funding, a recent trend toward decentralization of power from the federal government combined with federal budget cuts has eviscerated those minimum standards.

Sex reassignment surgery is a procedure funded by medicare in most provinces, although the funding of this procedure regularly attracts media attention of the "waste of taxpayers' dollars" variety. Ontario's conservative government has recently cut funding for sex reassignment surgery; the cut is the subject of a Charter challenge which has yet to go to trial.

The Canadian military, which provides medicare outside of the state medical system, funds sex

---

14 This result would not necessarily follow. In Canada abortions, which are authorized by a general physician in consultation with her/his patient, are state-funded.

reassignment surgery.

f. Human Rights Cases dealing with transgendered (transsexual) people

In Canada, the statutorily exclusive remedy for discrimination in the employment, services and facilities customarily available to the public, or accommodation is a human rights complaint. All human rights legislation in the country is designed to be "remedial" as opposed to punitive. As a consequence of that philosophy, financial awards are low, typically in the range of $2,000 to $10,000 for what would be, in a civil trial, general damages. However non monetary awards can include such remedial orders as reinstatement in a job, or specific educational steps to address the reasons for the discrimination, or an order that the respondent take such steps as in the opinion of the tribunal will rectify the discrimination.

The administrative structure of human rights legislation is similar though not identical across the country. Typically once a human rights complaint is filed, a human rights commission conducts an investigation, talking to each party and at least some of the party's witnesses. The investigator's report recommends whether or not the matter should be dismissed at that stage or referred to a human rights tribunal for a hearing. The commission makes the decision about whether to refer the matter for a hearing. If a hearing is held it is held in front of a non-judicial administrative tribunal.

There are only four published human rights decisions dealing with transsexual people in Canada. Of those three are of interest to this paper[15]

The first of those three decisions is C.D.P. (M.L.) c. Maison des jeunes[16] An MtF preoperative transsexual was dismissed when she came out to her employer as a transsexual and told her employer of her intention to transition. The Tribunal concluded (at para. 111) that "... le sexe non seulement s'entend de l'etat d'une personne mais encore comprend le processus meme d'unification, de transformation que constitue le transsexualisme" ("... sex does not include just the state of a person but also the very process of the unification and transformation that make up transsexualism"). As a result, held the tribunal, transsexuals are protected against discrimination on the basis of sex.

The C.D.P. decision came down after the hearing, but before a decision had been rendered in the B.C. case of Sheridan v Sanctuary Investments Ltd. In that case, the Tawni Sheriday, a pre operative transsexual, had begun dressing as a woman and taking hormones. Her physician gave her a letter explaining that she was a transsexual.

Sheridan patronized the respondent's bar, which catered to a queer clientele. She used the women's washroom — sometimes without incident, sometimes being warned by the bouncer not to do so or she would be barred. One evening when she arrived at the bar she was required to produce picture identification (though she was known to the staff), and, when the picture i.d. did not match her gender presentation, was refused entry on that basis. Showing her physician's letter made no difference. A short time later when Ms Sheridan returned to the bar, she was thrown out again because she used the women's washroom.

The manager of the respondent testified that his actions were based on complaints he had received from some lesbians.

---

15 The fourth is a Quebec case decided on the ground of 'civil status' which exists only in that jurisdiction which has a civil system based on the Napoleonic code rather than the British common law system which is the foundation of the civil system in the other nine provinces.

16 (T.D.P.Q. Montreal, No. 500-53-000078-970), dated July 2 1998.

Having concluded that Ms Sheridan was protected from discrimination on the grounds of sex, the tribunal also said:

> The Respondent's policy with respect to use of washrooms was a neutral policy which clearly had an adverse effect on transsexuals in transition. Therefore, the Respondent had a duty to accommodate transsexuals in general, and the Complainant in particular, to the point of undue hardship.

The analysis in Sheridan and Mamela followed the traditional structure of a discrimination claim.

Whereas the discrimination in the CDP case was "direct discrimination" — an employer saying explicitly to an employee "you cannot transition on this job" , the discrimination in Sheridan was not. Sheridan is an example of adverse impact discrimination.[17] A policy or practice which is unobjectionable on its face may have an adverse impact on a protected group. For example, an employer may have a six day work week (Monday to Saturday) and schedule its employees accordingly. Such a policy is facially neutral. But if a Seventh Day Adventist, whose religion requires observance of Saturday as a holy day without work, objects to working on Saturday on religious grounds, the employer has an obligation to accommodate his religious practice by not scheduling him to work that day.[18] (The logic of direct and adverse discrimination, together with the consequences that flow from them, have recently been eclipsed by a Supreme Court of Canada decision discussed in detail below.)

Notwithstanding the tribunal's excellent decision with respect to the right of a preoperative transsexual to use the washroom of her target gender, the tribunal held that the gay bar was not discriminating in denying entry on the basis that Ms Sheridan's picture identification did not match her gender presentation. The tribunal concluded that the respondent had a reasonable justification for refusing service to the complainant, on the basis of evidence that liquor licencing laws permitted the respondent to require picture identification; and that the area that the bar was in was a dangerous area.

In Canadian Charter and human rights jurisprudence, if a facially neutral policy (such as "men use the men's washroom; women use the women's washroom") has a disproportionate and adverse impact on a group protected from discrimination, the employer/accommodation/service provider is required to "accommodate" that individual to the point of "undue hardship". The concept of accommodation, developed in the context of complaints on the ground of disability where the issue was the extent to

---

17 The leading case from the Supreme Court of Canada on the difference between direct and adverse impact discrimination is Central Alberta Dairy Pool v. Alberta (Human Rights Comm.) (1990), 12 C.H.R.R. D/417 (S.C.C.) at D/433 to D/437.

18 The leading Supreme Court of Canada case on the duty to accommodate is Central Okanagan School Dist. No. 23 v. Renaud (1992), 16 C.H.R.R. D/425 (S.C.C.) at D/431 to D/440.)

which an employer is obliged to spend funds to make it possible for a person with a disability to work or continue to work in the workplace, sets a deliberately onerous standard. Once an individual has demonstrated the existence of prohibited discrimination, the onus shifts to the respondent to demonstrate that s/he or it cannot "accommodate" the individual without undue hardship, taken to include financial expenditure falling not far short of expenditures which would threaten the financial survival of the enterprise. The courts have held that the concept of accommodation applies to all prohibited grounds of discrimination, not just disability.

The final case of the trilogy is Mamela v Vancouver Lesbian Connection, decided in September 1999. The complainant was a preoperative transsexual lesbian,who joined the VLC and worked in the library. VLC's membership policy was to welcome people who identified as lesbian, queer, bisexual or transgendered. After Mamela was quoted in a queer newspaper to the effect that she identified as a lesbian, not as a 'woman', since 'woman' was a word which, derivatively speaking, came from 'wife/man', her membership in VLC was suspended. Members of the collective made derogatory remarks about Ms Mamaela's 'mannishness' and 'aggressiveness'.

By the time that Mamela's complaint reached the tribunal, the Vancouver Lesbian Connection was defunct as an organization, and no one appeared on their behalf. The tribunal addressed the issue of whether Mamela had been denied employment (no), and concluded that VLC had discriminated against Mamela on the basis of her gender identity in purporting to suspend her membership in VLC. On its facts the Mamela case did not have to address the question of whether a women's organization was entitled to refuse membership to a transgendered woman, since their policies permitted transsexual women to join, and Mamela's complaint was not about the denial of membership but about its suspension. Nevertheless it is important because the case was pursued solely on the ground of 'sex', with no reference to the ground of 'disability' which had been cited as an alternative ground in Sheridan. The case is also important as a case in which a transsexual woman has been accepted as validly participating in a women-only space.

2. Canadian Federal Prisons

There are at least three issues for transgendered people who are being incarcerated temporarily or permanently: in which gendered facility they will be housed, whether they will be given hormones while in jail, and whether they will be given sex reassignment surgery while in jail.

We have no information about the situation of any transgendered people in jail except transsexuals, and therefore this portion of the paper will address only the situation of transsexual people, specifically MtF preoperative transsexuals. However there is likely to be very little difference between the experience of preoperative transsexuals and cross dressers inside, if the cross dresser is out. Many transsexuals begin their journey identifying as cross dressers.

a. Going to Jail

A person's first encounter with being locked up for committing a crime, or being suspected of having committed a crime, is when they are arrested and taken to the police cells. Those may be either provincial, municipal, or federal, depending on who the police are in that area. They are held overnight in those cells and taken to court for their "first appearance" usually the next morning.

If they are held in custody awaiting trial, they are held in a "remand centre" which is generally a provincially-run custodial facility attached to the jail.

If they are convicted of a crime and sentenced to incarceration, they will be sent either to a federal or a provincial institution. They will be sent to a federal prison if their crime is one for which the sentence is two years or more, or is one of a number of specified crimes; or to a provincial correctional facility if their sentence is less than two years.

Both the federal and the provincial correctional services have facilities at several levels of security — so called minimum, medium, and maximum security facilities. Once an individual has been convicted and sentenced to federal time, the question of which institution she or he is sentenced to is determined by Corrections Canada. The judge who sentences the person has no say about where they will do their time, though it is quite common for a judge to make a recommendation on the subject.

In addition to strictly custodial facilities, there are forensic psychiatric facilities where people who have been found to be suffering from a mental illness are incarcerated.

For the purposes of this paper, we will look only at the federal corrections system, since most of the provincial systems parallel the federal one.

i. The Corrections and Conditional Release Act

The federal Corrections and conditional Release Act provides:

> 3. The purpose of the federal correctional system is to contribute to the maintenance of a just, peaceful and safe society by
>
> (a) carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders; and
>
> (b) assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community.
>
> 4. The principles that shall guide the Service in achieving the purpose referred to in section 3 are
>
> (a) that the protection of society be the paramount consideration in the corrections process;
>
> (b) that the sentence be carried out having regard to all relevant available information, including the stated

reasons and recommendations of the sentencing judge, other information from the trial or sentencing process, the release policies of, and any comments from, the National Parole Board, and information obtained from victims and offenders;

(c) that the Service enhance its effectiveness and openness

through the timely exchange of relevant information with other components of the criminal justice system, and through communication about its correctional policies and programs to offenders, victims and the public;

(d) that the Service use the least restrictive measures consistent with the protection of the public, staff members and offenders;

(e) that offenders retain the rights and privileges of all members of society, except those rights and privileges that are necessarily removed or restricted as a consequence of the sentence;

(f) that the Service facilitate the involvement of members of the public in matters relating to the operations of the Service;

(g) that correctional decisions be made in a forthright and fair manner, with access by the offender to an effective grievance procedure;

(h) that correctional policies, programs and practices

respect gender, ethnic, cultural and linguistic differences and be responsive to the special needs of women and aboriginal peoples, as well as to the needs of other groups of offenders with special requirements;

(i) that offenders are expected to obey penitentiary rules and conditions governing temporary absence, work release, parole and statutory release, and to actively participate in programs designed to promote their rehabilitation and reintegration; and

(j) that staff members be properly selected and trained, and be given

(i) appropriate career development opportunities,

(ii) good working conditions, including a workplace environment that is free of practices that undermine a person's sense of personal dignity, and

(iii) opportunities to participate in the development of correctional policies and programs.

[emphasis added]

The criminal justice system and the corrections service is among other things supposed to prepare someone to leave prison and assume a productive life. For that reason, people are released on "mandatory parole" generally after two thirds[19] of their sentence. While they are on parole, if they breach the terms of their parole or commit further criminal offences, they are returned to jail and may have to serve out the whole of their sentence inside. A person is generally eligible for parole after serving one third of their sentence (unless the sentence is one with a minimum term before parole eligibility). A parole board, which also operates under the Corrections and Conditional Release Act, will examine how sincere the person is in coming to terms with their crime, what their progress inside has been like — have they had many or few disciplinary infractions, for example?, what plans they have upon release and how realistic those plans may be; what support they have in the community, etc. They may or may not be released before their mandatory release date. When an inmate is released is on parole, Corrections Canada is responsible for overseeing the parole.

While a person is inside, she or he may be charged and convicted of institutional offences. The consequences of those offices can range from a fine, to loss of time out of cell, to loss of "good time".

---

19 Subject to any minimum imposed by the Criminal Code

ii. Men and Women in Jails

Canada's federal corrections system has institutions for men, and institutions for women. Until the mid-90's there was only one federal prison for women. It was the infamous P4W, located at Kingston Ontario. Successive commissions of inquiry over more than 50 years recommended that the institution be closed. It was mediaeval in its conditions; it meant that women doing "federal time" could not be anywhere near their families. There were no facilities which permitted women to have their children with them during any part of their sentence.

Synthia Kavanagh is serving her sentence in a male federal institution in British Columbia. She is routinely harassed, taunted, baited by male inmates and staff. She does not want to leave B.C. because if she does she will lose any possibility of access to the Gender Clinic at the Vancouver Hospital. When she went to jail Corrections Canada discontinued the hormones she had been taking. Though the sentencing judge had recommended that she do her time in a women's facility, the recommendation was ignored. Corrections Canada will not permit her to have gender reassignment surgery while she is in jail unless she pays for the procedure and for transporting the guards to oversee the procedure-- which would cost up to $100,000.
Synthia Kavanagh is currently housed in segregation — the hole — pending the completion of her human rights complaint against Corrections Canada. Corrections Canada is the only place in the prison safe for her. The hole has such a bad effect on people that Corrections Canada has a psychologist assess people there daily for "orientation to person place and time". A retaliation complaint has been filed with respect to her segregation status.

P4W was finally closed after the 1996 commission of inquiry led by Louise Arbour (now appointed to the Supreme Court of Canada) in the wake of an investigation into a riot in which male prison guards were seen on video tape to be stripping and beating women inmates.

Ms Arbour's report emphasized the inhumanity of the care of the women in P4W and the need for women's penal institutions across the country so that women would be able to do their time closer to their families.

The situation has improved. P4W has now been closed; and all women from British Columbia, whether sentenced to "federal time" or to "provincial time" do their time in the B.C. Correctional Centre for Women (BCCCW).

Corrections Canada recognizes the signal importance of gender in housing inmates. Their correctional facilities are designed either for men, or for women: but not both. The particular needs of female inmates are statutorily recognized. The Act provides:

Programs for female offenders

77. Without limiting the generality of section 76, the Service shall

(a) provide programs designed particularly to address the needs of female offenders; and

(b) consult regularly about programs for female offenders with

(i) appropriate women's groups, and

(ii) other appropriate persons and groups

Determining an inmate's gender solely on the basis of a genital inspection is medically backward, administratively unjustifiable, and directly harmful to transsexual inmates

(a) Trans People in Prison

For trans people, time inside is excruciatingly difficult. At every stage of the detention and incarceration process, trans people are held in the gendered facility in the gender to which they were assigned at birth, unless they have already had gender reassignment surgery. As a sheriff in the Coquitlam courthouse bluntly explained to the panel hearing Ms Kavanagh's human rights complaint, "As far as we are concerned they are male until they get the piece of paper saying that they are female. It is that simple".

First, trans people are at a higher risk for incarceration than any other population groups. Like many oppressed groups, trans people are at a higher risk for:

- ending up on the street as adolescents
- ending up in the sex trade
- ending up addicted to alcohol or drugs
- committing criminal offences

Trans people are often kicked out of their homes as adolescents if their parents learn that they are transgendered. Or, if the trans person has kept their gender identity issues under wraps, coping with their gender issues by denial, they often adopt extremes of the behaviour of the assigned gender (MtF trans people who go into very macho professions, for example), they may find themselves using alcohol or drugs to deal with the pain of their distance from themselves.

Statistically speaking trans people, like members of many other oppressed groups, are at a higher risk of criminal behaviour and addiction than other people are, for reasons that are directly attributable to their transgendered status. The marginalization process at work in the lives of trans people parallels the marginalization of , for example, many lesbians and gay men, and many aboriginal people, who can find no safe and welcoming place which understands and accepts all aspects of their identity.

Though there are many trans people in Canada, at any given time there are only a few transsexual people in Canadian corrections facilities. Their total number is impossible to estimate since Corrections Canada does not keep statistics which they can retrieve; however its estimates of the number of transsexuals in the federal system at a given time are between 14 and 20 in the whole country. When transsexual people are incarcerated they may be taking hormones, cross-living full time in their gender of choice, and anticipating sex reassignment surgery; or they may be at the beginning of their process of coming to awareness of their gender identity.

When Synthia Kavanagh was sentenced to jail in 1989, her hormones were discontinued within a week of her incarceration, on the basis of one cursory interview with a psychiatrist. The hormones were not restored till 1993, after Ms Kavanagh had filed a complaint with the Canadian Human Rights Commission. Corrections Canada has now settled this issue in Ms Kavanagh's favour, acknowledging that they had no right to discontinue the hormones Ms Kavanagh was taking when she was incarcerated.

(b) Corrections Canada Policies with respect to Trans People in Prison

Corrections Canada policies address only the situation of transsexuals, ie those people diagnosed with high intensity gender identity disorder under the Diagnostic and Statistical Manual IV (DSMIV)[20]. The situation of cross dressers is not touched upon.

Corrections Canada policy about the medical treatment of transsexual people is to "freeze" them at the stage they were at in their treatment for gender dysphoria when they came into prison. Under policies current in 1999, a transsexual inmate who was taken hormones before s/he was admitted to jail is continued on the hormones. However a person who is diagnosed as transsexual while s/he is in prison will not receive any treatment — gender counselling, hormones, primary or secondary sex reassignment surgery or cosmetic surgery — for her medical condition. No gender counselling is provided while the transsexual is in prison.

Secondary sex characteristic surgeries such as breast augmentations or reductions are permitted only in cases where the inmate pays for the entire cost of the procedure including the cost of payment for guards to escort her or him from the prison to treatment and back again. Permission for those procedures is discretionary.

Sex reassignment surgery — the surgical alteration of genitals — is currently available under no circumstances whatsoever, even if the inmate has been assessed for sex reassignment surgery and found to be eligible by one of Canada's two gender clinics, unless the inmate is prepared to pay for the surgery, her own transportation and accommodation costs, and the costs of accompanying guards, including their salaries.

The transsexual is in a catch 22 however: though she is effectively denied SRS during her incarceration, unless she has had SRS she will not be housed in a prison of her chosen gender. The result for almost every transsexual is that s/he must spend her entire prison term in a facility designed for people of the gender that s/he is not.

---

20 The DSMIV is the American psychiatric bible which catalogues and defines all mental illnesses. Updated versions are published from time to time. Homosexuality was a mental illness in the DSM until 1973.

The only book in North America written about the experience of being transsexual in prison is *Prisoner of Gender*. Kathy Johnson describes the abuse she suffered in the same federal penitentiaries in which Synthia Kavanagh is doing time.

MtF transsexuals who are housed in male institutions are treated by other inmates as women; and are therefore subject to being raped, sexually harassed, and taunted on an ongoing basis: they are subject to the treatment that a woman would receive were she incarcerated in a male institution, treatment which Corrections Canada deems so unacceptable for other women that they have created an entirely separate corrections regime to house women inmates. The fact that regime exists is a recognition of the dangers for women of housing them in the same correctional facilities as men.

Corrections Canada justifies its refusal to house MtF transsexual inmates in female institutions on three grounds: that many women inmates have been traumatized by men and would be likely to be re-traumatized if there were women with penises in their facility; that there is a risk of sexual assault on women in the facility by MtF transsexuals; and that women in those facilities might become pregnant.

Whether or not those risks might exist would depend on the specific situation of the MtF transsexual. If she has been taking estrogen for a significant period of time, she will have become "chemically castrated" with the result that she cannot achieve an erection, she will have no heterosexual attraction to women; and her sperm count will be low to non-existent. For so long as she continues to take her hormone regime, she will be a danger to other women in the women's prison on none of those bases.

It is relatively straightforward to make a clinical assessment of the degree to which an MtF transsexual has become hormonally female. And it is administratively straightforward (though almost certainly unnecessary) to insist that as a condition of being housed in a women's facility the MtF transsexual continue her regime of hormones. Such a condition is almost certainly unnecessary because it is typical of people with high intensity gender dysphoria that their primary obsession (and that is the word used in the literature) is to transition from their ascribed gender to their gender of identity.

Corrections Canada has adopted its policy of refusing to provide SRS on the basis of expediency. The two Canadian gender clinics, the Clarke Institute in Montreal and the Vancouver Gender Clinic, have somewhat different interpretations of the Harry Benjamin International Gender Dysphoria Association treatment criteria[21]. In particular, the Vancouver Gender Clinic requires people to go through only one year of the "real life test"; the Clarke insists on two years. And, material to this discussion, the Clarke Institute is of the opinion that it is impossible to fulfill the requirements of the real life test while living in prison; the Vancouver Gender Clinic disagrees.

(c) Equality Issues

There are three areas in which Corrections Canada policies about transsexual inmates are vulnerable to attack either under the Canadian Human Rights Act, or under the Charter of Rights and Freedoms, or

---

21 The HBIGDA standards are consensual standards which gender clinics observe to a greater or lesser extent. Central to the standards of care is a requirement that an individual live as a member of the target gender for a period (which in practice ranges from one to three years), have two different psychological assessments of their gender dysphoria, and undergo therapy, before SRS is recommended and performed. The concern demonstrated by the medical profession to ensure that penises are not removed in error are in stark contrast to the scandalous lack of care and tragic after effects of "cosmetic" breast augmentation and reduction surgeries.

both. The first is the "freeze policy" which restricts inmates to the level of hormones, if any, that they were being prescribed when they went to jail. The second is the policy of refusing sex reassignment surgery (bottom surgery) to inmates as a necessary medical service. The third is the policy of housing inmates in male institutions regardless of their progress transitioning.

The analysis of these issues is parallel regardless of which legal route the inmate chooses; but the results are different. Under the Human Rights Act, the complainant is asserting a denial of "services customarily available to the pubic"; the remedy is the provision of the denied services, special damages, and an order for a small amount ($2,000 to $10,000 is the usual range) for injured feelings. Under the Charter, a plaintiff is challenging the constitutional validity of a piece of legislation, regulations or policy; the remedy is an order that the impugned legislation/regulation/policy be interpreted or applied in a manner which is non discriminatory.

(d) An Equality Analysis under the Charter of Rights

The steps in an analysis under section 15 of the Charter are set out above. We would argue that (a) the either/orism of the statute outlining different treatment for men and women is discriminatory in its application to transsexuals, and so the policy of incarcerating MtF transsexuals in a male prison until after their surgery is complete is discriminatory and (b) that the health care policy restricting access to hormones, therapy, the real life test and sex reassignment surgery as necessary health care items is discriminatory against transsexuals in that it is a discriminatory denial of health care.

Any argument that the division of the world into mutually exclusive male/female categories (here, for purposes of deciding where transsexuals will be incarcerated) discriminates against transsexuals requires that the court understand and accept that gender is a continuous process and a socially constructed and maintained phenomenon, rather than something which is "given" and "natural", deviation from which is aberrant. Expert evidence that there are several indicators of gender — chromosomes, hormones, physical appearance and function, social identity, gender identity, perhaps others— which are generally congruent in an individual but sometimes incongruent as in interesexed people, cross dressers, and transsexuals, is required.

Notwithstanding that a lawyer acting for a trans person in prison is almost certainly going to be acting for a transsexual, it is important to call evidence that gender is on a continuum, rather than to treat the catgories of male and female as inviolable; and to call evidence of non-transsexual transgendered people. Otherwise the court may fall into the seductive trap of seeing the transsexual as someone who is stepping from one gender category to the other, leaving the either/orism— the hegemony of the existence and exclusivity of the categories themselves -- unimpaired. Such a conclusion may have the unintended effect of reinscribing the oppression of non-transsexual transgendered people, such as cross dressers, whose gender situation is then described, by comparison to transsexuals, as a "lifestyle choice" which does not merit human rights protection.

On the other hand, when dealing with transsexuals in prison it is equally important to call expert evidence that transsexualism is a "disability" (as described in the DSMIV) which, left untreated, is likely to result in anti social or self destructive behaviour (including self-castration, addictions, and suicide). This both provides an alternative way for a court or tribunal to come to grips with the phenomenon of gender benders (and this time without threatening the either/orism of the categories of male/female) and provides assurance to the decision maker that transsexualism is not a "lifestyle choice" but an aspect of an individual's personhood which cannot be changed "except at an unacceptable personal cost" to use the phrase of the Supreme Court of Canada in dismissing as undeterminative the question of whether sexual orientation is innate or chosen.[22]

---

22 Though more and more transsexual people are beginning to regard the classification of transsexualism (high intensity gender dysphoria) in the DSMIV as wrong and transphobia,

.Under the Charter of Rights it is also completely acceptable jurisprudentially to argue that the discrimination faced by an individual is multifactoral, so in submissions one would argue that an FtM in a woman's prison suffers discrimination based on her gender and on her disability and on a combination of her gender and her disability. In this instance, we would point to the statutory either/orism of distinctions between the treatment of men and the treatment of women as an illustration of the fact that Corrections Canada regards gender considerations as essential to the well being and proper treatment of incarcerated individuals; and demonstrate the internal and discriminatory inconsistency of their position in failing to accommodate in their bifurcated gender scheme.

In Synthia Kavanagh's case part of the claimed discrimination relates to the refusal of Corrections Canada to provide the health care services that she requires to deal with her gender dysphoria. So it is crucial to include evidence and an analysis of the way in which gender dysphoria/transsexualism is a disability, to support her claim for medical services

Finally and as a further alternative to an argument that the mistreatment of MtF transsexuals in prison amounts to discrimination on the basis of sex and/or disability, it is important to lay an evidentiary foundation for the court to find that 'gender identity' should be added as an analogous ground to the list of grounds protected under the Charter. This is the preferable outcome of a Charter challenge, since unless gender identity is recognized as a separate ground there is a continuing risk that a court will understand and prohibit discrimination against transsexuals (which does not threaten the gendered order) but will not understand or prohibit discrimination against other transgendered people. The necessary evidentiary foundation would demonstrate

- that there is no way to distinguish between transgendered people — for example, cross dressers -- on the one hand, and pre operative transsexuals on the other except in terms of whether they intend to have surgery; and that is not an appropriate basis on which to decide who gets protected from discrimination
- that many transsexuals begin their journey toward transition by cross-dressing, and it does not make sense to grant the same individual doing the same behaviours protection against discrimination only at the particular point in her/his life when s/he has decided to pursue gender surgery
- that in all likelihood the DSMIV's prognosis for transsexualism (which is that the only successful treatment is sex reassignment surgery) is a prognosis contaminated by the either/orism of Western thought which assumes that there are only two genders and therefore one must "be" one or the other; and that as the concept of gender is opened up the perceived necessity for SRS will decrease
- that historically in Canadian society transgendered people have been discriminated against on the ground of gender identity in all of the major social institutions: the law, education, religion, marriage, sport, the justice system, the military, etc etc
- that the discrimination against people on the basis of their gender identity typically involves punishment for being the "wrong" gender, and this punishment is extended to anyone that the perceiver understands to be "wrong" — whether the individual identifies for example as a butch lesbian or as a transgendered FtM; and that transphobia, homophobia and sexism are linked and overlap because society's either/orism punishes any deviance from a bifurcated gender reality in which the genders are "opposite" and the men are dominant

---

seeing transgenderism as a part of the normal range of human gender rather than something which is aberrant or abnormal, the lawyer will almost certainly have to take the more conventional view in arguing for a transsexual in prison for whom s/he is claiming medical care.

A very real difficulty in the equality litigation for transsexuals in prison in Canada is that one of the two gender clinics, the Clarke in Toronto, supports the non-treatment policies of Corrections Canada, including the "freeze" policy with respect to hormones, the denial of sex reassignment surgery to anyone who is incarcerated, and the housing of MtF transsexuals in women's jails. The core of the Clarke's position is a belief that the "real life test" cannot be carried out while an individual is incarcerated, since jail is an "artificial environment". The international standards for sex reassignment surgery require that an individual live for at least a year in the "target gender" and that some of that period be while under treatment by a gender clinic. Time spent in the target gender before being incarcerated would "count" only if under the care of a gender clinic; and time in jail can never (says the Clarke) count.

It is hard to understand the logic of the Clarke's position. The purpose behind the 'real life test' is to ensure that the individual is fully aware of the consequences of surgically changing gender, and to protect surgeons from lawsuits by disaffected post operative transsexuals who in retrospect did not have enough time or experience to assess the wisdom of their decision before surgery.

Evidence of the effect of Corrections Canada's discriminatory treatment on Ms Kavanagh includes the manner in which she has been treated; and evidence the psychological sequelae of the (mis)treatment she has received.
Ms Kavanagh, like all MtF transsexuals in prison, suffers routinely from harassment, sneering, sexual overtures, and sexual assault, both from other prisoners and from Corrections staff. Staff routinely refer to her as 'he' and make sexually explicit comments. Predictably Ms Kavanagh's coping mechanisms alternate between being super-macho, and threatening to beat up anyone who takes her on, and being femme. As a result reports describing her behaviour by Corrections psychologists accuse her of being manipulative— a charge regularly laid at the feet of transsexuals by psychologists who do not understand the dynamics of transsexualism.

Ms Kavanagh has been routinely but arbitrarily disciplined for such offences as "possession of contraband — to wit, lipstick" or "being disrespectful of staff" when she shoots back a comment in response to a sexist remark by a guard.

Ms Kavanagh is of course routinely "strip searched" by male prison guards, a procedure which she and all transsexuals find excruciatingly humiliating. And when urine tests are required to test for the presence of drugs, policy dictates that the guard must observe the inmate urinating, which again is humiliating for Ms Kavanagh.

Looked at from one point of view, living as a women in a male prison is the most difficult conceivable 'real life test', since one is required to assert one's gender into the teeth of an unresponsive and humiliating system. And since the necessary psychiatric evaluation and psychological support is available, and an ongoing assessment of the seriousness and validity of the inmate's intention easy to make, it is difficult to see why it is difficult for the medical profession to satisfy itself that the individual is a "suitable candidate" for SRS. Indeed, in some ways the profession has more information about an incarcerated inmate than about an individual in its gender clinics. The literature reports that many people going through a gender clinic treat the clinic's requirements (for example, with respect to the real life test) as hoops to be got through, and will lie if necessary about their experiences with the real world test in order to achieve their goal of surgery. An inmate, observed as she is 24 hours a day, does not have the option of lying.

A second ratonale offered by the Clarke for reusing treatment to (at least some) incarcerated transsexuals is that the surgery may not cure their bad behaviour — that disciplinary problems for example may persist after surgery. This is mystifying. An individual needing cancer surgery is not expected to be a more tractable inmate after treatment — and certainly their post-surgery 'behaviour' is not offered as a factor pro or con performing the surgery.

> In a cruel irony, the evaluations of Ms Kavanagh for parole all identify her gender dysphoria as a "criminogenic factor" which must be addressed before she can be released.

The rationale for leaving gender dysphoria untreated smacks of institutional expediency. The institution does not have to cope with housing a gender dysphoric individual in one of the two provinces with a treatment program available; does not have to pay the money which is perceived to be disproportionately expensive for the provision of expert psychiatric counselling; does not have to pay the costs (both financial and in terms of publicity) of having an inmate go through sex reassignment surgery; and, finally, does not have to address the tricky question of where to house transgendered individuals. Corrections Canada's policy amounts to ignoring the issues.

The impact of Corrections Canada's policies with respect to gender dysphoria is especially severe for anyone who had not understood her gender dysphoria before she went to jail and therefore was not taking hormones; and for people who were taking street hormones when they went to jail.

In addition to calling expert evidence to contradict the notion that the "freeze" policy is a reasonable treatment regime for transsexuals in prison. It is necessary to argue that the freeze policy itself— however it may be regarded by the medical profession-- is discriminatory.

In other gendered situations such as the military, sex reassignment surgery is provided, a period of leave is authorized, and the individual returns to the (gendered spaces of) the military as a member of the other gender. For transsexuals in prison, the situation is not so straightforward because they do not "take a leave" for the pre- and post-surgery period. It is nevertheless discriminatory to keep MtF transsexuals in a male prison, whether or not they have had their sex reassignment surgery, if they have become female.

The three provincial human rights cases about transsexuals are only persuasive, not binding on a court, even at the trial level. However the facts of those cases are helpful to us in that they show a willingness to insist that (at least) transsexuals, even pre operative transsexuals, be permitted to use the facilities and the services customarily available to women, is very helpful especially on the issue of placement in a constitutional challenge to the provisions of the Corections and Conditional Release Act..

Evidence of how other prison systems deal with transsexuals is of marginal relevance in the Canadian context since no other jurisdiction has the constitutional teeth to challenge the corrections legislation; and Canada has demonstrated in the context of sexual orientation cases its willingness to be a leader rather than a follower in the area of non-discrimination.

However, in any Charter case in which a novel ground of protection from discrimination is being asserted one must anticipate arguments by the Crown that even if the legislation is discriminatory, it is saved by section 1o of the Charter, which provides

> The Canadian Charter of rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Case law has established that two central criteria must be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic society. First, the objective to be served by the measures limiting a Charter right must be sufficiently important to warrant overriding a constitutionally protected right or freedom. The standard must be high to ensure that trivial objectives or those

discordant with the principles of a free and democratic society do not gain protection. At a minimum, an objective must relate to societal concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important. Second, the party invoking s. 1 must show the means to be reasonable and demonstrably justified. This involves a form of proportionality test involving three important
components. To begin, the measures must be fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective. In addition, the means should impair the right in question as little as possible. Lastly, there must be a proportionality between the effects of the limiting measure and the objective -- the more severe the deleterious effects of a measure, the more important the objective.must be.[23]

Section 1 is both the strength and the weakness of the Charter. It permits the court to do a sophisticated balancing of the competing rights and interests in Charter claims. However it suffers from a weakness : if judges of the court are either unfamiliar with the social situation of a particular group of people, or themselves affected by the stereotypical and discriminatory attitudes that an individual is trying to challenge, section 1 can serve as insurmountable barrier to an equality claim.

In light of the backlash from among some anti-trans feminist groups in Vancouver, it is entirely possible that the court would be faced with an intervention from a women's group arguing that the discrimination against transsexual people in gendered facilities is "justified in a free and democratic society", in light of the 'adverse impact' that equality for transsexual women would have on non-transsexual women.

The structure of that argument is as follows:

- gendered facilities, including gendered prison facilities, are in place to protect women from sexual advances, sexual assaults, and pregnancy
- because a substantial percentage of the users of gendered facilities including but not limited to prisons are women who have been traumatized at the hands of men, it would retraumatize those women to have among them someone who either is (in the case of a pre operative transsexual) or have been (in the case of post operative transsexuals) "men".
- no one can possibly understand, identify with, or properly participate in women's activities or women-only spaces unless she has been born and socialized as a woman
- the equality rights of transsexual women should end where 'women only' gendered facilities begin: it is a reasonable limit on the rights of transsexual women, even though that limit is discriminatory and contrary to section 15, to refuse to permit transsexual women to participate in women-only facilities

The rationale of the argument is discussed more fully below under the analysis of a 'bona fide and reasonable justification'.

---

23 *R v Oakes* S.C.C. 1983 headnote

(e) Canadian Human rights Act

The relevant sections of the *Canadian Human Rights Act* provides:

3.1 For greater certainty, a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds.

5. It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public

(a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or

(b) to differentiate adversely in relation to any individual,

on a prohibited ground of discrimination.

15. (1) It is not a discriminatory practice if

....

(g) in the circumstances described in section 5 or 6, an individual is denied any goods, services, facilities or accommodation or access thereto or occupancy of any commercial premises or residential accommodation or is a victim of any adverse differentiation and there is bona fide justification for that denial or differentiation.[24]

An analysis under the Canadian Human Rights Act of whether discrimination exists has several steps:

1. Is the respondent a body caught by the provisions of the Act.
2. Is the discrimination in respect of a "service, facility or accommodation customarily available to the general public"
3. Is the action complained of "discrimination",
4. Is 'gender identity' or a combination of sex and disability a prohibited ground of discrimination.
5. Is there any "bona fide justification" which would apply to negative discrimination.

(a) Respondent subject to the Canadian Human Rights Act?

It is clear that Corrections Canada is subject to the Canadian Human Rights Act because it is a federal agency constituted by statute which provides services (incarceration and parole supervision).

---

24 Section `4(1), which makes it a discriminatory practice to harass someone on a prohibited ground, and section 14.1, which makes it a discriminatory practice to retaliate against someone for filing a human rights complaint, may also assist depending on the facts of the case.

(b) Services customarily available to the general public?

Are its services "customarily available to the general public?" The Supreme Court of Canada has held, in UBC v Berg, that the fact that a service is available only to a subset of the public does not mean it is not a service "customarily available to the public"[25] and in the course of that judgement confirmed earlier decisions that human rights statutes should be given a fair, large and liberal interpretation not designed to defeat a claim on a technicality. Though the statute under consideration in Berg did not specify that a service be customarily available to the general pubic, it is unlikely that the court would find that Ms Kavanagh's complaint about services in prison was to be denied because she is not a member of the "general public". [26]

---

[25] The language of the human rights legislation under consideration

[26] Naqvi v. Canada (Employment and Immigration Commission) Canadian Human Rights Decisions: [1993] C.H.R.D. No. 2 No. T.D. 2/93;Menghani v. Canada Employment and Immigration Commission Canadian Human Rights Decisions: [1992] C.H.R.D. No. 4; Chiang v. Natural Sciences and Engineering Research Council Canadian Human Rights Decisions: [1992] C.H.R.D. No. 3 No. T.D. 3/92; Lang v. Canada (Employment and Immigration Commission) Canadian Human Rights Decisions: [1990] C.H.R.D. No. 8; Mehran Anvari and Canada Employment and Immigration Commission, Respondent Canadian Human Rights Decisions: [1988] C.H.R.D. No. 18 T.D. 18/88 LeDeuff v. Canada (Employment and Immigration Commission) Canadian Human Rights Decisions: [1986] C.H.R.D. No. T.D. 6/86[Peter and Trudy Jacobs and Canadian Human Rights Commission Mohawk Council of Kahnawake, [1998] C.H.R.D. No. 2 No. T.D. 3/98; Floyd v. Canada (Canadian Employment and Immigration Commission) Canadian Human Rights Decisions: [1993] C.H.R.D. No. 3 No. T.D. 3/93'Gordon Hum andThe Royal Canadian Mounted Police Canadian Human Rig [1986] C.H.R.D. No. 10 T.D. 10/86; Balbir Singh Nijjar , Canadian Human Rights Commission, Commission, and Canada 3000 Airlines Limited [1999] C.H.R.D. No. 3 No. T.D. 3/99;David Bader and Canadian Human Rights Commission and Department of hts Decisions: National Health and Welfare, Respondent [1998] C.H.R.D. No. 1 No. T.D. 2/98;Darlene MacNutt, Lolita Knockwood and John B. Pictou Jr. and Canadian Human Rights Commission Commission and Chiefand Council of the Shubenacadie Indian Band and Department of Indian Affairs and Northern Development [1995] C.H.R.D. No. 14 No. T.D. 14/95;Pond v. Canada Post Corp. Canadian Human Rights Decisions: [1994] C.H.R.D. No. 9 No. T.D. 9/94; Julius H.E. Uzoaba v Correctional Service of Canada, Canadian Human Rights Decisions: [1994] C.H.R.D. No. 7 No. T.D. 7/94;McKenna v. Canada (Department of Secretary of State) Canadian Human Rights Decisions: [1993] C.H.R.D. No. 18 No. T.D. 18/93; Pitawanakwat v. Canada (Department of Secretary of State)Canadian Human Rights Decisions: [1992] C.H.R.D. No. 14 No. T.D. 14/92;Prince v. Canada (Department of Indian Affairs and Northern Development) Canadian Human Rights Decisions: [1993] C.H.R.D. No. 1 No. T.D. 1/93; Rosin v. Canada (Canadian Armed Forces) Canadian Human Rights Decisions: [1989] C.H.R.D. No. 7 T.D. 7/89; Morissette v. Canada (Employment and Immigration Commission) Canadian Human Rights Decisions: [1987] C.H.R.D. No. 8T.D. 8/87.

(c) Conduct complained of amount to discrimination?

Though the Supreme Court of Canada had early drawn a distinction between "direct discrimination" and "adverse effect" discrimination (which formed the analytic framework in the trilogy of trans-positive human rights cases discussed above). The SCC has very recently revised their approach, in the BCGSEU case. Formerly, it was held that discrimination was 'direct' if the rule in issue explicitly or directly excluded a group of people. "Adverse effect" discrimination is caused by a rule which, though neutral on its face, has a discriminatory impact on a particular individual or group.

In BCGSEU the Supreme Court of Canada has acknowledged the artificiality of the distinction between direct and adverse effect discrimination, and has embarked on a "unified analysis" of discrimination, and, following that, of the defences of bona fide occupational requirement and bona fide justification.

It is unarguable that the placement policies of the Corrections Service discriminate against transsexuals in the prison system. To force MtF transsexuals to be housed in a male facility, and to be subjected to the routine and demeaning harassment that involves both from other prisoners and from staff who insist on referring to the inmate as 'he' , is a policy which has demonstrably harmful consequences for the individual transsexual woman. The policy with respect to the hormonal treatment of transsexuals which we have referred to as the "freeze" policy is also demonstrably discriminatory. There is no other area of essential medical treatment which is effectively denied to inmates while they are inside. And Corrections Canada's own parole assessments of may identify transsexualism as a criminogenic factor which must be addressed before an inmate can be released. A fortiori the refusal of Corrections Canada to provide sex reassignment surgery as an essential medical service is discriminatory. There are no other medically treatable criminogenic conditions for which treatment in prison is withheld by policy.

> "I asked to be locked in a cell by myself, got a razor, tied a tourniquet very tightly against the public bone and I made deep strong cut. My penis was now connected by a thread of skin and I was in so much pain no sound came from my throat. Later I remember saying, 'No penis now, put me in with the women'."
> Kathy Johnson **Prisoner of Gender**

That the medical service of sex reassignment surgery is essential is clear: the literature on high intensity transsexualism is consistent that the only treatment available for this condition is sex reassignment surgery. . In addition to the facts specific to her case, the respondent federal government provides funded sex reassignment surgery for its other major gendered institution: the military. And almost every socialized medicare plan in the country provides sex reassignment surgery as an essential service.

There is frankly no conceivable justification for describing treatment for high intensity gender dysphoria as anything but essential; and its denial anything but discriminatory.

Once again, though, a hurdle will be the Clarke Institute's support for a "freeze" policy while transsexuals are in prison. Essentially the complainant must demonstrate not only that the Corrections Canada standards are discriminatory, but that the standards devised by the Clarke Institute are similarly discriminatory.

> That the gender dysphoria that Ms Kavanagh suffers is a medical disability is unarguable: it is ensconced firmly in the DSMIV, and in her case the diagnosis is supported by two expert assessments of her condition.

The sole published rationale for withholding SRS from people who are incarcerated (apart from the fact that the SRS may not improve their disciplinary behaviour) is that the post-operative person may later report wish they had not had the surgery. That translates into an assertion that it is impossible accurately to assess someone who is in jail, in terms of determining whether they will later regret the irreversible surgery.

It is true that there is a small risk (as with any surgery) that someone will later regret the decision to have it. But that is true whether the individual is inside or outside of jail walls. There is literally no evidence that the rate of such regret is higher for people inside than outside prison. And the alternative is to ensure that all of the people who might benefit from SRS and takes steps along the road of integrating their newly changed gender are denied that opportunity and forced to live lives of tortured non-being in a gendered facility foreign to them, subject to routinely intimate and humiliating treatment and harassment, with no possibility that their gender dysphoria will be improved or even addressed. There are several documented cases of transsexual individuals attempting or succeeding at autocastration, or at suicide. The non-intervention policy means that the many must suffer horribly now and for their entire prison term lest the few suffer somewhat, and later.

Corrections Canada has a policy which bans sex reassignment surgery, continues hormone treatment only at pre-incarceration rates, and houses MtF transsexuals in male facilities till their sex reassignment surgery is complete. The discrimination is clear.

(d) Discrimination is on a ground prohibited under the Act?

That the discrimination is on the grounds of sex, and/or disability, is unlikely to be difficult to prove, in light of the human rights cases referred to earlier. Though provincial human rights decisions are not binding on a federal human rights tribunal, the fact that there are decisions from two provincial jurisdictions to the same effect is highly persuasive.

(e) Bona fide justification negativing the discrimination?

The big question under human rights legislation is whether or not Corrections Canada can escape liability for the discrimination by demonstrating that it has a "bona fide justification" both for its policies and for the application of its policies in Synthia Kavanagh's case. The onus is on Corrections Canada to demonstrate that it has satisfied that onus.

Because of the significant new direction adopted by the Supreme Court of Canada to the question of "bona fide occupational requirement" in BCGSEU, and because courts and tribunals have held that the logic of BFOR and bona fide justification are identical, it is worth quoting extensively from the court's newly-formulated test and the from the court's comments with respect to it. Paragraph numbers relate to the original judgement.[27]

> *54 Having considered the various alternatives, I propose the following three-step test for determining whether a prima facie discriminatory standard is a BFOR. An employer may justify the impugned standard by establishing on the balance of probabilities:*
>
> *(1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;*
>
> *(2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and*
>
> *(3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the*

---

27 The B.C. Government and Services Employees Union v British Columbia September 9, 1999 (unreported)

claimant without imposing undue hardship upon the employer.

55 This approach is premised on the need to develop standards that accommodate the potential contributions of all employees in so far as this can be done without undue hardship to the employer. Standards may adversely affect members of a particular group, to be sure. But as Wilson J. noted in Central Alberta Dairy Pool, supra, at p. 518, "[i]f a reasonable alternative exists to burdening members of a group with a given rule, that rule will not be [a BFOR]". It follows that a rule or standard must accommodate individual differences to the point of undue hardship if it is to be found reasonably necessary. Unless no further accommodation is possible without imposing undue hardship, the standard is not a BFOR in its existing form and the prima facie case of discrimination stands.

56 Having set out the test, I offer certain elaborations on its application.

Step One

57 The first step in assessing whether the employer has successfully established a BFOR defence is to identify the general purpose of the impugned standard and determine whether it is rationally connected to the performance of the job. The initial task is to determine what the impugned standard is generally designed to achieve. The ability to work safely and efficiently is the purpose most often mentioned in the cases but there may well be other reasons for imposing particular standards in the workplace. In Brossard, supra, for example, the general purpose of the town's anti-nepotism policy was to curb actual and apparent conflicts of interest among public employees. In Caldwell, supra, the Roman Catholic high school sought to maintain the religious integrity of its teaching environment and curriculum. In other circumstances, the employer may seek to ensure that qualified employees are present at certain times. There are innumerable possible reasons that an employer might seek to impose a standard on its employees.

58 The employer must demonstrate that there is a rational connection between the general purpose for which the impugned standard was introduced and the objective requirements of the job. For example, turning again to Brossard, supra, Beetz J. held, at p. 313, that because of the special character of public employment, "[i]t is appropriate and indeed necessary to adopt rules of conduct for public servants to inhibit conflicts of interest". Where the general purpose of the standard is to ensure the safe and efficient performance of the job -- essential elements of all occupations -- it will likely not be necessary to spend much time at this stage. Where the purpose is narrower, it may well be an important part of the analysis.

59 The focus at the first step is not on the validity of the particular standard that is at issue, but rather on the validity of its more general purpose. This inquiry is necessarily more general than determining whether there is a rational connection between the performance of the job and the particular standard that has been selected, as may have been the case on the conventional approach. The distinction is important. If there is no rational relationship between the general purpose of the standard and the tasks properly required of the employee, then there is of course no need to continue to assess the legitimacy of the particular standard itself. Without a legitimate general purpose underlying it, the standard cannot be a BFOR. In my view, it is helpful to keep the two levels of inquiry distinct.

Step Two

60 Once the legitimacy of the employer's more general purpose is

established, the employer must take the second step of demonstrating that it adopted the particular standard with an honest and good faith belief that it was necessary to the accomplishment of its purpose, with no intention of discriminating against the claimant. This addresses the subjective element of the test which, although not essential to a finding that the standard is not a BFOR, is one basis on which the standard may be struck down: see O'Malley, supra, at pp. 547-50, per McIntyre J.; Etobicoke, supra, at p. 209, per McIntyre J. If the imposition of the standard was not thought to be reasonably necessary or was motivated by discriminatory animus, then it cannot be a BFOR.

61 It is important to note that the analysis shifts at this stage from the general purpose of the standard to the particular standard itself. It is not necessarily so that a particular standard will constitute a BFOR merely because its general purpose is rationally connected to the performance of the job: see Brossard, supra, at pp. 314-15, per Beetz J.

Step Three

62 The employer's third and final hurdle is to demonstrate that the impugned standard is reasonably necessary for the employer to accomplish its purpose, which by this point has been demonstrated to be rationally connected to the performance of the job. The employer must establish that it cannot accommodate the claimant and others adversely affected by the standard without experiencing undue hardship. When referring to the concept of "undue hardship", it is important to recall the words of Sopinka J. who observed in Central Okanagan School District No. 23 v Renaud [1992] 2 S.C.R. 970, at p. 984, that "[t]he use of the term `undue' infers that some hardship is acceptable; it is only `undue' hardship that satisfies this test". It may be ideal from the employer's perspective to choose a standard that is uncompromisingly stringent. Yet the standard, if it is to be justified under the human rights legislation, must accommodate factors relating to the unique capabilities and inherent worth and dignity of every individual, up to the point of undue hardship.

63 When determining whether an existing standard is reasonably necessary for the employer to accomplish its purpose, it may be helpful to refer to the jurisprudence of this Court dealing both with the justification of direct discrimination and the concept of accommodation within the adverse effect discrimination analysis. For example, dealing with adverse effect discrimination in Central Alberta Dairy Pool, supra, at pp. 520-21, Wilson J. addressed the factors that may be considered when assessing an employer's duty to accommodate an employee to the point of undue hardship. Among the relevant factors are the financial cost of the possible method of accommodation, the relative interchangeability of the workforce and facilities, and the prospect of substantial interference with the rights of other employees. See also Renaud, supra, at p. 984, per Sopinka J. The various factors are not entrenched, except to the extent that they are expressly included or excluded by statute. In all cases, as Cory J. noted in Chambly, supra, at p. 546, such considerations "should be applied with common sense and flexibility in the context of the factual situation presented in each case".

64 Courts and tribunals should be sensitive to the various ways in which individual capabilities may be accommodated. Apart from individual testing to determine whether the person has the aptitude or qualification that is necessary to perform the work, the possibility that there may be different ways to perform the job while still

accomplishing the employer's legitimate work-related purpose should be considered in appropriate cases. The skills, capabilities and potential contributions of the individual claimant and others like him or her must be respected as much as possible. Employers, courts and tribunals should be innovative yet practical when considering how this may best be done in particular circumstances.

65 Some of the important questions that may be asked in the course of the analysis include:

(a) Has the employer investigated alternative approaches that do not have a discriminatory effect, such as individual testing against a more individually sensitive standard?

(b) If alternative standards were investigated and found to be capable of fulfilling the employer's purpose, why were they not implemented?

(c) Is it necessary to have all employees meet the single standard for the employer to accomplish its legitimate purpose or could standards reflective of group or individual differences and capabilities be established?

(d) Is there a way to do the job that is less discriminatory while still accomplishing the employer's legitimate purpose?

(e) Is the standard properly designed to ensure that the desired qualification is met without placing an undue burden on those to whom the standard applies?

(f) Have other parties who are obliged to assist in the search for possible accommodation fulfilled their roles? As Sopinka J. noted in Renaud, supra, at pp. 992-96, the task of determining how to accommodate individual differences may also place burdens on the employee and, if there is a collective agreement, a union.

66 Notwithstanding the overlap between the two inquiries, it may often be useful as a practical matter to consider separately, first, the procedure, if any, which were adopted to assess the issue of accommodation and, second, the substantive content of either a more accommodating standard which was offered or alternatively the employer's reasons for not offering any such standard: see generally Lepofsky, supra.

67 If the prima facie discriminatory standard is not reasonably necessary for the employer to accomplish its legitimate purpose or, to put it another way, if individual differences may be accommodated without imposing undue hardship on the employer, then the standard is not a BFOR. The employer has failed to establish a defence to the charge of discrimination. Although not at issue in this case, as it arose as a grievance before a labour arbitrator, when the standard is not a BFOR, the appropriate remedy will be chosen with reference to the remedies provided in the applicable human rights legislation. Conversely, if the general purpose of the standard is rationally connected to the performance of the particular job, the particular standard was imposed with an honest, good faith belief in its necessity, and its application in its existing form is reasonably necessary for the employer to accomplish its legitimate purpose without experiencing undue hardship, the standard is a BFOR. If all of these criteria are established, the employer has brought itself within an exception to the general prohibition of discrimination.

68 Employers designing workplace standards owe an obligation to be aware of both the differences between individuals, and differences that characterize groups of individuals. They must build conceptions of equality into workplace standards. By enacting human rights statutes

and providing that they are applicable to the workplace, the legislatures have determined that the standards governing the performance of work should be designed to reflect all members of society, in so far as this is reasonably possible. Courts and tribunals must bear this in mind when confronted with a claim of employment-related discrimination. To the extent that a standard unnecessarily fails to reflect the differences among individuals, it runs afoul of the prohibitions contained in the various human rights statutes and must be replaced. The standard itself is required to provide for individual accommodation, if reasonably possible. A standard that does not allow for such accommodation may be only slightly different from the existing standard but it is a different standard nonetheless.

In our view, the policies of Corrections Canada fail even the first step of the BCGEU case. That step, articulated in terms of a bona fide justification in the context of the delivery of services, would be to identify the general purpose of the impugned policy and determine whether it is rationally connected to the provision of the mandated services.

The purpose of the Corrections Service set out in its statute (repeated from above) are:

3. The purpose of the federal correctional system is to contribute to the maintenance of a just, peaceful and safe society by

(a) carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders; and

(b) assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community (emphasis mine).

Since the evidence, both for Ms Kavanagh and in all likelihood for all other transsexual prisoners, is that the untreated gender dsyphoria is a contributing criminogenc factor which must be addressed before the inmate can be successfully rehabilitated and reintegrated into the community, the policies of Corrections Canada with respect to hormones, SRS and placement actively contradict the purposes set out in the statute, and the principles set out later in the legislation. And it is hard to imagine policies which more directly undermine section 70 of the Act, which provides:

70. The Service shall take all reasonable steps to ensure that penitentiaries, the penitentiary environment, the living and working conditions of inmates and the working conditions of staff members are safe, healthful and free of practices that undermine a person's sense of personal dignity.

So also the gender-specific policies of Corrections Canada either discriminate directly against the complainant, or are discriminatory in their impact. Take for example policy with respect to strip searches and programming:

Gender requirement
A strip search authorized under subsection (1) shall be conducted in each case by a staff member of the same sex as the inmate.

Corrections Canada regards this policy to be so important that it embodies it in legislation; then administers it with respect to transsexuals with no attention to the effect of its unilatertal determination that a pre-operative MtF transsexual is male. This policy is in direct contradiction with the holding in Sheridan that for the purposes of human rights legislation a pre-operative transsexual [at least one already enrolled in a gender clinic] is female.

Programs for female offenders

77. Without limiting the generality of section 76, the Service shall

(a) provide programs designed particularly to address the needs of female offenders; and

(b) consult regularly about programs for female offenders with

(i) appropriate women's groups, and

(ii) other appropriate persons and groups

with expertise on, and experience in working with, female offenders.

Once again, Parliament has determined that it is so important to have specially designed programs for women that they have embodied it in legislation: conversely they deny gender-appropriate services to transsexual inmates, thereby exacerbating rather than mitigating the effects of their transsexualism.

With respect to the provision of health care, including sex reassignment surgery, there is a strong evidentiary foundation for the necessity of sex reassignment surgery and hormonal treatment for gender dysphoria of the kind suffered by Synthia Kavanagh. A condition which, untreated, predictably leads to self-mutilation, addiction and/or suicide is by defnitition life=threatening; treatment for it clearly falls within the parameters of “essential medical treatment” outlined in the legislation:

86. (1) The Service shall provide every inmate with

(a) essential health care; and

(b) reasonable access to non-essential mental health care that will contribute to the inmate's rehabilitation and successful reintegration into the community.

Standards

(2) The provision of health care under subsection (1) shall conform to professionally accepted standards.

Service to consider health factors

87. The Service shall take into consideration an offender's state of health and health care needs

(a) in all decisions affecting the offender, including decisions relating to placement, transfer, administrative segregation and disciplinary matters; and

(b) in the preparation of the offender for release and the supervision of the offender.

We will argue that there is no rational connection between the three impugned policies and the furtherance of Corrections Canada's mandate as that mandate relates to MtF transsexuals generally and to Synthia Kavanagh in particular, since the policies exacerbate rather than mitigate the gender dysphoria suffered by transsexual inmates; and because the gender dysphoria in turn is a criminogenic factor in the profiles of transsexual inmates.

Assuming that corrections Canada succeeds on the first aspect of the test, does it pass Step Two, the subjective element? In that step, the service provider must demonstrate that it adopted the particular standard [policies relating to transsexual inmates] with an honest and good faith belief that it was necessary to the accomplishment of its purpose, with no intention of discriminating against the claimant.

Here Corrections Canada will rely on the expert evidence of the Clarke Institute in support of its policies with respect to MtF transsexuals — their opinion that the "freeze" policy, of maintaining transsexuals at the level of hormones they had been taking at admission, and of refusing them sex reassignment surgery on the basis that the real life test is impossible while an individual is incarcerated. And Corrections Canada will rely on the evidence of their director of female prisons with respect to their apprehension that having a male to female transsexual incarcerated in the same institution as other women will cause harm to those other women, in particular by retraumatizing them, by exposing them to the danger of sexual assault, and by exposing them to the risk of pregnancy.

With respect to the evidence of the Clarke, Corrections Canada has made a choice between the expert opinion of the Clarke Institute over that of the Vancouver Gender Clinic and has done so with no apparent evaluation of the relative merits of the policy apart from the convenience from an administrative point of view of adopting one or the other. This choice cannot satisfy the requirements of the second step. Compare the facts of the BCGEU case itself. Following upon a coroner's recommendation that all first response firefighters should be physically fit, the employer contracted with a consultant to devise an appropriate fitness test for its firefighters. The test as developed required as an aerobic component that the individual cover x distance in y seconds. The grievor, a woman, argued that women's aerobic capacity differs from that of men; and that the standard test, which she had failed, was not an accurate measure of her undisputed ability to perform her duties as a firefighter.

The court heard evidence that the aerobics test was a reasonable predictor of one aspect of fitness to perform the duties of a firefighter. But it did not stop there. It inquired into whether the design of the test had taken into account the different aerobic capacities of women and men. Finding that it did not, the court held that the employer could not rely on the results of the test to justify an opinion about an employee's ability to perform as a firefighter.

So Corrections Canada will not be able simply to point to the Clarke Institute's opinions about the treatment of transsexuals in prison. It will have to justify its choice of that opinion; and further will have to demonstrate that the opinion is correct and has taken into account the effect of the test on MtF transsexuals in jail.

The question of where MtF transsexuals should be placed is in many ways more complex. First it is not a question which lends itself to an "either/or" answer: either MtF transsexuals should be in a male facility, or they should be in a female facility. We will argue that the essence of a policy which takes account of gender variability is that every individual should be assessed and treated according to her or his own gender identity. We specifically do not assume the responsiblity for figuring out, on behalf of Corrections Canada, where some or all transsexuals should be housed. We do say that the current policy of housing

preoperative MtF transsexuals in male prisons is discriminatory.

The question of having preoperative transsexuals in a women's facility strikes at the very core of transphobia. It means "having men in a women's space". Arguments about the inappropriateness of such an arrangement are often made in "defence" of women-only services such as rape crisis centres or battered women's shelters (see Introduction). In that context, the argument goes as follows: Women have spent decades carving out women-only spaces as shelters from the public and private misogyny and harm endured by women at the hands of men. It is only in the safety of those spaces, away from the intimidating presence of any men, that it is possible for women to heal from the damage they have suffered and to recover their strength as women. Having a man in that space would retraumatize the women in that space, make them feel unsafe in the very place that they are meant to feel safe and protected.

Nor is the problem solved by permitting only post-operative transsexual women, since (the argument goes) those people have been "socialized to male privilege" and therefore can never properly empathize with the experiences of "woman-born women".

The history of trans liberation in North America in relation to feminism, particularly that part of feminism that emphasizes the importance of women-only spaces, is a history of vehement early resistance to trans people, hotly contested debates over who is a "real" woman, followed ultimately by accepatance of trans presence. Examples range from the exclusion of trans women from the Michigan Women's Music Festival in the early 1990's, to debates at the National Organization of Women.

Research shows that lesbian women are more likely than non lesbian women to hold anti-trans views.[28] In British Columbia there are several examples of pre-operative transsexual women both as clients of women-only agencies such as transition houses, and as staff of women-only facilities, without incident. There is literally no evidence in any literature that the presence of transsexual women (preoperative or postoperative) has the consequences imagined by anti-trans feminists[29].

The essentialism of anti-trans feminists is ironic, since a major insight of feminism has been that biology is not destiny; and that gender is socially constructed, socially maintained, and socially enforced.

The anti-trans position runs afoul of the principles embodied in human rights jurisprudence, which emphasizes that each individual is to be assessed on her own merits by non-discriminatory evaluation criteria — whether for the provisions of service or for employment or for accommodation.

Anti-trans feminists disagree, however. They point to cases in which tribunals and courts have upheld the right of a group constituted along one area of commonality to exclude people who do not share that commonality as defined by the group. Many Canadian human rights statutes contain an exemption similar or identical to the current The earliest British Columbia case with respect to that question is Caldwell v St. Thomas Aquinas High School, [30] in which the facts were that a Roman Catholic School Board had refused to renew the taching contract of a teacher who had, in contravention of church doctrine, married a divorced man in a civil ceremony.

The Supreme Court of Canada upheld the right of the school board to refuse to renew Caldwell's contract on two separate grounds. First, it found that being an observant Catholic was a bona fide qualification for the position of a teacher in a Catholic school:

---

28 Kendal, Monica unpublished Master's thesis University of Victoria 1996

29 Though there are polemics such as Janice Raymond's *Transsexual Empire*

30 [1984] 2 S.C.R. 603

> It will be only in rare circumstances that such a factor as religious conformance can pass the test of bona fide qualification. In the case at bar, the special nature of the school and the unique role played by the teachers in the attaining of the school's legitimate objects are essential to the finding that religious conformance is a bona fide qualification.

Second, it relied on section 22 of the human rights legislation then in effect. Section 22 provided:

> 22. Where a charitable, philanthropic, educational, fraternal, religious or social organization or corporation that is not operated for profit has as a primary purpose the promotion of the interests and welfare of an identifiable group or class of persons characterized by a common race, religion, age, sex, marital status, political belief, colour, ancestry or place of origin, that organization or group shall not be considered as contravening this Act because it is granting a preference to members of the identifiable group or class of persons.

The court said in relation to that section and its application to the facts before it,

> In failing to renew the contract of Mrs. Caldwell, the school authorities were exercising a preference [within the meaning of section 22] for the benefit of the members of the community served by the school and forming the identifiable group by preserving a teaching staff whose Catholic members all accepted and practised the doctrines of the Church. In my opinion then, the dismissal of Mrs. Caldwell may not be considered as a contravention of the Code and the appeal must fail.

However the Caldwell case did not start a stampede of exclusionary programs. In Brossard v Quebec[31] the court refused to apply a similar provision in the Quebec human rights statute to legitimate an anti-nepotism policy banning the hiring of relatives in a municipality.[32] The court held against the

---

31 [1988] 2 SCR 279

32 And for example in Ontario Human Rights Commission in. Etobicoke, [1982] 1 S.C.R. 202 the Supreme Court of Canada held that a requirement that firefighters retire at 60 was not a BFOR in the absence of evidence relating age to performance ability; in Druken v. Canada Employment and Immigration Commission (1987), 8 C.H.R.R. D/4379 (Can. Trib.) a provision in the Unemployment Insurance Act prohibiting payment of benefits to an unemployed person who was

municipality because it was not an organization of the type protected by the exempting section; and said in the alternative:

> Further, the second branch of s. 20 is designed to promote the fundamental freedom of individuals to associate in groups for the purpose of expressing particular views or engaging in particular pursuits, and to prevent those individuals from being inhibited in so doing by the anti-discriminatory norm in s. 10. Therefore, to be protected by the second branch of s. 20, an institution must have, as a primary purpose, the promotion of the interests and welfare of an identifiable group of persons characterized by a common ground under s. 10. The institution itself may fall into one or another of the s. 20 types, but there must always be a connection between the brand of s. 10 discrimination practised by the group and the nature of the institution as well as a congruence between a primary group purpose and the brand of s. 10 discrimination

The Supreme Court of Canada upheld the right of private societies as against the equality rights of excluded people in a decision called Yukon Order of Pioneers. In that case a society by that name had as its purpose the collection and dissemination of information aabout the history of theYukon. Women were not permitted to join. The complainants argued unsuccessfully that the exclusion of women from membership had the effect of creating a male-dominated and biased history; and that constituted a denial of services customarily available to the public [information about history] on the basis of sex. Since this case is relatively recent it is hard to predict what impact it will have. It may be confined to its facts; in the relevant human rights legislation there were specific provisions governing membership in societies which were held to prevail over the more general anti-discrimination sections; and the court held (disingenously) that since the history compiled by the society's members was available equally to women and men there was no discrimination in the provision of services.

Some of the cases in which a conflict of rights between two equality seeking groups is raised are dealt with under the BFJ or BFOR exceptions, either because the respondent is not a philanthropic etc. organization, or because the relevant legislation (eg the Canadian Human Rights Act) do not contain a section exempting philanthropic etc organizations from the application of the anti-discrimination provisions. However the logic of the analysis is the same: there is a contest, or an apparent contest, between the equality or other rights (eg safety) of one group of people and the equality rights of the complainant. So the analysis of BFJ cases is relevant where there is an exemption for philanthropic etc. groups, and vice versa.

In a case concerning the federal Human Rights Act[33], the legislation which applies to federal prisons, a tribunal held that it was discriminatory of an aboriginal nation to refuse to provide services ordinarily provided to band members to a black man who had been adopted as a Mohawk when he was an infant. Under the then-current membership rules of the band, an individual was not recognized as a Mohawk if

---

married to her/his previous employer was held not to be justified since the UIC Commission had not tried other ways of reducing abuse of the system. On the other hand, in Saskatchewan (Human Rights Commission) v. Saskatoon (City), [1989] 2 S.C.R. 1297 a rule requiring mandatory requirement of firefighters at a certain age was upheld when the employer demonstrated that it had considered alternative measures of ensuring that firefighters were fit but none was practicable.

33 Jacobs v Mohawk Council of Kahnawake [1998] C.H.R.D. No. 2 No. T.D. 3/98. The issue was bitterly contested: "This matter has occupied the Human Rights Tribunal for 18 days of hearing extending over a period from August, 1995, to November, 1997. Overall, 13 witnesses gave evidence and there were 71 Exhibits filed. In all, there were 2,828 pages of transcript. The time involved in completing this matter was punctuated by five interlocutory proceedings before the Tribunal and two separate Applications to the Federal Court of Canada including one appeal to the Federal Court of Appeal.

s/he did not have Mohawk blood.

The conflict of values in the dispute were manifest:

> What lies at the heart of this Complaint, particularly from the MCK's perspective, is the entire question of native rights to self-determination within the Canadian framework. Particularly at issue is the right of a native community to determine its own membership and the resulting entitlement to certain services, benefits and privileges. The question is complex as it rests within a web of legal, political and social considerations that are continually evolving. The matter is further complicated by the checkered history of the long-term relationship that has existed between the Government of Canada and its aboriginal peoples

The Mohawk Council of Kahnawake asserted a defence of bona fide justification. The tribunal held that the belief of the MCK that the measures adopted by them to determine their own membership was genuine and untainted by any improper purpose, thus satisfying the "subjective branch" of the BFJ test. However it held that the "objective branch" of the BFJ test was not satisfied, because the exclusionary measures adopted were not in fact "reasonably necessary" to the accomplishment of MCK's goal as a community, the complainant having been an active member of the community since his birth; and the measures were not, on the evidence, based on "sound and accepted practice"; and MCK failed to demonstrate that there was no practical alternative to the discriminatory measures it had adopted.

With respect to the situation of MtF transsexuals in women's gendered services, including correctional facilities[34], we argue that neither the BFJ defence nor the defence for philanthropic etc organizations can justify the blanket exclusion of transsexual women, for several reasons.

First, absence a "panty test", it is impossible to distinguish between trans and non trans women. Butch lesbians, who are fiercely woman-identified, are routinely mistaken for men and would fail most "appearance" tests, and many trans women "pass" so well that they would pass most "appearance" tests.

Second, there is no evidence that the presence of trans women in women-only services, either as consumers or as providers of services, have negatively impacted the service or other consumers or providers of those services.

Third, there is abundant evidence that trans women have been both consumers and providers of services in women-only organizations without ill effect.

Fourth, trans women, like all other women, may be beaten by their mates, sexually harassed or sexually assaulted, and require support services provided by women, not men; and like women of colour and lesbian women who use those services, it is important to trans women that they be reflected among the

---

34 Though jails are run by Corrections Canada, some of the half way houses under its jurisdiction are run by private agencies who may have as a goal the provision of services to women (Elizabeth Fry, for example)

service providers.

Fifth, there is no evidence that less draconian measures than outright exclusion will not be adequate to deal with problems of trans women; indeed appropriate screening policies and procedures will weed out women — trans or non-trans — who are not suitable as consumers or providers of particular services.

Since there is no evidence of harm, and abundant evidence of lack of harm, springing from the participation of trans women in women's services and organizations, the belief of some non-trans feminists that trans women will have a negative impact is just that: a belief, a foundationless belief, otherwise known as prejudice and stereotype. Such a stereotype or baseless fear cannot be dressed up as "adverse impact" on non-trans women so as to give it more credibility in human rights terms.

A similar analysis pertains, of course, under section 1 of the Charter. Though Corrections Canada might attempt to rely on section 1 as a justification of its legislation and policies with respect to trans women, we would argue that for the reasons listed above that attempt should fail.

Remedies

Remedies for transsexual women are straightforward. They should be provided the hormones they need, whatever their treatment status upon incarceration; offered appropriate therapy and enrolment in a recognized gender clinic; be provided with sex reassignment surgery upon the recommendation of the clinic; and should not be housed in correctional facilities for men.

Conclusion

Transgendered people are entitled to protections afforded to disadvantaged groups of people in Canadian society. This paper has reviewed the hegemony of a binary gender system in Canadian law, and examined the situation of preoperative MtF transsexuals in a federally regulated prison system in light of federal human rights legislation and in light of the equality guarantees under the Charter of Rights. We have concluded that by the tests in the Canadian Human Rights Act and in the Canadian Charter of Rights and Freedoms, Corrections Canada discriminates against them, in "freezing" inmates at their admission level of hormones, in housing MtF transsexuals in male facilities unless they have had sex reassignment surgery, and in denying sex reassignment surgery to anyone who is incarcerated. We have concluded further that the discrimination cannot be justified, either under the bona fide justification defence or the philanthropic etc exemption of human rights legislation where it exists, nor under the balancing provisions of section 1 of the Charter of Rights and Freedoms, and that attempts to justify the discrimination on the basis of the effect on non-trans women are based in stereotype and prejudice rather than fact. We express caution about the manner of litigating rights for transsexuals so that the form of argument does not inadvertently affect non-transsexual people such as cross dressers, drag kings and queens, butch lesbians, and others who experience discrimination on the basis of their apparent gender nonconformity.

Bibliography

Barnes, Anita C. 1998. “The Sexual Continuum: Transexual Prisoners”. New England Journal on Criminal and Civil Confinement. 24(2) 599-646
.
Basson, Rosemary and Jerilynn C. 1998.Prior Hormonal Therapy of Gender Dysphoria in **Current Concepts in Transgender Therapy** Dallas Denny ed. Garland Publishing Inc. New York and London

Benjamin, Harry 1966 **The Transsexual Phenomenon**. New York: Julian Press

Bolin, Anne 1998. Transcending and transgendering: Male to Femal Transsexuals, Dichotomy, and Diversity in **Current Concepts in Transgender Therapy** Dallas Denny ed. Garland Publishing Inc. New York and London

Bornstein, Kate 1994 **Gender Outlaw: On Men, Women, and the Rest of Us** New Vintage Books

Bradley, Susan J., Susan Coates, Richard Green, Stephen B. Levine, Heino F. L. Meyer Bahlburg, Ira B. Pauly M.D. and Kenneth J. Zucer. 1991 Interim Report on the DSM-IV Subcommitte on Gender Identity Disorders Archives of Sexual Behaviour Vol 20 No 4

Brown, George R. 1988. “Transsexuals in the Military: Flight into Hypermasculinity”. Archives of Sexual Behavior. 176) 527-537.

Brown, Mildred L. and Chloe Ann Rounsley “The Transsexual Dilemma” in **True Selves**: **Understanding Transsexualism**

Bullough, Vern L. et al 1993 **Cross Dressing, Sex and Gender** Philadelphia: University of Philadelphia Press.

Bullough, Vonnie and Bullough, Vern 1998. “Historical Perspectives, 1952 to Present”in **Current Concepts in Transgender Therapy** Dallas Denny ed. Garland Publishing Inc. New York and London

Canada. Human Rights Commission. Special Report to Parliament. *The Effects of the Bhinder Decision on the Canadian Human Rights Commission*. Ottawa: 1986.

Cole, Collier M. Et al (1997) “Transgender Behavior and DSM IV” in Dallas Denny (ed) **Current Concepts in Transgender Identity**. New York: Garland Publishers. Vancouver, UBC Press

Cole, Sandra S. 1998. “The Female Experience of the Femme: A Transgender Challenge in **Current Concepts in Transgender Therapy** Dallas Denny ed. Garland Publishing Inc. New York and London

Crane, M. C. "Human Rights, *Bona Fide* Occupational Requirements and the Duty to Accommodate: Semantics or Substance?" (1996), 4 *C.L.E.L.J.* 209.

Day, Shelagh, and Gwen Brodsky. "The Duty to Accommodate: Who Will Benefit?" (1996), 75 *Can. Bar Rev*. 433.

Denny, D. (1992) “The politics of diagnosis and the diagnosis of politics: The university -affiliated gender clinics, and how they failed to meet the needs of transsexual people” *Chrysalis Quarterly, 1(3) 9-20*

Denny, D. 1991, June. Female to male reassignment surgery in the 90s. *Our Sorority* 42-44.

Derogatis, L. r. et al (1978) A psychological profile of the transsexual: 1. The male *Journal of Nervous and Mental Disease*, 166(4), 234-254

Doctor, R. 1988. *Transvestites and transsexuals* New York: Plenum Press

Ekins, Richard and Dave King .1998 Blending Genders: Contributions to the Emerging Field of Transgender Studies in ***Current Concepts in Transgender Therapy*** Dallas Denny ed. Garland Publishing Inc. New York and London

Ekins, Richard 1998. On Male Femaling: A Grounded Theory Approach to Cross-dresing and Sex-Changing *In* ***Current Concepts in Transgender Therapy*** Dallas Denny ed. Garland Publishing Inc. New York and London

Etherington, Brian. "Central Alberta Dairy Pool: The Supreme Court of Canada's Latest Word on the Duty to Accommodate" (1993), 1 *Can. Lab. L.J.* 311.

Feinberg, Leslie 1996 **Transgender Warrior** Boston. Beacon Press.

Feinberg, Leslie **Trans Liberation: Beyond Pink and Blue** 1998 Boston. Beacon Press.

findlay, barbara 1994 Finding Our Place: Transgender Law Reform Report. Vancouver, High Risk Project.

findlay, barbara 1973 “On Ethnomethodology: A Study of the Epistemological Underpinnings of Social Science” MA Thesis, Univesity of British Columbia.

findlay, barbara 1991 “With All of Who We Are” Vancouver, Lazara Press

Fisher, G.P. 1992. “Transsexualism of Inmates in the Various Prisons: Transsexualism is Gender Dysphoria of Human Beings”.

Fleming, M. et al 1981. “A Study of Pre- and Postsurgical transsexuals: MMPI Characteristics”. Archives of Sexual Behavior 10(2)

Fleming, M. et al 1980. “Methodological problems in assssing sex-reassignment: A reply to Meyer and Reter”. *Archives of Sexual Beha viour* 9(5), 451-456

Fox, Patricia1992. “The Role of the Prison Medical Service”. New Doctor/Legal Services Bulletin. Australia.

Garber, Marjorie 1992 **Vested Interests: Cross-Dressing and Cultural Anxiety.** New York: Routledge.

Garfinkel, Harold 1967 **Studies in Ethnomethodology** Englewood Cliffs, N.J: Prentice-Hall 1967

Golding, Sue 1997 **The Eight Technologies of Otherness** London and New York: Routledge

Green, Jamison 1998. “FTM: An Emerging Voice” in **Current Concepts in Transgender Therapy** Dallas Denny ed. Garland Publishing Inc. New York and London

Green, Richard 1998. Inclusion to Transsexualisms and Sex Reassignment: Reflections at 25 Years

Green, Richard 1998. Mythological, Historical and Cross-Cultural Aspects of Transsexualism In **Current**

Concepts in Transgender Therapy Dallas Denny ed. Garland Publishing Inc. New York and London

Green, R. et al Transsexual Surgery follow up: Status in the 1990s in J. Bancroft et al *annual Review of Sex Research* 163-174 Society for the Scientific Study of Sex

Henkin, William A. 1998. "An Alternate Paradigm for Understanding Cross-Gender Experience" in **Current Concepts in Transgender Therapy** Dallas Denny ed. Garland Publishing Inc. New York and London

Hubbard, Ruth 1998. "Gender and Genitals: Constructs of Sex and Gender" in **Current Concepts in Transgender Therapy** Dallas Denny ed. Garland Publishing Inc. New York and London

Israel, Gianna E. and Donald Tarver, MD. 1997. **Transgender Care: Recommended Guidelines, Practical Information and Personal Accounts** Philadelphia: Temple University Press

Johnson, Katherine & Stephanie Castle 1997 **Prisoner of Gender** Vancouver: Perceptions Press

Kendal, Monica unpublished Master's thesis University of Victoria 1996

Kessler, Suzanne J. et al **Gender: An Ethnometodological Approach** 1978. Chicago: The University of chicago Press

Kuiper, Bram et al 1988. "Sex Reassignment Surgery: A Study of 141 Dutch Transsexuals" Archives of Sexual Behavior 17(5) 439-457

Lepofsky, M. David. "The Duty to Accommodate: A Purposive Approach" (1993), 1 *Can. Lab. L.J.* 1.
McKenna, Ian B. "Legal Rights for Persons with Disabilities in Canada: Can the Impasse Be Resolved?" (1997-98), 29 *Ottawa L. Rev.* 153.

Lindemalm, G. et al (1986) Long term follow up of 'sex change' in 13 male to female transsexuals *Archives of Sexual Behaviour 15(3) 187-210*

Lindgren T.W. (1975) A body image scale for evaluating transsexuals *Archives of Sexual Behaviour 4(6) 639-656*

Lundstrom, B. et al (1984) Outcome of sex reassignment surgery *Acta Psychiatrica Scandinavica* 70(4) 2890-294
Meyer, J.K et al 1979.Sex reassignment: follow up *Archives of General Psychiatry 36(0) 1010*

Money, John et al 1998. "Gynemimesis and Gynemimotophilia: Individual and Cross Cultural Manifestations of a Gender-Coping Strategy Hitherto Unknown*"* in **Current Concepts in Transgender Therapy** Dallas Denny ed. Garland Publishing Inc. New York and London

Messing, Karen, and Joan Stevenson. "Women in Procrustean Beds: Strength Testing and the Workplace" (1996), 3 *Gender, Work and Organization* 156.

Messing, Karen. *One-Eyed Science: Occupational Health and Women Workers*. Philadelphia: Temple University Press, 1998.

Molloy, Anne M. "Disability and the Duty to Accommodate" (1993), 1 *Can. Lab. L.J.* 23.

Money, John 1998. "A New Concept of Body-Image Syndromes and Gender Identity" in **Current Concepts in Transgender Therapy** Dallas Denny ed. Garland Publishing Inc. New York and London

Morgan, J. 1992. “Transsexuals and the Crinal Justice System. New Doctor/Legal Services Bulletin. Austraia.Motiuk, L.> et al “The Prevalance, Nature and Severity of Mental Health Proglems among Federal Male Inmates in Canadian Pentitentiaries”. CSC Canada

O’Keefe, Tracie et al. 1997. **Trans-X-u-all: The Naked DifferenceLondon**: Extraordinary People Press

Pauly, Ira B. 1998.Gender Identity and Sexual Oreintation in **Current Concepts in Transgender Therapy** Dallas Denny ed. Garland Publishing Inc. New York and London

Pauly, Ira B.1985 Gender Identity disorders. In M. Farber (ed) **Human Sexuality: Psychosexual effects of disease** pp 295-316 New York Macmillan

Pauly, I. et al 1986. “The gender identity movement; A growing surgical psychiatric liaison” *Archives of Sexual Behaviour* 15(4) 315

Pauly, Il (1981) Outcome of sex reassignment surgery for transsexuals. *Australian and New Zealand Journal of Psychiatry 15(1) 45-51*

Pentney, William. "Belonging: The Promise of Community: Continuity and Change in Equality Law 1995-96" (1996), 25 C.H.R.R. C

Peterson, M.E.et al 19995. “Surgical Sex Reassignment: A Comparative Survey of International Centers”. Archives of Sexual behavior 24(2) 135-156.

Petersen, Maxine E. and Robert Dickey MD. 1995. Surgical Sex Reassignment: A Comparative Survey of International Centers **Archives of Sexual Behaviour** Vol 24 No 2.

Peterson, M. A., et al 1996. “Transsexuals within the Prison System: An Internatonal Survey of Correctional Services Policiees. Behavioral Sciences and the Law. 14. 219-229.

Phillips, Paul, and Erin Phillips. *Women and Work: Inequality in the Canadian Labour Market*. Toronto: James Lorimer & Co., 1993.

Ross, M. W. , Rogerts et al 1978. “Stigma, sex and society: A new look at gender differentiation and sexual variation” *Journal of homosexuality* 3(4) 315-330

Schrang, Egene A.Male to Female Feminizing Genital Surgery in **Current Concepts in Transgender Therapy** Dallas Denny ed. Garland Publishing Inc. New York and London

Steiner B.W. 1985 “The management of patients with gender disorders” In B.W. Steiner (ed) **Gender Dysphoria; Development, research, management** pp 325-350

Strassberg D.S. et al 1979. “ Psychopathology in self-identified female to male transsexuals, homosexuals and heterosexuals” *Archives of Sexual Behaviour* 8(6) 491-496

Walinder, J. et al 1979. “Transsexualism: Incidence, prevalence and sex ration: comments on three different studies”. In *Proceedings of the 6th International Gender Dysphoria Association* Coronado CA

Waler, P. A. et al **1979.The Standards of care: The hormonal and surgical sex reassignment of gender dysphoric persons** Galveston TX the University of Texas Medical Branch

Watkin, Kenneth. "The Justification of Discrimination Under Canadian Human Rights Legislation and the *Charter*: Why So Many Tests?" (1992), 2 *N.J.C.L.* 87.

Wilchins, Riki 1997. **Read My Lips:Sexual Subversion and the End of Gender.**

Yalden, Maxwell F. "The Duty to Accommodate: A View From the Canadian Human Rights Commission" (1993), 1 *Can. Lab. L.J.* 283.

This pamphlet contains legal information. It is *not* legal advice. Laws change quickly, and individual situations vary. To find out how the law affects your situation, contact me. First interviews are always free of charge.

barbara findlay, Q.C.

604-251-4356 *or* bjf@barbarafindlay.com

www.barbarafindlay.com