

MANITOBA HUMAN RIGHTS BOARD OF ADJUDICATION

BETWEEN:

T.A.

Complainant,

-and-

**GOVERNMENT OF MANITOBA, MANITOBA JUSTICE, VITAL STATISTICS
AGENCY**

Respondent,

Appearances:

T.A., Complainant

Susan Ursel, Emily Elder, and Kristen Allen, Counsel for the Complainant

Isha Khan & Sandra Gaballa, Counsel for the Manitoba Human Rights Commission

Leslie Turner, Counsel for the Respondent

DAN MANNING, adjudicator:

1. This is a complaint of discrimination against the Government of Manitoba in the provision of service based on the complainant's gender identity and sex pursuant to section 13 of the *Manitoba Human Rights Code* (the "Code"). The

complainant alleges that they were denied a request for a gender congruent birth certificate. Gender identity has been a protected ground in Manitoba since 2012.

2. The facts are uncontested. The complainant, T.A., is transgender and identifies as pangender. T.A.'s preferred gender pronoun is they/them and I will use their preferred pronoun throughout this decision. As a pangender individual, T.A. believes that neither "male" or "female" appropriately aligns with their sense of gender.
3. T.A. adopts a wide range of gender expression in order to feel whole and complete as a person. For instance, T.A. may choose to wear clothing typically associated with male and female gender. T.A. pursues interests which may be considered stereotypically male and others stereotypically female.
4. In early 2012, T.A. decided that they would like to pursue changes in sex designations for all their identity documents. T.A. was "severely ill" at the time and experienced periods of hospitalization. They were on long-term disability from work and experienced periods of "street homelessness." T.A. believed that having gender congruent documents would help to ameliorate their situation. In December 2013, T.A. made a request of the respondent to provide them with a birth certificate that was congruent to their gender identity.
5. The respondent is the Government of Manitoba, the Vital Statistics Agency. (the "Agency"). The Agency is responsible for issuing birth certificates to people who were born in Manitoba. The enabling legislation, the *Manitoba Vital Statistics Act* ("the Act") requires all issued birth certificates to contain the particulars of a person's sex to be displayed on a birth certificate pursuant to section 32(3) of the Act. The terms "sex" and "sex designation" are not defined in the Act, nor does the Act list which "sex designations" are available. The practice of the Agency is to only allow the sex designation of "male" and "female" on Manitoba birth certificates.
6. In December 2013, the complainant wrote to the respondent, and requested to remove the sex designation from their birth certificate. In support of the request, the complainant attached a letter from their psychologist. The psychologist wrote

that in her opinion, the applicant's gender identity did not accord with the sex designation on the birth certificate and requested a change on the birth registration to "X". T.A. wanted a birth certificate to use as a foundational document in order to obtain other forms of identification, for example, a passport. T.A. wished to travel to explore their South African heritage.

7. The then, (not current) Director and Chief Operating Officer of the Agency wrote back in January 2014 and advised that the only sex designations available to anyone was either "M" for male or "F" for female. T.A. was advised that no other sex designations are available and sex designations must be displayed on all Manitoba Birth Certificates. This practice continues today.
8. The complainant decided not to pursue a birth certificate. In February 2015, the complainant filed a Complaint of Discrimination under the Manitoba Human Rights Code.
9. The Commission and the complainant called other witnesses, two of them were qualified as experts. I will refer to their evidence later in this decision.
10. The respondent called one witness; the current Director of the Vital Statistics Agency. She gave evidence about Agency procedures, policies, and practices. She was not acting as director at or around the time that T.A.'s request was made and denied.
11. She testified that the process involving the registration of sex for a newborn is as follows. The parents of a newborn in Manitoba, or some other "informant" will complete a Registration of Birth form within days of birth. The document requires, among other things, information about the parents, the newborn's name and sex. The Registration of Birth only permits "Male" or "Female" as options with regards to sex. Once the document is completed, it is then passed along an "event registrar", who is usually a nurse, midwife, or someone employed by the hospital. The event registrar checks the form for accuracy and completion and forwards it to the Agency. Staff from the Agency conduct another check for accuracy, and compliance and if satisfied will register the information in the provincial vital event registry. When someone requests a birth certificate, they

are provided with a document that is an “extract” of the information contained in the provincial vital event registry, which in turn reflects the Registration of Birth document.

12. In addition to registering and providing documentation regarding vital events, the Agency has information sharing agreements with other organizations. Data is provided to, among others, Statistics Canada, the Public Health Agency of Canada, and Manitoba Centre for Health Policy. These agencies study and publish information so that various population trends can be studied. Information with regards to the sex of an individual is part of the verification or validation of vital event data and it is one of the fields that is sought after by the individuals who consume vital statistics data for policy making and research purposes. In support of the practice to issue only male and female sex designations, the Director referred to a document titled, “The Principles and Recommendations for a Vital Statistics System” which states:

“Sex refers to the biological characteristic and it is needed to describe a newborn child, a decedent or a foetal death. Data should be categorized into “male” and “female” and in case of a foetal birth, the category “unknown” is also appropriate.

Vital statistics disaggregated by sex serve various purposes. For example, data on live births by sex is used to calculate the sex ratio at birth. Unusual changes in the ratio of male to female births may indicate gender-biased registration problems and an unusually high or low sex ratio at birth may indicate some degree of gender preference in society. Infant deaths and deaths by sex allow analysis of mortality differences by sex.”

13. The Director testified that only the binary options of “male” and “female” are available on the registration of birth form because at the time of birth, the only information available relates to observable primary physiological sex characteristics. The Director testified that only “male” and “female” comprise “sex” and that no information is collected about the “gender” of individuals.

14. It is possible for a person born in Manitoba to change their “sex designation”. Section 25 of the *Act* outlines the procedure. In addition to the proscribed fees,

a “Change of Sex Designation” application form must be completed and submitted.

15. A copy of the Change of Sex Designation paperwork was filed as an exhibit in the Agreed Book of Documents. It is approximately 12 pages in length. In “Section F,” an applicant is required to make a Statutory Declaration that “I identify with the requested sex designation of:”, followed by two boxes marked “Male” and “Female”. One box must be selected. “Section G” requires a health care professional to indicate, whether in their professional opinion, the applicant’s current “sex designation of,” followed by two boxes marked “Male” and “Female”, “is inconsistent with the sex with which the applicant identifies.” Once again, only one box must be selected. The health care professional must also indicate whether, in their professional opinion, the applicant’s sex designation of Male or Female is consistent with the sex designation with which the applicant identifies.
16. The director testified that an applicant cannot change their sex designation to anything other than “male” or “female” based on her understanding of the purpose of the *Act* and the mandate of the Agency. Furthermore, the *Act* requires that sex be displayed on all birth certificates. Of the 13 other Canadian jurisdictions that issue birth certificates, eight, including Manitoba continue to print male and female only. Five provide for a third option, and of those five, three provide an option for not printing sex.
17. The Director testified that the complainant did not complete the change of sex designation paperwork, so it was not possible to accommodate a change of sex designation. She confirmed, however, that the complainant would not have been issued a birth certificate with an “X” sex designation, nor could the complainant have been issued a birth certificate with no sex designation at all.

Section 9(2)(g): “Gender Identity”

18. The discrimination alleged in this case is based on gender identity as a protected ground pursuant to section 9(2)(g). Gender identity was added as a ground for discrimination to the *Code* in June 2012 but is left undefined. As this case is the first adjudication in Manitoba on the ground of “gender identity”, it is necessary to discuss the meaning of “gender identity” as it appears in the context of the *Code*.

19. The Commission and the complainant called two expert witnesses. The first was Dr. Reese Malone who was qualified as a witness in the area of trans and non-binary adult health and related clinical experience with medical transitioning in the context of gender dysphoria. It was agreed that Dr. Malone was qualified to give expert evidence because he has “acquired special or peculiar knowledge” through his education and clinical experience. The second was Dr. Corinne Mason who was qualified as an expert in gender studies, queer identity, LGBTQ2IA experiences and intersectionality. The respondent did not object to either witness’ qualifications and I found that both were qualified to give expert evidence given their level of education, profession and clinical experiences. I found both witnesses’ evidence necessary and appropriate. (See *R v. Mohan*, [1994] 2 SCR 9 at p. 21; and *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 at paras. 19-24) The following is my understanding of gender and its implications and subsequent analysis.

20. The evolution of the concept of gender identity has given rise to specialized uses of words that are more nuanced than they appear in everyday speech. A person’s “sex” in the context of this decision refers to their physical anatomy. At birth, a child’s biological sex is recorded in their birth registration by a parent, or medical professional. That registration is based on the appearances of the newborn’s genitalia. Almost everyone is born either male or female and that sex is designated or “assigned” at birth. There are some individuals who are born “intersex.” An intersex individual is someone born with variations in their biological sex characteristics and are neither exclusively physiologically male or female. The evidence of the Director was that an “intersex” birth is extraordinarily rare and that in her review of the records of the preceding five

years, she could find no instance of an “intersex” person born that survived very long past birth.

21. “Gender” is a system that outlines roles, behaviours, and expressions deemed acceptable on the basis of an individual’s birth sex. For example, if a person is born anatomically female, gender would be the system that informs that person what roles they should play, and what behaviours they should engage in to conform to society’s idea of what it is to be “female.” The same is true for being “male.”
22. “Gender identity” is a concept that is central to personhood. It is a psychological self-awareness of one’s conscious self in relation to gender. An individual’s gender identity may align with their birth sex, or it may not. It also may change. “Gender expression” is the way an individual presents and communicates their gender identity. It can be expressed through clothing, speech, body language, hairstyle, or voice. Other examples of gender expression are choice of name and personal pronouns.
23. A person may communicate their gender expression in a way that is consistent with their gender identity but not always. Some individuals will choose a gender expression that is inconsistent with their gender identity for reasons of safety, security, or to conform with social standards. For example, a person who was assigned “male” at birth may identify with being female but choose to dress as a man in public to avoid discrimination. Dr. Malone testified that those who conceal their gender identity often face a profound negative impact on their mental health and wellbeing.
24. People whose gender identity is incongruent to their biological sex, such as transgender, pangender, and other non-binary people are a historically disadvantaged and discriminated against population.
25. The Human Rights Tribunal of Ontario confirmed the historical disadvantage of trans and non-binary people in *XY v. Ontario (Government and Consumer Services)*:

[164] ... transgendered persons are a historically disadvantaged group, and I agree. In my view, it is beyond debate that transgendered persons such as the applicant are a historically disadvantaged group who face extreme social stigma and prejudice in our society. This is a notorious fact and it is appropriate for the Tribunal to take notice of it. Indeed, I have already done so at an earlier stage of this proceeding: *XY v. Ontario (Government and Consumer Services)*, 2010 HRTO 1906 (CanLII), at para. 10.

[165] If I did have any doubt about the disadvantaged position of transgendered persons in our society (which I did not), it would have been removed by Dr. Karasic's uncontradicted and unchallenged testimony about some of the difficulties facing transgendered persons. Specifically, Dr. Karasic testified that transgendered persons as a group tend to face very high rates of verbal harassment and physical assault and are sometimes even murdered because of their transgendered status. Dr. Karasic also testified that it is very difficult for transgendered persons to find employment, that there are very high rates of unemployment among transgendered people generally, and that many transgendered people are fired once they are exposed in the workplace as being transgendered. He testified that he himself has had "many" highly skilled and college-educated transgendered patients with very promising professional careers who were unable to find employment upon transitioning to their felt gender, sometimes ending up in homeless shelters. In addition, Dr. Karasic testified that suicide attempts and substance-related disorders are commonly associated with gender identity disorders. During his testimony, Dr. Karasic referred a couple of times to the ridicule which transgendered persons often experience. He testified that the fear of being ridiculed tends to limit transgendered persons' outside activity. Dr. Karasic described the social stigma attached to being transgendered as "pretty severe".

26. So did the British Columbia Human Rights Tribunal in *Oger v. Whatcott (No. 7)*, 2019 BCHRT 58:

[60] This is a significant time for trans and gender diverse people. Their long fight for equality is bearing some fruit, as society begins to adjust its traditionally static and binary understanding of gender, and its tolerance for people to identify and express their gender authentically...

[61] However, as this hearing made clear, the journey is far from over. Unlike other groups protected by the *Code*, transgender people often find their very existence the subject of public debate and condemnation. What flows from this existential denial is, naturally, a view that transpeople are less worthy of dignity, respect, and rights...

[62] And so, despite some gains, transgender people remain among the most marginalized in our society. Their lives are marked by "disadvantage, prejudice, stereotyping, and vulnerability": *F(C) v. Albert (Vital Statistics)*, 2014 ABQB 237 at para. 58; see also *Rainbow Committee of Terrace v. City of Terrace*, 2002 BCHRT 26 at paras. 47-51. They are stereotyped as "diseased, confused, monsters and freaks": *Nixon v. Vancouver Rape Relief Society*, 2002 BCHRT 1 at paras. 136-137, overturned 2005

BCCA 601 (not on this point). Transpeople face barriers to employment and housing, inequitable access to health care and other vital public services, and heightened risks of targeted harassment and violence. The results include social isolation, as well as higher rates of substance use, poor mental health, suicide, and poverty: *XY v. Ontario (Government and Consumer Services)*, 2012 HRTO 726 at paras. 164-166. For transgender children, anti-trans bullying leads to higher rates of absenteeism and poorer educational outcomes, which then has ripple effects for their health and future prospects: Christophe Cornu (2016), "Preventing and addressing homophobic and transphobic bullying in education; A human-rights based approach using the United Nations Convention on the Rights of the Child", *Journal of LGBT Youth*, 13:1-2, 6-17 at pp 7-8.

27. The above passages from the Human Rights Tribunals in British Columbia and Ontario are consistent with the evidence I received from Dr. Malone and Dr. Mason.

28. Additionally, I heard from Charlie Eau, a non-binary transgender person who has lived in Winnipeg most of their adult life. Charlie Eau's preferred personal pronoun is "they/them". Charlie Eau's reported that they:

"hear nearly every day from community members who are experiencing various levels of violence, from micro aggressions to harassment to ... serious incidents of violence, based on gender nonconformity in Winnipeg or Manitoba"¹

29. It is clear that trans and non-binary people not only face historic discrimination but that discrimination against them continues to this very day in Manitoba. As has been noted in Ontario, "gender identity" and "gender expression" are relatively new concepts that some people refuse to accept and actively oppose. (see *Lewis v. Sugar Daddys Nightclub*, [2016] OHRTD No 332 at paras. 36-39)

30. The Legislature responded in 2012 and added "gender identity" to the *Code*. The intent was to address the historic discrimination against trans and non-binary people; to provide stronger protection for non-binary people; and to expand tolerance and education to Manitobans. On May 23, 2012 during the second

¹ Although clearly hearsay, I find this evidence relevant and appropriate under section 39(2) of the *Code* because it is consistent with other admissible evidence regarding discrimination of trans and non-binary individuals.

reading of Bill 36, *The Human Rights Code Amendment Act*, the then Minister of Justice, Andrew Swan, said:

“New under gender identity recognizes that individuals are diverse in their sense of self and particular in their sense of being male or female. Of particular importance is that gender identity may not confirm—conform to a person's birth sex and this is often a basis for discrimination. Manitoba may be the first province to include gender identity as a protected characteristic in its Human Rights Code, although Ontario is also moving a bill through its legislature at this time. The Northwest Territories is the only other Canadian jurisdiction to do so.

While it is arguable that complaints on this basis could be dealt with under the grounds of sex and disability, the strong and clear message from the community, and most important transgendered and two-spirited communities, is a provision which is much stronger and much more appropriate.

The Human Rights Commission carries a strong educative function, and including gender identity in the code will enable the commission to carry out its work to expand Manitobans' tolerance and understanding of this issue.”

31. Whereas in the past trans and non-binary people have successfully advanced human rights claims on the combined grounds of “sex” and “disability”, this is no longer appropriate. (See *Sheridan v. Sanctuary Investments Ltd. (B.J.'s Lounge)*, [1999] BCHRTD No 43 at paras. 95-97 and 91-93; and *Hogan v. Ontario*, 2006 HTRO 32 at paras. 123 – 127). It is clearly offensive to non-binary complainants to assert and prove that they have a disability. (See *MacDonald v. Downtown Health Club for Women*, 2009 HRTD 1043 at para. 30) Likewise, an individual's biological sex is not necessarily relevant to their gender, gender identity, or gender expression. However, “sex” and “gender identity” are complex notions that are often intertwined and in the instant case, impossible to parse.
32. Turning to the concept of “gender identity” as it appears in section 9(2)(g) of the *Code*, I am of the view that this ground needs to be interpreted broadly and expansively. Section 9(2)(g) protects people of all genders, including non-binary, pangender, or gender diverse individuals from discrimination. It also includes, within reasonable limits, all forms of gender expression from unjustified discrimination.

Discrimination Analysis

33. The complainant and the Commission are *ad idem* and jointly submitted their written argument. Unless otherwise indicated, any reference to the complainant should be understood to also include the position of the Commission.

34. To make out a *prima facie* case of discrimination, the complainant bears the onus to establish that the respondent denied them a service which they otherwise provide the public, and that the complainant's gender identity was a factor in that denial. If the complainant establishes a *prima facie* case, then the burden shifts to the respondent to establish that the denial was *bona fide* and reasonably justified. If justified, there is no discrimination. (See *Moore v. British Columbia (Education)*, [2012] 3 SCR 360 at para. 33. (“*Moore*”).

Section 13(1) of the *Code* provides:

13(1) No person shall discriminate with respect to any service, accommodation, facility, good, right, licence, benefit, program or privilege available or accessible to the public or to a section of the public, unless bona fide and reasonable cause exists for the discrimination.

35. It is common ground between the parties that the issuance of birth certificates and certified copies of a registration of birth constitutes a “service” for section 13(1) of the *Code*. It is also agreed that the complainant's identification as pangender falls within the protected characteristics of s.9(2)(g) of the *Code*.

36. I will now turn to the issues raised by the respondent to support their position that the complainant has failed to make out a *prima facie* case.

Issue 1: Raising an additional ground of discrimination during opening submissions.

37. In the filed complaint dated February 27, 2015, the complainant did not explicitly state that they were relying on discrimination based on sex. The applicable characteristic expressly relied upon by the complainant was “gender identity.”

During opening submissions, counsel for the Commission advised that the complainant is advancing two grounds of discrimination: “sex” and “gender identity”. They argue that an intersectional analysis, which recognizes the inter-related nature of the two concepts of “sex” and “gender identity” should be considered. The complainant argues that only by applying an intersectional analysis of the overlapping and intersecting concepts of “sex” and “gender identity” can a fuller picture of the nature of discrimination be understood.

38. The respondent objects that it is unfair to raise an additional ground of discrimination for the first time during opening submissions. The respondent argues that “sex” and “gender identity” are distinct characteristics in entirely different sub-clauses: 9(f) and 9(g). The respondent submits that these concepts may be related and may even be used interchangeably in everyday parlance. However, they remain distinct concepts for the purpose of the application of the provisions of the *Code* as drafted and enacted by the Legislature. To allow the complainant to advance “sex” as a protected characteristic for the first time during opening submissions is inconsistent with procedural fairness and creates inherent prejudice.

39. I disagree with the respondent for following reasons. First, there was no demonstrated or undue prejudice to the respondent. The ground was raised prior to any evidence being called. No adjournment was requested by the respondent to address any surprise that may have flowed from the opening remarks of Commission counsel. When asked, counsel for the respondent could not articulate any actual prejudice as a result of the new ground being raised. There was a three-week break between the conclusion of the complainant and the Commission’s case and the beginning of the respondents. There was plenty of time for the respondent to prepare and address any issues that may have caught them by surprise.

40. Second, I agree that the grounds of sex and gender identity are interwoven and intersect in this complaint. Section 43(1) of the *Code* allows the adjudicator to decide whether any party to the adjudication has directly or indirectly contravened the code in a manner alleged in the complaint. In the instant case,

the written complaint clearly incorporates the concepts of gender and sex. At paragraph 6:

“I understand that it is useful for the government to collect this type of data for various reason, but it is possible to collect this data without displaying it on my birth certificate”.

And at paragraph 10:

“I would like there to be training for government employees on processing requests for sex designation changes so that all relevant employees are fully aware of the policy and have a better understanding of the systemic discrimination the individuals applying for a change face on a daily basis.”

41. Third, the jurisprudence in other transgender and gender identity cases clearly recognize the interconnected nature of gender and sex. The respondent is presumed to be aware of the jurisprudence surrounding the issues raised in this case. In *Hogan v. Ontario*, 2006 HRTO 32, the Ontario Human Rights Tribunal recognized that transgender and intersexed individuals are protected on the ground of “sex” in the Ontario Human Rights Code.

[125] The common usage of the words “sex” and “gender” are synonymous enough in ordinary usage to be used interchangeably for the ground “sex” in the *Code*. First, a definition of gender includes “a sex, male or female”: *Webster’s Encyclopaedic Dictionary* (New York: Avenel Books, 1984), p. 361. At p. 770 it defines sex to be the distinction between male and female. In the majority’s view, the absence of a specific sex falls within the rubric of the term sex, just as atheism can fall within the ground of creed or religion. Gender ambiguity as in transsexualism or intersexed is a form of sex. Because a person is mentally or anatomically not definitely male or female does not diminish one’s status as a person.

[127] Adhering to McIntyre J.’s instructions, the majority concludes that the construction of the terms sex and gender are flexible enough to enable it to conclude that transsexuals and the intersexed fall within the ground of sex to recognize the *Code’s* special nature and purpose of the enactment, and to give it an interpretation that advances its broad purposes to protect every person from unlawful discrimination on the ground of sex. To conclude otherwise may deny transsexual or intersexed persons the protection of the *Code* on the ground of sex because of their ambiguous gender. There is a body of human rights jurisprudence in Canada, albeit nascent, that supports the proposition that discrimination because of transsexualism is sex discrimination. (See, e.g., *Kavanagh v. Correctional Service of Canada*, (2001) 41 C.H.R.R. D/119 (C.H.R.T.), *Sheridan v. Sanctuary Investments Ltd. (c.o.b. as B.J.’s Lounge)*, (1999) C.H.R.R. D/467 (B.C.H.R.T.), *M.L. and Commission des droits de la personne et des droits de la jeunesse du Québec c. Maison des jeunes*, [1998] J.T.D.P.Q. No. 31 (Qué. H.R.T.), *Ferris v. Office and Technical Employees Union, Local 15*, [1999] B.C.H.R.T. No. 55, and *Mamela v. Vancouver Lesbian Connection*, (1999) 36 C.H.R.R. D/318 (B.C.H.R.T.)). Looking at other

democratic polities, for example, in the European Union, in many countries including the United Kingdom, transsexualism is considered as sex discrimination. (See U. K. *Sex Discrimination Act 1975* and the *Gender Recognition Act 2004*, which was enacted specifically to strengthen protection of transsexual persons against discrimination because of sex). In the United States of America, the majority of courts that have dealt with the question has held that *Title VII of the Civil Rights Act of 1964*, 42 U.S.C. 2000e-2(a) (1) find that discrimination because of transsexuality is discrimination based on sex. (See *Schroer v. Billington*, (D DC 03/31/2006), United States District Court for the District of Columbia, No. 05-1090 (JR). Accordingly, the majority puts forward this proposition, transgenderism is the sexual identity of a person and it is of critical importance to demand or attract protection under the *Code* under the ground of sex.

(See also, See *Sheridan v. Sanctuary Investments Ltd., (B.J.'s Lounge)*, [1999] BCHRTD No 43 (paras. 90-91)).

42. Finally, this tribunal has a duty to consider all grounds advanced by the complainant. See *Turner v. Canada (Attorney General)*, 2012 FCA 159 at paras. 23-37.

Issue Two: Is a finding of differential treatment required under the Manitoba Code a condition precedent to a finding of discrimination?

43. The respondent argues, as I understand it, that in Manitoba, “differential treatment” must be found as fact before a *prima facie* case can be made out because of the wording of section 9 of the *Code*.

9(1) In this Code, "**discrimination**" means

... (b) differential treatment of an individual or group on the basis of any characteristic referred to in subsection (2); or

9(1.1) In this Code, "discrimination" includes any act or omission that results in discrimination within the meaning of subsection (1), regardless of

(a) the form of the act or omission; and

(b) whether the person responsible for the act or omission intended to discriminate.

44. They argue that if the complainant cannot establish differential treatment, as required by section 9 of the *Code*, then the definition of discrimination for the purpose of applying the *Code* will not be satisfied and the allegation of discrimination fails. The respondent argues that since no Manitoban can get a birth certificate without a sex designation, or with a non-binary designation on

