



An Introduction to Transgendered Women: An Equality Analysis

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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.

An Introduction to Transgender Women

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Introduction

This paper is revised for all of the participants in the IOHRA (International Organization of Human Rights Agencies) Forum in Vancouver in August 2000. The situation of transgendered women is a poorly understood, and activism for human rights has been controversial among some Canadian non-trans feminists. It is written for non-trans readers.

The paper is 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.

1. Who Trans People Are

'Transgendered' is an umbrella term which includes everyone who does not fit neatly into one of the two boxes 'male' or 'female'.

Transgendered people include anyone who identifies, whether temporarily or permanently, as other than the gender they were assigned at birth; and people who though they identify as their assigned gender, are mistaken for members of the 'opposite' sex.

A child's gender is assigned on the basis of a cursory genital inspection at birth. Till very recently, doctors have understood their responsibility to be to remedy any ambiguity in the appearance of the genitalia by surgically altering the infant to be a 'real' male or, more usually, a 'real' female. Though gender formation is poorly understood, it is known that factors which influence the formation of gender include the hormonal bath in the womb at the earliest stages of pregnancy; chromosomes inherited from each bio-parent; the way a child is socialized; and the way a child understands her or his gender. Though those factors are usually congruent, sometimes they are not: people may have ambiguous genitalia; or one of twelve (not two) possible chromosome sets with respect to gender; or both male and female reproductive organs; or a gender identity (self-perception) at variance with one's morphology; etc.

Throughout the world and across cultures and histories are people who have occupied

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I am a non-trans lesbian lawyer, of Caucasian British ancestry, raised working class and christian on the prairies, who is a survivor of abuse and mental hospitals as a youth. I have been active for 30 years in the Canadian feminist, anti-racist, and queer liberation movements.

a gender other than 'male' or 'female'. How those gender-places are defined, the reasons people have for occupying them, and whether they are revered or reviled, has varied enormously. In the 15th and 16th centuries for example many genetic women² cross dressed all their lives as men; they were executed if they were discovered.

The 'genderism' of western thought is consistent with the general western habit of separating and analysis, of emphasizing difference rather than commonality.

Some of the ways that transgender people identify currently in North America include the following.

Transsexuals are people who understand themselves to have been 'born in the wrong body'. What little knowledge there is in the public about transgendered people is usually about transsexuals. Transsexualism is a 'disorder' in the Diagnostic and Statistical Manual (as homosexuality once was); the only recognized cure is sex reassignment surgery — ie the construction of genitals which match the internal sense of self. Typically a transsexual "transitions" over a period of time, taking hormones first, then cross dressing in a mandatory 'real life test' that is required by gender clinics before sex reassignment surgery is performed, perhaps having secondary surgery (eg mastectomies for FtM's breast augmentation for MtF's) then having the genital reconstruction (sex reassignment) surgery.

Intersexed people, formerly known as "hemaphrodites", are people born with incongruent physical indicators of gender — for example, the sex organs of both genders.

Cross dressers or transgenderists are people who live as the gender 'opposite'³ their assigned gender, some or all of the time. Some transsexuals have decided not to have surgery, notwithstanding the diagnosis and prognosis for them. Their analysis of the situation is that if gender fluidity was the social norm, sex reassignment surgery would be unnecessary. And some transsexuals begin their journey of recognition of their gender identity by cross dressing.

Drag kings and queens are people who cross dress occasionally, often as a performance piece, but who otherwise live in their 'assigned' gender.

More and more young queer activists are identifying as 'trans': if asked they will say that they are both male and female, or neither male or female. That assertion challenges the foundations of

The first time I heard a young person identify as 'trans', neither male nor female, I was deeply and profoundly shocked— shocked in the way I remember being in 1964 when I first saw a teen aged boy with a pony tail, shocked in a way that brought the word 'unnatural' to my soul, to my lips.

I tried to overcome my shock and be respectful. But the next week I came back and said, "I don't know what to do about the pronouns. I can't talk about you without using a gendered pronoun!" "That's ok," s/he said. "Either pronoun is fine with me".

2 There is no commonly-agreed term to refer to gender-at-birth, in part because gender-at-birth may itself be ambiguous.

3 Obviously 'opposite gender' has meaning only in an either/or scheme

genderism, of the gender system as it has been conventionally understood.⁴

Gender identity is not the same as sexual orientation. A transgendered woman may be lesbian bisexual or straight.

People who were assigned a male gender, but take a female gender, are MtF; conversely, those assigned a female gender who take a male gender are FtM. As non-trans women we share some of the experiences both of FtM and of MtF transgendered people.

This paper is concerned with transgendered women. Those include both female to male trans people, who may always have “female” genitals; and male to female transgendered people who may not have, or may not yet have, or may never have “female genitals”. The former are included by necessity, the latter by choice in society’s category ‘female’. To the extent that society insists that people “are” and “are always” the gender of their genitals, FtMs have an almost impossible time becoming ‘male’.

It is unfortunately beyond the scope of this paper to make vivid and concrete the many and very different lives of transgendered people. But there are many excellent books in the bibliography; and academic work in the area of gender is burgeoning.

Transgendered people are united not by their common interests, but by their common oppression. In this way they are like lesbians and gay men, who share almost nothing with each other except the homophobia both experience.

2. 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 orientation⁵. At issue in that case was a judgement of the Court of Appeal in Alberta, perhaps Canada’s most socially 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 statutory 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.

⁴ As lesbians and gay men, and society’s homophobia, have taught much not just about homosexuality but about sexuality in general, trans people have much to teach all of us about how we have developed our own unquestioned gender identities.

⁵ *Vriend v Alberta* [1998] 1 S.C.R. 493.

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”.⁶

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.

3. Trans equality claims under Canadian constitutional law

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.

Applying the template of Vriend, 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 people⁸. 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

Trans issues are the number one human rights issues at this time.

Lorna Boschman, video artist whose work is in the MOMA: ‘Boy/Girl’ , Scars, Doing Time, etc.

⁶ 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*)

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!)

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

4. Canadian Legal Treatment of Gender: Genderism in the Law

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 this “genderism” which has constrained judicial response to the experience of transgendered people. 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.

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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 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).

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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 genderist hegemony 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.

Canadians' identity documents — birth certificates, drivers licence, passport — both require and specify gender¹¹. 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

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.

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

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.

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 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.

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

5. 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

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.

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.

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.

In a case called Rape Relief v B.C.¹⁵, an all-women’s crisis organization¹⁶ took judicial review of a decision by the Commission to refer for hearing the complaint by a transgender woman that she had been denied the opportunity to train and volunteer with the organization. Nixon had filed her complaint solely on the ground of ‘sex’.

Rape Relief argued that the ground ‘sex’ could not properly be invoked by an MtF trans woman (whether or not she was legally a woman), since ‘sex’ was a concept in human rights law which related to the oppression of women by men. Rape Relief argued that in a human rights regime with a list of protected grounds, the Commission had exceeded its jurisdiction by referring a complaint under an existing ground [sex] which was really a complaint under a ground which did not exist [gender identity]. The B.C. Supreme Court disagreed, saying that the ground ‘sex’ was properly available not only to those few transsexuals who have completed MtF sex reassignment surgery and had their gender legally changed, but to all transgendered people. The tribunal has not yet been held.

There are only four published human rights decisions dealing with transsexual people in Canada. Of those three are of interest to this paper¹⁷

The first of those three decisions is C.D.P. (M.L.) c.

The test of how we deal with diversity is how we deal with people who make us uncomfortable.

Monika Chappell, member of DAWN, Aboriginal Women’s Action Network, December 9 Coalition; and Equality Rights Advisory Committee, Court Challenges Program.

15 Relevant extracts are at Appendix C

16 Most women only crisis services in the Lower Mainland extend services to women who are transgendered; many also have trans positive employment policies.

17 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.

Maison des jeunes¹⁸ 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'état d'une personne mais encore comprend le processus même 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 Sheridan, 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.

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.

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.

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 transgendered¹⁹. 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 Mamela'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. The tribunal held that discrimination on the basis of gender identity is discrimination on the basis of 'sex'. 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*.

What bothers me most is the people who say that trans women are socialized as men and can't and don't understand what people who were socialized as women go through. In fact we know that women are socialized in really different ways depending on their cultural background, class, generation, etc etc. And to say that someone who grew up identifying as a girl while being treated as a boy by everyone around them is socialized 'as' a man as if there is only a singular male socialization ..well, it's not. They weren't socialized as boys who thought they were boys.

Persimmon Blackbridge lesbian feminist novelist, theorist, performance artist, sculptor.

6. A Section 15 Equality Analysis: The Example of A Transsexual MtF prisoner

Synthia Kavanagh is a MtF transsexual woman who is incarcerated in a federal male

prison. She presents as a long-haired, attractive, slim but shapely woman.²⁰ The federal legislation governing the incarceration of “federal” inmates (those serving sentences longer than two years) make specific provisions for women’s facilities; and require that intimate searches of women be done by women staff.

Though Corrections Canada has permitted Ms Kavanagh to take hormones, and to have breast augmentation surgery, it is refusing to permit her to have sex reassignment surgery; it is refusing to house her in a female prison until she has sex reassignment surgery; and the Parole Board has assessed her transsexualism as a criminogenic factor which, unless treated, will prevent her release.

This presents a clear case for a Charter challenge.

Under the Charter we would argue (a) the genderism 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 intersexed 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 categories 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 genderis— 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, and preoperative or non-operative transsexuals 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 genderism of the categories of male/female) and provides assurance to the decision maker that transsexualism is not a “lifestyle choice”

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Her breast size is 34D. Corrections Canada has permitted her to have breast augmentation surgery.

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.²¹ Under the Charter of Rights it is also completely acceptable jurisprudentially to argue that the discrimination faced by an individual is

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

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 genderism 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 transsexuals in their bifurcated gender scheme.

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 genderism 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

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, 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.

- 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 genderism punishes any deviance from a bifurcated gender reality in which the genders are “opposite” and the men are dominant

7. Arguments against Protections on the Ground of Gender Identity

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 1 of the Charter.

In light of the current anti-trans activism among some feminist groups, it is conceivable that the court would be faced with a defence or 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 be argued to have on non-transsexual women.²²

Many gender-conservative feminists say of themselves that they are in favour of human rights for trans people; they just don’t want trans women to use/work in women only facilities. The difficulty with this position is that their rationale – that this is a gendered space developed for the protection of women against the violence of men – is applicable to most gendered spaces. The NIMBY argument was used, for example, by Sanctuary Investments who said they were relying on a complaint from a lesbian about Sheridan’s use of the women’s washroom. The logic of the argument that women’s crisis centres should be able to exclude trans women if they want to means equally that they should be able to exclude aboriginal women, or women with disabilities, or Jewish women, or women of colour, or women with psychiatric histories, or...from using or volunteering in their services.

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 elements of that argument are similar to an argument under human rights legislation that discrimination against transgendered women particularly in women-only services or facilities, is bona fide justified. Without addressing the different ways that the arguments might surface in a Charter challenge or in a human rights case, it is worth examining the merits of the arguments.

The question of having transgendered women in a women's facility strikes at the very core of transphobia. It means, according to anti-trans feminists, "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 acceptance of trans presence. Examples range from

**Of course it makes us uncomfortable.
But we just have to bite the bullet
and do the right thing.**

Nora D. Randall, **Random Acts**

the exclusion and subsequent inclusion of trans women from the Michigan Women's Music Festival in the early 1990's, to debates at the National Organization of Women²³.

There are literally no examples in the literature of problems generated by transgendered women in women's facilities; although there is substantial documentation of resistance to the presence of transgendered women.

Research shows that lesbian women are more likely than non lesbian women to hold anti-trans views.²⁴ 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. .

The argument by some feminists that if anyone has ever experienced life as a man cannot ever really be a woman is ironic, since a major insight of second-wave feminism has been that biology is not destiny; and that gender is socially constructed, socially maintained, and socially enforced. To argue, now, that the shape of one's genitalia is the only important determinant of gender, and should dictate what human rights an individual should have, seems somewhat retrogressive. This is particularly true in light of medical research demonstrating that although no one can explain the formation of gender, gender is a multifactoral experience not adequately explained by any one aspect of an individual's experience; and that gender as it 'naturally occurs' does not come in either/or categories.

The anti-trans position as I have described it above (and I may not have done justice to a position which is deeply held and vehemently argued by well-respected feminists) 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.

From the perspective of anti-trans feminists, there is a conflict between the equality rights of two groups of people: non trans women, and trans women. 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. The earliest British Columbia case with respect to that question is *Caldwell v St. Thomas Aquinas High School*,²⁵ in which the facts were that a Roman Catholic School Board had refused to renew the teaching contract of a teacher who had, in contravention of church doctrine, married a divorced man in a civil ceremony.

Quaere whether an institution founded to support women would be entitled to exclude trans women. Some anti-trans women point to the existence of (for example) aboriginal women's shelters, which do not accept non-aboriginal women. The analogy is flawed. Aboriginal women's shelters exist because of the racism and cultural insensitivity aboriginal women have experienced in mainstream women's shelters. It would not be acceptable for a mainstream women's shelter to refuse admission to an aboriginal woman. Similarly, though it would make sense to have trans women's

23 The National Association of Women policy on transgendered people is attached at appendix A.

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

25 [1984] 2 S.C.R. 603

services, that should not mean that trans women are excluded from more mainstream women-only services. The result of such an exclusion, at the moment, would mean that trans women can get no services at all.

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:

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 court approval of exclusionary programs. In *Brossard v Quebec*²⁶ 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.²⁷ The court held against the municipality because

26 [1988] 2 SCR 279

27 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 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*

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 about the history of the Yukon. 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 (disingenuously) 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. Feminists reacted with disgust at a view of the world in which the court could not see that those who gather and create history imbue that history with their own experiences and biases.

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

Trans issues are very important issues for our community. We have to align ourselves with the struggles of trans people. We can never have equality at the expense of the human rights of other people.

Janine Fuller, recipient of B.C. Civil Liberties award for outstanding contribution, manager of Little Sisters queer bookstore

(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.

exemption for philanthropic etc. groups, and vice versa.

In a case concerning the federal Human Rights Act²⁸, 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 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.

When anti-trans feminists argue that groups formed for the purpose of benefitting women are entitled to decide that trans women may not attend, they are arguing that they can discriminate against some women. In that argument they stand on the precedent in Caldwell, point to the decision in Yukon Pioneers (both decisions decried by feminists when they were made). We would ask: does equality-rights feminism support a white women's group who, on grounds of racism, decided to exclude women of colour, and to rely for their justification on those cases? Or a women's group which decided (as many historically did) that lesbians were "the problem" with the women's movement and excluded them? If not, we must ask ourselves what the difference is with trans women.

With respect to the situation of MtF transsexuals in women's gendered services, including correctional facilities²⁹, 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.

An argument that one's gender should be assessed on the basis solely of the appearance of their genitalia at the time they were born is an argument about how to determine gender which has no scientific basis; which seeks to enforce an either/or gender hegemony in the face of the lived experiences of intersexed people, transgendered people, butch lesbians — anyone who experiences gender in a more complex way.

The experience of a trans child (for example, an FtM trans child who believes she is a boy, and that she will grow a penis...only to discover at puberty that instead she is cursed with breasts and a period) is not the same as the socialization of a girl child who is at home in her body. And a child who believes herself to be a girl, but is perversely treated through her childhood by everyone she knows as a boy, has not been socialized in the same ways as a boy child who enjoys being a boy. The essence of the experience of being a boy socialized 'male' in this society is the experience of privilege. Of being rewarded for who one is. The essence of the experience of being a girl socialized as a boy is the experience of oppression. Of being punished for who one is.³⁰

Absent a "panty test", it is impossible to distinguish between trans and non trans women. Butch lesbians, who are often 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. This is a critical fact. How, apart from asking someone how s/he identifies, will a group establish whether an individual is entitled to services?

Many young queer activists today — people who, thirty years ago, might have identified as "butch lesbians", identify as trans. They claim a definitional space just as lesbians — and, indeed, butch lesbians, femme lesbians, and so on— claimed a definitional space. They claim the right to be and to define who they understand themselves to be apart from the dominant paradigm of what is permissible, without paying the price of ostracism and discrimination. In that they follow in the proud footsteps of feminists, queer activists, and other equality seekers.

People who identify anywhere on the gender spectrum apart from the either/or of male and female know that they will incur disapprobrium, bashing, discrimination, and massive disruption of their family and friends. Coming out as trans is at least as risky

29 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)

30 I acknowledge that language that says the experience of being a girl socialized as a boy has, apparently, the same essentialist problem which I accuse anti-trans feminists of. But there is a critical difference. While I acknowledge that gender is 'actually' multifactorial and not well understood, I assert that we must found our human rights in a diverse society on the identity a person claims for herself.

as coming out as gay lesbian or bisexual: and with far fewer legal protections or social and political support.

People who identify as trans do so seriously: they do not do so for the purpose of (for example) 'invading women's spaces'. We can expect that just as more and more people came out as queer as it became more acceptable, more and more of us will acknowledge and explore aspects of their gender identity than have been able to do so before³¹.

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

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 service providers.

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 for whatever reason 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. A belief without foundation is otherwise known as prejudice and stereotype. Such a stereotype or baseless fear cannot be recast as "adverse impact" on non-trans women so as to give it more credibility in human rights terms.

8 Conclusion

Transgendered people are entitled to protections afforded to disadvantaged groups of people in Canadian society. Though we non-trans women find the idea that a person who was ever, in any way, a "man", can be a woman, we have to recognize that in this situation we are the ones with the power, relatively speaking, to treat trans women with respect, with dignity, and with equality.

APPENDIX A
Rape Relief v British Columbia (Human Rights Commission) 2000

Indexed as:
Vancouver Rape Relief Society v. British Columbia
(Human Rights Commission)

Between
Vancouver Rape Relief Society, petitioner, and
The British Columbia Human Rights Commission and
the British Columbia Human Rights Tribunal,
respondents

[2000] B.C.J. No. 1143
2000 BCSC 889
Vancouver Registry No. A993201

British Columbia Supreme Court
Vancouver, British Columbia
Davies J.
Heard: April 10 - 14, 2000.
Judgment: June 7, 2000.
(76 paras.)

Counsel:
Gwen Brodsky and Christine Boyle, for the petitioner.

Thomas F. Beasley, for the respondent, the British
Columbia Human Rights Commission.
Katherine Hardie, for the respondent, the British
Columbia Human Rights Tribunal.
Barbara Findlay, for Kimberly Nixon, the complainant.

[para1] DAVIES J.:-- Kimberly Nixon is a post-operative male to female transsexual. She is medically and legally a woman.

[para2] The petitioner, Vancouver Rape Relief Society, has denied Ms. Nixon the opportunity to volunteer her services as a rape counsellor. That refusal has given rise to a complaint which the respondent, British Columbia Human Rights

Tribunal (the Tribunal), is now scheduled to hear on July 14, 2000. [*As of May 2001 the hearing has been held but no decision has been rendered*]

[para3] The petitioner has applied for judicial review seeking an order prohibiting the Tribunal from hearing Ms. Nixon's complaint. It submits that the Tribunal has no jurisdiction over the subject matter of the complaint or, alternatively, has lost jurisdiction due to delay in the processing of the complaint.

ISSUES

[para4] From a broad human rights perspective this proceeding raises the question of whether the prohibition against discrimination on the basis of sex under the British Columbia Human Rights Code, R.S.B.C. 1996, c. 210 (the present Code) extends protection from such discrimination to transgendered individuals. From a more narrow perspective it raises administrative law issues concerning:

- (a) whether the respondents, British Columbia Human Rights Commission (the Commission) and Tribunal have jurisdiction over the subject matter of Ms. Nixon's complaint in the specific circumstances;
- (b) whether the petitioner's application for judicial review based upon the alleged lack of jurisdiction is premature;
- (c) what is the appropriate test for judicial review of the Commission's determination to refer Ms. Nixon's complaint to the Tribunal for hearing; and
- (d) whether there has been such inordinate delay in the processing of Ms. Nixon's complaint that this court should now prohibit the Tribunal from hearing the complaint.

BACKGROUND

[para5] The petitioner is a non profit women's organization incorporated in 1975. It is dedicated to assisting women in crisis because of male violence.

[para6] On April 18, 1977 the petitioner applied under the British Columbia Human Rights Code, S.B.C. 1973, c. 119 (the 1973 Code) for approval of a women only hiring policy. It did so because of the nature of its rape counselling and other services provided to women in crisis.

[para7] Section 22 of the 1973 Code provided for "group rights exemptions" and s. 11(5) contained approval provisions for such exemptions. To the extent relative to these proceedings they provided:

22. If 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 ... sex ... that organization or group must not be considered to be contravening this Code because it is granting a preference to members of the identifiable group or class of persons.

11 (5) The Commission may approve programmes of government, private organizations or persons designed to promote the welfare of any class of individuals and any approved programme shall be deemed not to be in contravention of any of the provisions of this Act.

[para8] On April 20, 1977 approval of a women only hiring policy was granted to the petitioner.

[para9] In 1984 the 1973 Code was replaced by the Human Rights Act, S.B.C. c. 22 (the 1984 Act). The 1984 Act, as well as the present Code which came into force in 1997, each have group rights exemption provisions which are similar to those contained in the 1973 Code. The 1984 Act contained and the present Code now contains approval provisions which are similar but not identical to those contained in the 1973 Code.

The group rights exemption granted to the petitioner in 1977 under the 1973 Code has never been withdrawn.

[para10] On August 29, 1995 Ms. Nixon responded to a publicly advertised request for volunteers by attending a training session organized by the petitioner. There is some controversy as to the conversations which occurred between Ms. Nixon and one or more of the petitioner's trainers which led to the petitioner's refusal to allow Ms. Nixon to continue with the training program that evening. There is, however, no doubt that the petitioner rejected Ms. Nixon as a counsellor because she had not been a woman since birth.

[para11] The petitioner's rationale for that decision is that only a woman who has grown up with experience as a girl and a woman will have "the attendant insights into the relationship between male violence and women's inequality in order to assist women in crisis because of male violence". That rationale is coupled with a concern that some clients of the petitioner requiring counselling may not be comfortable with a counsellor whom they may believe is not or may not be a woman.

[para12] The petitioner continues to assert the appropriateness of that rationale as the basis for its continuing policy of refusing to allow any person who is not female by birth to participate as a volunteer counsellor in its organization. The petitioner asserts that the policy was and is a valid one under both the 1984 Act and the present Code because of the still existing exemption status granted for its women only hiring policy in 1977.

[para13] On August 30, 1995 Ms. Nixon filed a complaint against the petitioner under the 1984 Act alleging discrimination "by refusing me employment, because of my sex contrary to Section 8 [of the 1984 Act]".

[para14] To the extent relevant to these proceedings, s. 8 of the 1984 Act provided:

- 8 (1) No person shall
- (a) refuse to employ or refuse to continue to employ a person, or

(b) discriminate against a person with respect to employment or any term or condition of employment,

because of race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person ...

(4) Subsections (1) and (2) do not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

(emphasis added)

[para 15] On March 6, 1996 Ms. Nixon amended her complaint under the 1984 Act. She alleged that the petitioner had discriminated against her "with respect to a service and/or facility customarily available to the public and/or by refusing to employ me because of my sex, contrary to Sections 3 and 8 [of the 1984 Act]".

[para 16] To the extent relevant to these proceedings, s. 3 of the 1984 Act provided:

- 3 (1) No person, without a bona fide and reasonable justification, shall
 - (a) deny to a person or class of persons any accommodation, service or facility customarily available to the public, or
 - (b) discriminate against a person or class of persons with respect to any accommodation, service or facility customarily available to the public,

because of race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability or sex or sexual orientation of that person or class of persons.

(emphasis added)

[para 17] On January 1, 1997 the Human Rights Amendment Act, 1995, S.B.C. 1995, c. 42 (the Amendment Act) came into force creating the present Code. Pursuant to the transitional

provisions of the Amendment Act, unresolved complaints filed under the 1984 Act were continued under the present Code. There were no significant substantive changes to the relevant portions of either ss. 3 or 8 of the 1984 Act which were, however, renumbered as ss. 8 and 13 respectively in the present Code.

[para 18] The coming into force of the Amendment Act and the creation of the present Code also resulted in the decommissioning of the Council of Human Rights which had been created by the 1984 Act. That body had itself been created to replace the Human Rights Commission created by the 1973 Code. In place of the Council of Human Rights, the Amendment Act and the present Code created the Tribunal and the Commission. These two entities are separate and serve different functions.

[para 19] Section 15 of the present Code provides that the Commission is comprised of a chief commissioner, a deputy chief commissioner, and a commissioner of investigation and mediation. The commissioner of investigation and mediation is charged with the responsibility of investigating and processing complaints filed or continued under the present Code, has the authority to appoint delegates to investigate complaints and to determine whether to refer complaints to the Tribunal for adjudication.

[para 20] The Tribunal is independent of the Commission and has no involvement in the investigation and processing of complaints. The Tribunal's principal mandate under the present Code is to determine whether complaints referred to it by the commissioner of investigation and mediation (or a delegate) are justified and, if so, provide appropriate remedies.

[para 21] I will not discuss in detail the tortured history of Ms. Nixon's complaint through the investigative process under the 1984 Act and the present Code from August of 1995 until September of 1999. It was, however, not until there had been much delay and involvement of many investigative personnel that on September 10, 1999 Mr. Kevin Gillese, a delegate of the commissioner of investigation and mediation,

issued a decision referring Ms. Nixon's complaint to hearing by the Tribunal.

[para22] A review of the documentary evidence establishes that neither Ms. Nixon nor the petitioner were well served by the failure of the Human Rights Council under the 1984 Act or the Commission under the present Code to address Ms. Nixon's complaint in an expeditious and timely way. I am satisfied that their failure to do so arose primarily as a consequence of administrative backlogs and lack of resources.

[para23] The evidence also establishes that although the petitioner was aggressive in the defence of its position at all times prior to the referral to the Tribunal on September 10, 1999, it was not unreasonably so and at no time acquiesced in either investigative or administrative delay.

DISCUSSION AND ANALYSIS

[para24] The petitioner raises three jurisdictional issues in support of its application for an order prohibiting the Tribunal from hearing Ms. Nixon's complaint.

[para25] Two of those issues relate to the question of whether Mr. Gillese, acting as a delegate of the commissioner of investigation and mediation, erred in law by exceeding his jurisdiction. The petitioner says he did so by:

- (a) misinterpreting the meaning of discrimination on the basis of sex under the 1984 Act and the present Code to include discrimination based on "gender identity (including transsexualism)"; and
- (b) similarly misinterpreting the statutory group exemption provisions and the approval of the petitioner's 1977 women only hiring policy.

[para26] The petitioner asserts that neither the Commission nor the Tribunal has the authority to amend its enabling legislation to add what it says is a new ground of discrimination. It submits that for that reason the delegate and Commission had no basis upon which to refer the complaint and the Tribunal has no jurisdiction to hear it.

[para27] The third jurisdictional issue is raised in the alternative. It is based upon the proposition that if the Commission and Tribunal did have jurisdiction over the complaint, the Tribunal has now lost jurisdiction due to delay in the processing of the complaint which it says has caused prejudice to the petitioner and its members.

[para28] As to the first two issues, counsel for the Commission, Tribunal, and Ms. Nixon submit that without the benefit of all of the evidence which would be relevant and available to the Tribunal concerning Ms. Nixon's complaint, the petitioner's application for prohibition is premature. They also submit that either Mr. Gillese was correct in referring Ms. Nixon's complaint for hearing or, alternatively that the appropriate standard for review of his decision is that of reasonableness. They say that the decision was not unreasonable and that the question of jurisdiction over the subject matter of the complaint should be left to the Tribunal to determine.

[para29] As to the delay issue, the Commission and Tribunal both acknowledge that there has been significant delay in the investigation and processing of Ms. Nixon's complaint. They submit, however, that in the circumstances of

the complaint and most particularly the petitioner's continuing policy of refusing to allow transgendered women to provide counselling services, such delay does not warrant a prohibition order. They say further that the Tribunal should be left to decide whether the complaint should be stayed by it due to any actual prejudice to the petitioner's ability to defend the complaint because the Tribunal is in the best position to assess the actual effect of delay relating to the evidentiary and legal issues requiring investigation.

[para30] Ms. Nixon joins the respondents in their submissions concerning delay but makes the further argument that to prohibit the Tribunal from proceeding with its hearing because of institutional delay which arose entirely outside her control would have a greater adverse effect upon her than upon either the petitioner or its members. She also points to the lack of practicality of a prohibition order in light of the ongoing policy of the petitioner. Her counsel submits that a new complaint could be filed immediately after a stay is entered since it is inevitable that the petitioner would again refuse to allow Ms. Nixon to provide volunteer counselling

services to its clients if she applied to do so.

(a) Is the Petitioner's Application for Prohibition Premature?

[para31] The petitioner submits that since the 1984 Act and the present Code prohibit discrimination only on listed grounds which do not include either "transsexualism" or "gender identity", the Commission had no jurisdiction to refer

Ms. Nixon's complaint and the Tribunal has no jurisdiction to adjudicate upon it. It says the issue can readily be decided as a question of statutory interpretation without the need for further evidence.

[para32] The respondents and Ms. Nixon submit that this court should not exercise its jurisdiction to determine these issues until the Tribunal has had the opportunity to rule upon its own jurisdiction after having the benefit of the evidence of all of the facts relevant to Ms. Nixon's complaint necessary to decide whether it has jurisdiction.

[para33] The respondents and Ms. Nixon rely upon the decision of Lamperson J. in *Kelowna (City) v. British Columbia (Human Rights Commission)*, [1999] B.C.J. No. 1848 (S.C.) in which he extensively reviewed the applicable authorities concerning prematurity and then stated (at para. 11):

Courts are usually reluctant to interfere with the work of an administrative tribunal before its processes have been exhausted. There are several reasons for this approach.

1. Judicial intervention may fragment the tribunal's proceedings.
2. The tribunal may resolve the dispute to the parties' satisfaction.
3. The court's decision may be rendered moot because of the tribunal's ruling on some other aspect of the proceedings.
4. It is helpful for the court to have an evidentiary record and the tribunal's analysis of the dispute, especially in areas where the tribunal has special expertise.
5. Courts avoid deciding constitutional and Charter

issues on hypothetical facts or in a factual vacuum.

[para34] In answer to the argument that its application is premature, the petitioner acknowledges that the Tribunal does have jurisdiction to hear preliminary challenges to its own jurisdiction. It submits, however, that the court should not postpone its own jurisdiction to determine these fundamental jurisdictional issues until the Tribunal has considered and ruled upon the issues. It relies upon *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854 for the proposition that the court has jurisdiction to hear and determine jurisdictional issues and upon *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353 for the proposition that fundamental questions of jurisdiction involving statutory interpretation should be reviewed by the court rather than an administrative tribunal when the tribunal has no special expertise in statutory interpretation.

[para35] The petitioner argues that the court should rule upon the jurisdictional issues at this stage because:

- (a) the issues raise narrow questions of statutory interpretation in which the Tribunal has no particular expertise;
- (b) determination by the Tribunal will be futile and will likely result in further applications for review because the Tribunal has determined in three recent decisions (*Sheridan v. Sanctuary Investments Ltd. (No. 2)* (1998), 33 C.H.R.R. D/464, [1998] B.C.H.R.T.D. No. 18; *Mamela v. Vancouver Lesbian Connection*, [1999] B.C.H.R.T.D. No. 51, and *Ferris v. O.T.E.U., Local 15*, [1999] B.C.H.R.T.D. No. 55 that discrimination based upon sex does include transsexualism; and
- (c) at issue in this proceeding is not only the Tribunal's jurisdiction to hear the complaint but also that of the Commission to refer the complaint to the Tribunal for hearing in circumstances where the Tribunal has acknowledged in *Hunter v. British Columbia (Ministry of Health)*, [1999] B.C.H.R.T.D. No. 65 that it has no supervisory role over the actions of the Commission so that the court must fulfill that role.

[para36] I acknowledge the general wisdom of awaiting

the availability of a full evidentiary record prior to determining an issue of jurisdiction in most administrative law matters. I have, however, determined that in this case it is appropriate to decide the preliminary jurisdictional issues raised by the petitioner without further evidence. I do so because:

- (a) I am in general agreement with the petitioner's submissions concerning the appropriateness of the court rather than an administrative tribunal determining fundamental issues of jurisdiction based upon statutory interpretation;
- (b) I am concerned about the expense of further applications for review which seem almost inevitable given the status of the Tribunal's own jurisprudence; and
- (c) the petitioner has agreed that its preliminary jurisdictional issue can and should be determined upon the adjudicative facts most favourable to Ms. Nixon.

[para37] The facts most favourable to Ms. Nixon's complaint are that on August 29, 1995 as a post operative transsexual woman, Ms. Nixon was both medically and legally a woman. Given those admissions by the petitioner, I see no need for a further factual matrix in order to determine the issue of the respondents' jurisdiction over her complaint on the basis of statutory interpretation.

(b) Do the Respondents Have Jurisdiction Over Ms. Nixon's Complaint?

[para38] The petitioner submits that by referring Ms. Nixon's complaint to the Tribunal Mr. Gillese purported to alter the ground "sex" to encompass transsexualism or "gender identity" thus giving it a meaning never intended by the legislature. It submits that similar errors were made by the Tribunal in the cases of Sheridan (supra), Mamela (supra), and Ferris (supra), upon which Mr. Gillese relied and which errors it anticipates the Tribunal will perpetuate if it hears Ms. Nixon's complaint.

[para39] These issues of legislative intent and statutory interpretation are of obvious importance to the broad question of whether the 1984 Act and the present Code encompass

protection against discrimination arising from gender identity or transsexualism on the enumerated ground of sex. In my opinion, however, the more narrow issues of whether the Commission had jurisdiction to refer Ms. Nixon's particular complaint to the Tribunal and whether the Tribunal has jurisdiction to hear the complaint can be determined by reference to section 27(1) of the Vital Statistics Act, R.S.B.C. 1996, c. 479.

[para40] That section provides:

- 27 (1) If a person in respect of whom trans-sexual surgery has been performed is unmarried on the date the person applies under this section, the director must, on application made to the director in accordance with subsection (2), change the sex designation on the registration of birth of the person in such a manner that the sex designation is consistent with the intended results of the trans-sexual surgery.

[para41] The provisions of s. 27 of the Vital Statistics Act were initially enacted in 1973 at the same time that the 1973 Code was enacted. Section 27 of the Vital Statistics Act establishes that the legislature intended that post operative transsexuals such as Ms. Nixon would be entitled to the same legal status as other members of their post operative sex.

[para42] It is therefore my opinion that in Ms. Nixon's case the discriminatory conduct which she now alleges against the petitioner may fairly be characterized as an allegation of discrimination against her as a woman, a complaint over which the Commission and the Tribunal both have jurisdiction just as they have jurisdiction over any complaint of discrimination by any woman based upon appearance.

(c) Does the Tribunal Have Jurisdiction Over the Petitioner's Group Exemption Approval?

[para43] Ms. Nixon's complaint also engages the issue of the extent to which the approval of the petitioner's women only hiring policy under the 1973 Code's group rights exemption provisions may validate the petitioner's refusal to allow Ms. Nixon to provide counselling services to the petitioner's clients.

[para44] In my view, based upon my analysis of the issues of the respondents' jurisdiction over Ms. Nixon's complaint generally but also upon the nature of the inquiry into the women only hiring policy and its rationale, the determination of this secondary jurisdictional question is one which is well within the jurisdiction of the Tribunal. At issue is the ongoing validity of the 1977 approval made by a predecessor human rights board. At issue also is the relationship of that approval and the general group rights exemption to the complaint of a person who is legally a woman. The extent to which such approval may apply to a transgendered woman is an issue which should be determined by the Tribunal on the basis of a full evidentiary record which can explore the rationale for and the continued validity of the approval in light of the group rights exemption provision under the present Code. I see no reason to warrant the court's interference in that process.

(d) Does Sexual Discrimination Include Discrimination Based on "Gender Identity" or Transsexualism?

[para45] I have already determined that the respondents do have jurisdiction over the subject matter of Ms. Nixon's specific complaint on the relatively narrow basis of the applicability of s. 27 of the Vital Statistics Act to her particular circumstances.

[para46] The further issue arises as to whether I should also consider the broader question of whether the prohibition in the 1984 Act and the present Code against discrimination on the basis of sex also includes discrimination on the basis of gender identity or transsexualism.

[para47] I recognize that in so doing my determinations constitute obiter dicta but I have decided to address this larger issue because:

- (a) if I am wrong in my interpretation of section 27 of the Vital Statistics Act to the facts of Ms. Nixon's case, the issue would then be a live one;
- (b) the matter was thoroughly argued before me;
- (c) the issue raises a question of statutory

interpretation based upon legislative intent and as such the evidentiary foundation related to the circumstances of any particular allegation of discriminatory behaviour are of less significance than would be the case if the issue raised was not one of legislative intent and statutory interpretation; and

- (d) my opinion on the issue may be of assistance to the Commission, Tribunal, and other interested groups.

[para48] In making the argument that the legislature did not intend to extend human rights protection to transsexuals or to prohibit discrimination on the basis of "gender identity" within the prohibition against discrimination on the basis of the enumerated ground "sex" under the 1984 Act or the present Code the petitioner relies upon "legislative intent" submissions that:

- (a) both the 1984 Act and the present Code contain a "closed" list of grounds upon which discrimination must be based before it will be prohibited;
- (b) amendments to the 1984 Act passed by the legislature in 1992 added the grounds "family status" and "sexual orientation" to ss. 3 and 8 of the 1984 Act and broadened the ground "age" to include younger people but did not add "transsexualism" or "gender identity" as enumerated grounds;
- (c) the legislature did not adopt an "open-ended" list of grounds notwithstanding such recommendations made by Professor Bill Black after his comprehensive review of British Columbia's human rights legislation in 1994; and
- (d) the legislature did not act upon a recommendation made by the Commission on January 19, 1998 to add the ground "gender identity" as a new ground of discrimination under the present Code. That recommendation stated:

In the few cases where transgendered people have filed human rights complaints in various provinces, including B.C., their claims have been processed on the grounds of sex/gender, disability or sexual orientation. The Transgendered Law Reform Project, sponsored by the B.C. Law Foundation, showed the inadequacies in dealing with this type of

discrimination under the existing categories. Adding 'gender identity' as a ground for protection would ensure that adequate protection is accorded to all those who fall under the category .

[para49] The petitioner also relies upon decided cases which have held that the ground "sex" in the human rights legislation under consideration in those cases could not be interpreted to include discrimination based upon sexual orientation. (See: Board of Governors of the University of Saskatchewan v. Saskatchewan Human Rights Commission, [1976] 3 W.W.R. 385 (Sask. Q.B.); Vogel v. Government of Manitoba (1983), 4 C.H.R.R. D/1654 (Man. Bd. Adj.); Vogel v. Manitoba (No. 2) (1991), 16 C.H.R.R. D/233 (Man. Bd. Adj.); aff'd (1992) 16 C.H.R.R. D/233 (Man. Q.B.); Knodel v. British Columbia (Medical Services Commission) (1991), 58 B.C.L.R.(2d) 356 (S.C.); Egan v. Canada (1991), 87 D.L.R. (4th) 320 (F.C. T.D.); and Nielsen v. Canada (Human Rights Commission), [1992] 2 F.C. 561 (T.D.).)

[para50] The petitioner submits that in considering the meaning of the ground "sex", regard must be had to the specific legislative and jurisprudential context in which the term "sex" is used. It submits that the issue is not what the term "sex" might mean in the abstract or in some other legislative or semantic context, but rather what it means in the context of the legal concept of sex discrimination. The petitioner asserts that sex discrimination means an unjustified refusal of a benefit or the imposition of a burden because one is a man or a woman, or because of social, economic or political disadvantage primarily associated with maleness or femaleness. It relies upon Brooks v. Canada Safeway Ltd., [1989] 1 S.C.R. 1219 and Janzen v. Platy Enterprises Ltd., [1989] 1 S.C.R. 1252.

[para51] In essence it is the petitioner's submission that the legislature intended to limit discrimination based upon "sex" to social and economic issues of discrimination arising between men and women which were the product of a male dominated society. While acknowledging that transgendered individuals could also be oppressed and subjected to discrimination, the petitioner submits that the legislature has deliberately refrained from extending protection to them and that it is not now open to the Commission or Tribunal to do so by interpreting "sex" in a manner the petitioner says was never intended by the legislature. The petitioner says that to do so would be to allow the Commission and

Tribunal to usurp a legislative function. See: Cooper v. Canada (Human Rights Commission) (supra).

[para52] I do not accept the petitioner's premise that by prohibiting discrimination on the basis of sex, the legislature intended to redress only male/female social, economic and political issues. I also do not accept that its failure to amend the 1984 Act or the present Code to specifically include gender identity or transsexualism as enumerated grounds of discrimination should be taken to mean that the legislature did not intend that human rights protection on the ground of sex did not extend to transsexuals.

[para53] It is well settled law that human rights legislation is to be approached purposively giving it a fair, large and liberal interpretation with a view to advancing its objects. See: Gould v. Yukon Order of Pioneers, [1996] 1 S.C.R. 571.

[para54] In Gould, Iacobucci J. stated (at p. 586):

A true purposive approach looks at the wording of the statute itself, with a view to discerning and advancing the legislature's intent. Our task is to breathe life, and generously so, into the particular statutory provisions that are before us.

[para55] Careful review of Professor Black's recommendations and the 1998 recommendations of the Commission leads to the conclusion that the recommendations were intended to ensure human rights protection was available for transsexuals, not to create protection which did not already exist. In those circumstances, legislative inaction cannot be read as an intention to deny that protection exists.

[para56] In my opinion to limit discrimination on the basis of sex to male/female issues places a far too narrow limit upon the purpose and intent of the 1984 Act and the present Code. While Canadian courts have indeed looked to issues which concerned the social, economic and political disadvantage of women in assessing what conduct may amount to discrimination on the basis of sex, many cases also reflect the less specific principle that human rights legislation is intended to preclude and rectify the wrongful oppression of the weak by the strong and the disadvantaged by the advantaged in society.

[para57] In my view, unless compelled to do so by specific

legislative direction or clear evidence to the contrary, it would be wrong to interpret the prohibition against discrimination on the basis of sex in either the 1984 Act or the present Code as not also prohibiting discrimination against an individual merely because that person or group is not readily identifiable as being either male or female.

[para58] I see no compelling direction by the legislature to reach such a conclusion and I reach the opposite conclusion for the following reasons:

- (a) I refer once again to the provisions of s. 27 of the Vital Statistics Act which were enacted in 1973 at the same time as this province's first human rights legislation. It cannot be said that the legislature was not alive to the issue of transsexualism;
- (b) I can discern no pattern in the statutes or regulations of this province which leads me to the inevitable conclusion that the words "sex" and "gender" are used with any specific intent. They appear to me to be used either randomly or interchangeably;
- (c) I have been referred to no sufficiently common definitions of "sex" in either common usage dictionaries or legal dictionaries which leads me to the inevitable conclusion that "sex" is limited to male/female issues or does not include gender related questions;
- (d) there is compelling medical evidence that determinations of sex and gender characteristics and issues often involve multifactorial considerations which go well beyond simple maleness or femaleness; and
- (e) since sex or gender issues may factually include more than purely male or female possibilities and characteristics it would in my view be wrong to approach the question of discrimination based upon sex from a solely male or female perspective.

[para59] I am accordingly of the opinion that the prohibition against discrimination on the basis of "sex" in the 1984 Act and the present Code includes a prohibition against discrimination on the basis of transsexualism.

(e) What is the Standard of Judicial Review of a Determination by the Commission to Refer a Complaint to the Tribunal?

[para60] Since I have determined that Mr. Gillese was correct in his determination that the Commission had jurisdiction to refer Ms. Nixon's complaint to the Tribunal, it is not necessary to answer this question.

[para61] The issue was also, however, argued at some length and in the event I am wrong in my determination that Mr. Gillese was correct, an answer to the question may prove to be necessary.

[para62] I have determined that the standard of review is that of reasonableness. I have done so because:

(a) the obligation of the commissioner of investigation and mediation (or a duly appointed delegate such as Mr. Gillese) to decide whether complaints referred to the Commission should be dismissed in whole or in part or referred to the Tribunal for adjudication is found in s. 27 of the present Code;

(b) Section 27 provides:

27 (1) The commissioner of investigation and mediation may, at any time after a complaint is filed, dismiss all or part of the complaint if that commissioner determines that any of the following apply:

(a) the complaint or that part of the complaint is not within the

jurisdiction of the commissioner of investigation and mediation;

(b) the acts or omissions alleged in the complaint or that part of the complaint do not contravene this Code;

(c) there is no reasonable basis to justify referring the complaint or that part of the complaint to the tribunal for a hearing;

(d) proceeding with the complaint or that part of the complaint would not

(i) benefit the person, group or class alleged to have been discriminated against, or

(ii) further the purposes of this Code;

(e) the complaint or that part of the complaint was filed for improper motives or made in bad faith;

(f) the substance of the complaint or that part of the complaint has been appropriately dealt with in another proceeding;

(g) the contravention alleged in the complaint or that part of the complaint occurred more than one year before the complaint was filed unless the complaint or that part of the complaint was accepted under section 22(3).

(2) In making a determination under subsection (1)(f), the commissioner of investigation and mediation must consider the factors referred to in section 25(3).

(3) If the commissioner of investigation and mediation dismisses a complaint or part of a complaint under subsection (1), that commissioner must inform the following persons of the decision in writing and give reasons for the decision:

(a) the complainant;

(b) the person against whom the complaint was made, if that person had been given notice of the complaint;

(c) the deputy chief commissioner, if that commissioner is not already a party.

(emphasis added)

(c) in *Kelowna (City) v. British Columbia (Human Rights Commission)* (supra) Lamperson J. implicitly determined the issue of the appropriate standard of review for a referral at paragraph 16 as being the

"reasonableness" standard when he stated:

[The Commissioner of Investigation and

Mediation], as a gatekeeper, makes no decision based on the merits. Ms. O'Byrne has not said that s. 8 was breached, but merely that the issue warrants a hearing before the Tribunal. That is not a patently unreasonable decision.

(emphasis added)

[para63] I have considered the argument that a determination by an administrative body that it has jurisdiction under its enabling statute is one that should be assessed on a standard of correctness due to the principle that a statutory body cannot confer jurisdiction upon itself. See: *Cooper v. Canada (Human Rights Commission)* (supra).

[para64] Notwithstanding that proposition, in view of the implicit determination of this issue by Lamperson J. in *Kelowna (City)*, I am not prepared to say that a correctness standard should be imposed upon the non-adjudicative fact finding role of the Commission especially when it is not

required by s. 27(3) of the present Code to give reasons for assumption as opposed to refusal of jurisdiction.

[para65] It seems to me that as a practical matter to impose a standard of correctness at the gatekeeper level could require judicial review at a time when the court would not have sufficient evidence to determine whether the investigative as opposed to adjudicative facts necessary were available to it allow an informed decision on jurisdiction.

(f) Has the Tribunal Lost Jurisdiction Over the Subject Matter of Ms. Nixon's Complaint Due to Delay?

[para66] The petitioner submits that a delay of sixty-one months from the date which Ms. Nixon filed her complaint under the 1984 Act until Mr. Gilese referred the complaint to the Tribunal is inexcusable and that I should stay the hearing of the complaint because of severe prejudice allegedly suffered by the petitioner and its members due to that delay. The petitioner relies upon *Blencoe v. British Columbia (Human Rights Commission)*, [1998] B.C.J. No. 1092 (B.C.C.A.); *NLK Consultants Inc. v. British Columbia (Human Rights Commission)*, [1999] B.C.J. No. 380 (B.C.S.C.); and *Nulla Bona*

Holdings Ltd. v. British Columbia (Human Rights Commission), [2000] B.C.J. No. 1458, unreported B.C.S.C. Kelowna Registry

docket No. 46411, February 10, 2000.

[para67] Blencoe was a split decision of the British Columbia Court of Appeal in which Lambert J.A. dissented. McEachern C.J.B.C. and Prowse J.A. for the majority held that a delay of 30 months in the bringing of several sexual harassment complaints to a hearing before the Tribunal constituted a breach of Mr. Blencoe's rights under s. 7 of the Canadian Charter of Rights and Freedoms (the Charter). Chief Justice McEachern said (at paragraph 105):

Courts of law have developed an extensive jurisprudence surrounding the determination of unreasonable delay in the context of criminal proceedings. Nothing that I say in this case should be taken to suggest that this jurisprudence must now be applied in the human rights context in all cases. In my view, the delay in this case is so excessive when weighed against the seriousness of the charge and the simplicity of the issues that it could never be viewed as reasonable under any test. An analysis of the precise scope of the test for unreasonableness should be left for a case which is not as clear cut as this one and which requires a more principled approach.

[para68] In NLK Consultants, J.T. Edwards J. held that a delay of approximately four and one-half years in the processing and investigation of a complaint of sexual discrimination was unreasonable compared to other cases and that NLK Consultants Inc. was prejudiced and denied its right to natural justice. Edwards J. applied Blencoe notwithstanding that no Charter rights were involved since the respondent NLK Consultants Inc. was a corporation.

[para69] In Nulla Bona Holdings Ltd., Cole J. held that a delay of 39 months in the processing and investigation of a complaint that the complainant's employment was terminated due to her pregnancy was unreasonable in the circumstances of that case.

[para70] The petitioner submits that since the delay in this case is longer than that considered in Blencoe, NLK Consultants, and Nulla Bona Holdings the same result should follow. It also submits that in addition to inferred

prejudice arising from the institutional delay, it has suffered actual prejudice arising from the death of an important witness and inability to locate another witness. It

says further that its members are prejudiced in that their reputations as persons who support human rights have been tarnished by Ms. Nixon's unresolved complaint.

[para71] As I have previously noted, the delay in the processing and investigation of Ms. Nixon's complaint is attributable to institutional delay arising from a backlog of cases before the Commission, its failure to process those cases expeditiously and lack of resources. I am not, however, satisfied that in all of the circumstances of this case it is appropriate to direct a judicial stay of further proceedings before the Tribunal.

[para72] In my opinion the reasoning in Blencoe is not directly applicable in this case because it was specifically decided on the basis of Charter principles which do not arise in this case. In addition, Blencoe involved allegations against an individual, which were quasi-criminal in nature (characterized as "tantamount to sexual assault") which had resulted in enormous publicity and the destruction of Mr.

Blencoe's political career.

[para73] I am also satisfied that both NLK Consultants and Nulla Bona Holdings are factually very different from the circumstances in this case. Although both cases did involve findings of inferred prejudice arising from delay, the applicants in each case had also both suffered demonstrable and substantial actual prejudice arising from the loss of crucial evidence due to delay. In my view, neither NLK Consultants nor Nulla Bona Holdings intended to establish that any particular length of delay constitutes inferred prejudice requiring that a judicial stay must be entered.

[para74] I am satisfied that the factual circumstances of this case are sufficiently different from those in Blencoe, NLK Consultants, and Nulla Bona Holdings that it would not be appropriate to prohibit the Tribunal from adjudicating upon Ms. Nixon's complaint. I say that because:

- (a) the petitioner has not established actual prejudice arising from lost evidence either in relation to a deceased witness, the inability to locate a witness or the effluxion of time;
- (b) unlike in NLK Consultants and Nulla Bona Holdings, the evidentiary issues raised by the petitioner

in this case are peripheral to the primary evidentiary concerns, i.e. what was said to Ms. Nixon by the petitioner's trainer (who is available to give evidence and who has not alleged she has suffered any failed memory) on August 29, 1995;

DAVIES J.

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(c) in the event that what now appear to be peripheral evidentiary issues do become significant issues when the Tribunal hears the complaint the Tribunal will be better able to assess the extent to which the petitioner may in fact be prejudiced in its defence and retains the jurisdiction to enter a stay if it is necessary and appropriate to do so because of actual prejudice;

(d) the petitioner acknowledges that its policy of refusing to allow women who were not born women continues to exist so that the same issue could immediately again arise for consideration by the Commission and Tribunal even if a stay of Ms. Nixon's existing complaint was entered;

(e) unlike the circumstances considered in Blencoe, NLK Consultants, and Nulla Bona Holdings in which the respondents deny the factual basis for the allegations of discrimination, the petitioner in this case relies upon a defence of justification arising from the group rights exemption approval granted for its women only hiring policy in 1977; and

(f) I fail to see how an argument concerning alleged prejudice to the petitioner or its members as an organization and individuals supportive of human rights can arise in the circumstances of an ongoing policy which they say is justified by the nature of the petitioner's objectives.

[para75] In all of the circumstances of this case and most particularly because of the existence of its ongoing policy which it justifies on human rights principles, I am satisfied that the petitioner has not established that it has been so prejudiced by the institutional delay in this case that it has been deprived of natural justice.

CONCLUSION

[para76] The petitioner's application for an order prohibiting the Tribunal from proceeding to hear Ms. Nixon's complaint either for lack of jurisdiction over the subject matter of the complaint or for loss of jurisdiction due to delay is dismissed.

APPENDIX B

OPPRESSION OF TRANSGENDERED PEOPLE

WHEREAS, the National Organization for Women (NOW) has worked for the elimination of all forms of oppression in our society targeted at groups who are systematically mistreated; and

WHEREAS, the [transgendered and transsexual communities](#) confront oppression daily and are systematically mistreated because of artificial gender constructs in our society; and

WHEREAS, there is a lack of understanding and information on issues affecting transgendered and transsexual people; and

WHEREAS one of NOW's goal is to eliminate all sex stereotypes including so-called gender roles; and

WHEREAS, NOW affirms and honors the right of people to self-identify; and

THEREFORE, BE IT RESOLVED, that NOW and its subunits encourage education and dialogue within NOW and with other organizations on gender and sex stereotypes, including the issues of those who are transgendered and transsexual people; and

BE IT FURTHER RESOLVED that NOW reaffirm its commitment to ending all sex and gender stereotypes; and

BE IT FINALLY RESOLVED that we acknowledge that gender is a patriarchal social construct used to oppress women.

Appendix C

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