April 23rd, 2009

Gender Reassignment Surgery, Human Rights, and the Minister

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Legislation Considered:

Human Rights, Citizenship and Multiculturalism Act, R.S.A. 2000, c.H-14

When the Alberta government introduced its budget on April 7, 2009, one of its cuts was to de-insure new gender reassignment surgeries. According to the CBC, "[t]he province had funded a maximum of 20 gender reassignment surgeries [GRS] annually; the cut is expected to save the government about $700,000 a year." The CBC also reported that a number of human rights complaints were filed by transgendered persons on April 15, 2009, alleging that the cut amounts to discrimination on the basis of gender identity contrary to Alberta's *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 2000, c.H-14 ("*HRCMA*"). In response to a question about whether an Ontario case where a similar cut was found to violate human rights legislation would serve as a precedent in Alberta, Lindsay Blackett (Minister of Culture and Community Spirit) is said to have made the following comment: "We have a slightly different process, and we have slightly different value systems and a way of thinking in Alberta, and since most of the people on our commission are from Alberta, they may look at it a little differently then Ontarians do." Blackett's reported comment is disturbing on a number of grounds.

First, as the Minister of Culture and Community Spirit, Blackett is the Minister responsible for human rights legislation in this province. Human rights processes are required to be independent of government (see the UN Principles relating to the Status of National Institutions (The Paris Principles), which guarantee the independence of national human rights institutions). While it is unclear whether Blackett's comment justifying the de-listing of GRS would meet the legal test for interference with administrative independence, the remark is still troubling. For example, will members of the Human Rights and Citizenship Commission be fearful that their salaries will be in jeopardy if they permit these complaints to proceed to a hearing, given that remuneration for the chief commissioner and other members of the Commission are prescribed by the Minister (see s. 15(4) *HRCMA*))? What does Blackett's statement portend for the Alberta government's current review of our human rights legislation, and the argument that discrimination on the basis of being transgendered should be included in proposed amendments to the *HRCMA*?

Second, Blackett's comment suggests that there is a "different value system" and "way of thinking" in Alberta. This suggestion of some sort of monolithic Alberta value system runs contrary to the *HRCMA* itself, the preamble of which provides:

> it is recognized in Alberta as a fundamental principle and as a matter of public policy that all Albertans should share in an awareness and appreciation of the diverse racial and cultural composition of society and that the richness of life in Alberta is enhanced by sharing that diversity…

To the extent that we do have a common value system in Alberta, wouldn't the independence of the Human Rights Commission from the influence of government - the rule of law itself - be one of those values (see *Roncarelli v. Duplessis*, [1959] S.C.R. 121)?

Third, even if there is a relatively conservative mindset in this province compared to some others (like Ontario), this is precisely why we have human rights legislation. Individuals who belong to minority or disadvantaged groups, such as the transgendered (who, it must be said, are not themselves a monolithic group), require the protection of human rights legislation to ensure that they are not subjected to the tyranny of the majority. Again, the preamble of the *HRCMA* is instructive:

> it is recognized in Alberta as a fundamental principle and as a matter of public policy that all persons are equal in: dignity, rights and responsibilities without regard to race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income or family status … (emphasis added).

"Gender" (or "sex") has been held to include gender identity for the purposes of human rights legislation in other provinces (see e.g. *Vancouver Rape Relief v. British Columbia (Human Rights Commission*), 2000 BCSC 889 (CanLII)). In the Ontario case where the delisting of GRS was found to contravene human rights legislation, gender identity disorder was found to be a disability protected by the legislation (see *Hogan v. Ontario (Health and Long-Term Care*), 2006 HRTO 32 (CanLII)). In Alberta, it appears that the Commission accepts complaints made on the basis of being transgendered even though this ground is not explicitly included in the *HRCMA* (see *Skeffington v. Alberta (Human Rights and Citizenship Commission*), 2006 ABQB 776). Therefore, discrimination in the areas of employment, housing, and public services in the province (including, one would assume, the delivery of health care services) is likely prohibited on the ground of being transgendered in Alberta.

This is not to refute the argument that transgender identity should be explicitly included in the *HRCMA*. Rather, my contention is that it appears that the "values" described by the Minister, to the extent they exist, are not consistent with the current state of the law in Alberta.