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A Vital Judgment: Upholding Transgendered Rights in Alberta

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Case commented on: *C.F. v Alberta*, 2014 ABQB 237 (CanLII)

Alberta's Director of Vital Statistics interpreted her home statute, the *Vital Statistics Act* (RSA 2000, c V-4 (Old *VSA*), later repealed and replaced by SA 2007, c V-4.1 (New *VSA*)) in a way that required transgendered people to have genital reconstructive surgery in order to be eligible to have the sex on their birth certificate changed. C.F., a trans female, challenged this interpretation as contrary to her rights under sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* (*Charter*). In a ground breaking decision released on April 22, 2014, Justice B.R. Burrows of the Alberta Court of Queen's Bench found in favour of C.F. and ordered the Director to issue her a new birth certificate. The Alberta government has included amendments to the *Vital Statistics Act* in section 9 of Bill 12, the *Statutes Amendment Act, 2014*, which was introduced in the legislature on May 5, 2014.

Facts and Arguments

C.F. was born physically male, but believed herself to be female during her childhood years. As an adult, she transitioned to living as a female, and legally changed her name in June 2011 to reflect this. The Director of Vital Statistics issued a birth certificate with C.F.'s new name, but it still reported her sex as "male". C.F. sought to have her birth certificate changed, but was advised that section 22 of the Old *VSA* required that "her anatomical sex structure be surgically changed from male to female and that two physicians depose in affidavits that such a change had taken place" before such an alteration could be made (at para 5). C.F. was "perfectly content with the anatomical sex structure she was born with" (at para 8), and relied on section 24(3) of the Old *VSA* for the change to her birth certificate, which provided that:

> 24(3) If, after a registration has been received or made by the Director, it is reported to the Director than an error exists in the registration, the Director shall inquire into the matter and, on the production of evidence satisfactory to the Director verified by statutory declaration, the Director may correct the error by making a notation of the correction on the registration without altering the original entry.

Error was defined in section 1(i) of the Old *VSA* to mean "incorrect information, and includes the omission of information."

In December 2011, C.F. submitted a statutory declaration with her section 24(3) application which attested to her lived identity as a female. She also submitted a letter from a psychiatrist specializing in transgenderism which confirmed that C.F. "has undergone a transformation to being full time in the female gender role for the rest of her life" (at para 12). In her written submissions, C.F. argued that the designation of her sex on her birth certificate as "male" was incorrect information, constituting an error that the Director should correct (at para 13).

The Director rejected C.F.'s application in March 2012 on the basis that "The sex indicator on your birth registration was completed based on evidence of your anatomical sex. As the registration documents are completed directly after birth, the sex indicator was completed indicating male based on the evidence at the time, and an error did not occur" (at para 14). The Director indicated that an application under section 22 of the Old *VSA* following genital surgery would be required in order to change the sex on C.F.'s birth certificate. It should be noted that under the New *VSA*, section 30 also requires genital surgery before a transgendered person is entitled to a change to their birth registration; section 60 continues to provide the Director with discretion in the case of "errors."

C.F. brought an application for judicial review and *Charter* relief, arguing that the Director's decision violated her rights under sections 7 and 15(1) of the *Charter* (as well as making some procedural fairness arguments).

Section 7 of the *Charter* protects the rights to life, liberty and security of the person. C.F.'s argument here was that the Old *VSA* and the Director's interpretation of the Act "deprived her of liberty and security of the person by making it impossible for her to have an accurate birth certificate unless she submitted to unwanted and potentially dangerous surgery" (para 19). The Court noted that this argument was not pursued in written or oral submissions, but nor was it formally abandoned (C.F. apparently was not represented by counsel at the QB hearing).

Section 15(1) is the *Charter*'s equality rights provision. C.F.'s argument under this section was that the Old *VSA* and the Director's interpretation of the Act discriminated against trans people, who are "forced to have birth registrations that do *not* reflect their lived sex unless they submit to Genital Surgery" (at para 20, emphasis in original). C.F. submitted that this amounted to discrimination on the combined grounds of sex, mental or physical disability, gender identity, and trans status.

In its response, the Director argued that the Old *VSA* not discriminatory, rather it provided a benefit to a disadvantaged group, i.e. transgendered persons who had undergone genital surgery. The Director relied on section 15(2) of the *Charter*, which permits governments to establish ameliorative programs targeted at disadvantaged groups and thereby avoid claims of discrimination by other groups. The Director did not rely on section 1 of the *Charter*, which allows reasonable limits on *Charter* rights that are demonstrably justifiable in a free and democratic society.

Decision and Commentary

In his decision, Justice B.R. Burrows focused on the section 15 issues raised by C.F. and the government. He quickly dismissed the Director's section 15(2) argument, finding that section 22 of the Old *VSA* and the accommodation it provides to transgendered persons who have genital surgery "is entirely irrelevant to transgendered persons, like C.F., who do not so wish or who are not so willing" (at para 28). Rather, the discrimination "results from the birth registration system

not recognizing or accommodating the fact that [C.F.] has transitioned and is now female" (at para 28).

Though he did not cite the leading cases on section 15(2) of the *Charter* in this part of his decision, Justice Burrows' reasons are largely in line with *R. v. Kapp*, 2008 SCC 41, [2008] 2 SCR 483 and *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, 2011 SCC 37, [2011] 2 SCR 670. These cases provide that if a section 15(1) claimant can prove an adverse distinction based on a protected ground, the government then has an opportunity to argue that the distinction is "saved" by section 15(2) on the basis that it is an ameliorative program targeted at a disadvantaged group (*Cunningham* at paras 43-44). According to *Cunningham*, even programs that are underinclusive of particular disadvantaged groups can be saved by section 15(2), provided that the programs are truly ameliorative in purpose, and the exclusion of the claimant group "serves or advances" the ameliorative goal (at para 45). In other words, section 15(2) "permits governments to assist one group without being paralyzed by the necessity to assist all, and to tailor programs in a way that will enhance the benefits they confer while ensuring that the protection that s. 15(2) provides against the charge of discrimination is not abused for purposes unrelated to an ameliorative program's object and the goal of substantive equality" (at para 49). In *Cunningham*, the exclusion from Métis settlement legislation of Métis persons who were also registered as Indians was found to serve and advance the purpose of that legislation, which was to "[establish] a Métis land base to preserve and enhance Métis identity, culture and self-governance, as distinct from surrounding Indian cultures and from other cultures in the province" (at para 62; for a critique see Jonnette Watson Hamilton and Jennifer Koshan, "The Supreme Court of Canada, Ameliorative Programs, and Disability: Not Getting It" (2013) 25(1) Canadian Journal of Women and the Law 56-80, available here).

Justice Burrows did not consider whether there was a distinction based on a protected ground before considering section 15(2). But apart from that analytical oversight, his decision that the government could not rely on section 15(2) seems correct. Even if section 22 of the Old *VSA* could be seen to have an ameliorative purpose in that it provides post-operative transgendered persons with the benefit of having their birth certificates changed, it is difficult to see how the exclusion of those trans persons who are unwilling to have surgery could "serve or advance" this benefit, as required by *Cunningham*. This is not the sort of case where the government would be "paralyzed by the necessity to assist all", given that applications by transgendered persons to change their birth registration are likely rare and relatively low-cost. Nor was the exclusion of trans people in C.F.'s position needed "to tailor programs in a way that will enhance the benefits they confer." It could also be argued that the *VSA* is the sort of "broad societal legislation" to which section 15(2) was not intended to apply (see *Kapp* at para 55). The issue was not with section 22 in isolation, but with the overall failure of the *VSA* regime to allow C.F. and others like her to change their birth certificates.

Turning to section 15(1), Justice Burrows set out the two part test for discrimination from *Kapp*:

> (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? (*CF* at para 30, citing *Kapp* at para 17).

In his analysis of step one of the *Kapp* test, Justice Burrows relied on a recent decision of the Ontario Human Rights Tribunal considering a similar regime for changing birth certificates in Ontario. In *XY v. Ontario (Minister of Government and Consumer Services)*, [2012] OHRTD No 715, 2012 HRTO 726, the Ontario government had conceded that the regime requiring genital

surgery drew a distinction based on disability, sex, or both grounds. At the time of the case, Ontario had not yet amended its human rights legislation to include gender identity as a protected ground (see *Human Rights Code*, RSO 1990, c H.19, amended SO 2012, c 7, s 1). The Ontario Human Rights Tribunal held that in light of the government's concession, it was clear that transgendered persons were protected under the *Code*, and that it need not determine whether that was on the basis of sex and/or disability. It cited a number of cases supporting the conclusion that transgendered persons are protected on either or both of those grounds (at para 88, citing *Hogan v. Ontario (Health and Long-Term Care*), 2006 HRTO 32 (CanLII), (Gender Identity Disorder found to be "disability"); *Vancouver Rape Relief v. BC Human Rights*, 2000 BCSC 889 (CanLII) at para 59, as cited in *Hayes v. Barker*, [2005] BCHRTD No. 590, at para 31-32 (sex); *MacDonald v. Downtown Health Club for Women*, 2009 HRTO 1043 (CanLII) (sex); *Kavanagh v. Canada (Attorney General)*, [2001] CHRD No. 21 at para 135 (sex and disability); *Sheridan v. Sanctuary Investments Ltd. (c.o.b. B.J.'s Lounge)*, [1999] BCHRTD No. 43 at para 97 and 110 (sex and disability)).

Justice Burrows noted that while there was no similar concession by Alberta in this case, he had no difficulty finding that the *VSA* birth registration regime treated transgendered persons differently than non-transgendered persons, as well as from transgendered persons willing to undergo genital surgery. Persons in the claimant group were prevented from obtaining a birth certificate that reflected their lived sex. This was found to be a distinction based on sex, or, "if "sex" … is interpreted so narrowly as to exclude the characteristics of transgendered persons that make them transgendered, then, at very least, the distinction is made on a ground analogous to sex" (at para 39).

It is unfortunate that Justice Burrows did not take the next step and formally recognize gender identity or status as a transgendered person as an analogous ground for the purposes of section 15 of the *Charter*. Analogous grounds are those that reflect personal characteristics that are "immutable or changeable only at unacceptable cost to personal identity" or that "the government has no legitimate interest in expecting us to change to receive equal treatment under the law." See *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, 1999 CanLII 687 at para 13 (SCC), [1999] 2 SCR 203. It was not open to the Ontario Human Rights Tribunal to take this step in the *XY* case, since human rights legislation only protects specifically listed grounds of discrimination and not grounds analogous to those, as section 15 of the *Charter* does. Although the failure to explicitly recognize gender identity did not undermine C.F.'s claim, it may mean that transgendered persons must continue to rely on sex and/or disability to mount claims of discrimination under the *Charter*. Disability in particular can be a difficult ground to bring forward in this context. As noted in *XY* (at para 5), many transgendered persons do not see their gender identity as a disability, yet they must rely on the grounds available to them where gender identity has not been recognized as a protected ground.

In addition, Justice Burrows' characterization of the claimant group as "transgendered persons" could be seen as a bit too broad, since their comparison to "transgendered persons willing to undergo genital surgery" reveals that the distinction is actually drawn on the basis of willingness to have surgery. Nevertheless, since *Withler v Canada (Attorney General)*, 2011 SCC 12, [2011] 1 SCR 396, a mirror comparator analysis is no longer required in section 15(1) cases. It is clear that transgendered persons in the position of C.F., who wish to have their birth certificates reflect their true gender identity without surgery, are treated differently and disadvantageously under the *VSA* regime.

As for the second part of the test for section 15(1), Justice Burrows noted that "the focus should be on the impact of the impugned law on the "human dignity" of the group alleged to have been treated unequally" (at para 32). This is incorrect – in *Kapp*, the Court abandoned human dignity as the focal point for discrimination, noting the problems that focus had caused in section 15(1) claims (at para 22). But Justice Burrows' subsequent analysis of step 2 does not actually focus on human dignity, but rather on prejudice and stereotyping, the actual focal points in *Kapp*.

Here, Justice Burrows referred to affidavit evidence from a psychiatrist, Dr. Dan Karasic, which established the "the disadvantage, vulnerability, stereotyping, and prejudice suffered by transgendered persons" (at para 40). Dr. Karasic's evidence also indicated that the great majority of transgendered persons do not have genital surgery, due to difficulties in access as well as personal preferences. Lastly, he spoke to the importance of having access to legal documents reflecting a transgendered person's lived sex in terms of reducing risks of violence, harassment and discrimination (at paras 42-45).

The evidence of C.F. substantiated much of the expert evidence. The treatment she received at the hands of the government was described by Justice Burrows as "insensitive at best" (at para 48). He noted how C.F. was required "to discuss her status as a transgendered person and the state of her genitalia with strangers", or as C.F. put it, "transgendered people's genitals are essentially a form of public property; it's open to anybody to ask about them, because they are what defines somebody's sex, according to Alberta" (at para 49). Not having an accurate birth certificate also prevented C.F. from obtaining an accurate passport, which adversely affected her employment situation.

The response of the Director to C.F.'s evidence and submission (at para 52) was called "remarkable" by Justice Burrows (at para 53); the word "paternalistic" also comes to mind:

> In response, Alberta states that giving a transgendered person an official government document with a sex designation which is dissonant with their gender identity does not convey any message about the validity of a person's gender identity – it simply reflects known facts determined at birth. … Changing the facts as known and recorded at birth to reflect a subsequently developed gender identity would send the message that there is something shameful about a birth sex that is inconsistent with a gender identity, and in need of correction, when the inconsistency is in fact an integral part of the transgendered person's identity. In short, altering the birth record to conform to a subsequently developed gender identity sends the message that transgendered people need to hide (or need to be ashamed of) their true identity as transgendered persons who identify with the opposite sex.

As noted by Justice Burrows, this response sends the message to transgendered people "that the prejudice, stereotyping and vulnerability they feel either do not exist or are insignificant", and "that though their fellow human beings are all either male or female … they should fearlessly "come out" as members of a third sex … and expect to be accepted without question" (at para 56). He found that the *VSA* birth registration regime thereby perpetuated the prejudice and stereotyping experienced by transgendered persons, and amounted to discrimination contrary to section 15(1) of the *Charter*.

Justice Burrows' decision does not cite the latest Supreme Court authority on section 15(1), *Quebec (Attorney General) v A*, 2013 SCC 5, [2013] 1 SCR 61, where a majority of the Court called into question whether prejudice and stereotyping should still be seen as crucial markers of

discrimination requiring proof in every section 15 case (at para 325 per Abella J; for ABlawg commentary see here). But this omission was not critical to the outcome of *C.F. v Alberta*, as this was a case where prejudice and stereotyping could clearly be shown. It is interesting to note, however, that there was also evidence of the historical disadvantage experienced by transgendered persons in *C.F.* (at para 46), and the perpetuation of this disadvantage could have been seen as an alternate means of finding discrimination in this case on the basis of *Quebec v A*.

In terms of remedies, Justice Burrows held that to the extent the *VSA* did not permit C.F. to obtain a birth certificate consistent with her lived sex, it was inconsistent with the *Charter* and was of no force or effect. He also granted C.F. a personal remedy under section 24(1) of the *Charter*, ordering the Director of Vital Statistics to issue C.F. a birth certificate recording her sex as female within 30 days of the judgment (at paras 64-65).

As noted above, the Alberta government introduced an amendment to the *Vital Statistics Act* in Bill 12, the *Statutes Amendment Act, 2014*, on May 5, 2014. Section 9 of Bill 12, which is expected to pass this week, would add the following section to the *VSA*:

> **30 (1.1)** The Registrar may, in a circumstance provided for in the regulations and subject to any conditions in the regulations, amend the sex on the person's record of birth and may, with the consent of the other party to the marriage, amend the sex on the record of a subsisting marriage, if any, of the person that is registered in Alberta.

Although the scope of the regulations is still to be seen, this section appears to do away with the requirement of an error before the Registrar can exercise his or her discretion to change the birth certificate of a transgendered person. According to Government House Leader Robin Campbell, who spoke to the amendment at Second Reading on May 6:

> Changes to the Vital Statistics Act will allow changes to the requirement for individuals to amend their sex indicator on birth records and birth certificates in a manner which is seen as less discriminatory. Service Alberta has been actively monitoring changes in other jurisdictions and collaborating with the Vital Statistics Council for Canada on this issue. The proposed amendments will authorize the creation of regulations to allow a change of sex identifiers on birth records or certificates. While the regulations are being revised, requests for a change of sex on a birth certificate from transgendered individuals will be addressed on a case-by-case basis to accommodate those individuals who have not had sex reassignment surgery. This change shows our government's commitment to addressing this issue while allowing time for consultation and analysis to ensure that we are getting it right. (Alberta Hansard, May 6, 2014 at 736).

Conclusion

The *C.F.* case is an important victory for transgendered persons in Alberta wishing to change their birth registration without undergoing genital surgery. More broadly, the recognition that distinctions drawn on the basis of being transgendered amount to distinctions based on sex and that transgendered persons face historic disadvantage will also be useful for cases pending under the *Alberta Human Rights Act*, RSA 2000, c A-25.5. As noted above, it would have been

preferable for *Charter* purposes if Justice Burrows had recognized gender identity as an analogous ground. But under the *Alberta Human Rights Act*, gender identity is not yet explicitly protected, so claimants must rely on gender (or disability) as the relevant ground. The Alberta Human Rights Commission has signaled that it will accept complaints of discrimination on the basis of gender identity under the ground of gender, and there is a case currently before the Commission involving a claim by a transgendered person of employment discrimination (See *Greater St. Albert Roman Catholic Separate School, District No. 734 v Buterman*, 2014 ABQB 14, confirming the Chief Commissioner's decision to send this claim to a tribunal hearing).

There is a wonderful line from Justice Sheila Greckol in the *Buterman* case that is a pertinent way to close this post: "Human rights process is not only for the lion-hearted and well-heeled conversant with litigation, but also for the timorous and impecunious — for all Albertans." (2014 ABQB at para 184). The fact that C.F. successfully asserted a difficult rights claim under the *Charter* while self-represented makes her victory all the more remarkable.

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