

MANITOBA HUMAN RIGHTS BOARD OF ADJUDICATION

BETWEEN:

T.A.

Complainant,

-and-

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

Respondent,

Appearances:

T.A., Complainant

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

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

Leslie Turner, Counsel for the Respondent

DAN MANNING, adjudicator:

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 9(2)(g): “Gender Identity”

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Discrimination Analysis

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

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

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

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

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

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

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

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

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

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

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

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

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

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

And at paragraph 10:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

the birth certificate there is no “differential treatment” and therefore no discrimination.

45. With respect, this argument confuses the issue to be decided. The issue is whether the practice of the respondent in not providing non-binary sex designations discriminates against the complainant based on the protected ground of sex and gender identity. The *effect* of this practice is that non-binary individuals are either denied a birth certificate or denied an accurate birth certificate. In my view section 9 of the *Code* is consistent with the conventional approach to applying human rights legislation that has developed in the case law.

46. The conventional approach requires a tribunal to decide at the outset into which of two categories the case falls: “direct discrimination”, where the standard is discriminatory on its face, or “adverse effect discrimination”, where the facially neutral standard discriminates in effect. The Supreme Court of Canada in *Ontario (Human Rights Commission) v. Simpson-Sears Ltd.*, [1985] S.C.J. No. 74 (“*O’Malley*”) clarified this approach. At paragraph 18 the McIntyre J. wrote:

... Direct discrimination occurs in this connection where an employer adopts a practice or rule which on its face discriminates on a prohibited ground. For example, "No Catholics or no women or no blacks employed here." There is, of course, no disagreement in the case at bar that direct discrimination of that nature would contravene the Act. On the other hand, there is the concept of adverse effect discrimination. It arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force. For essentially the same reasons that led to the conclusion that an intent to discriminate was not required as an element of discrimination contravening the Code I am of the opinion that this Court may consider adverse effect discrimination as described in these reasons a contradiction of the terms of the Code. An employment rule honestly made for sound economic or business reasons, equally applicable to all to whom it is intended to apply, may yet be discriminatory if it affects a person or group of persons differently from others to whom it may apply.

Issue Three: Has a prima facie case of discrimination been established?

47. As mentioned earlier, the complainant bears the onus to establish that the respondent denied them a service which they otherwise provide to the public and that gender identity and sex was a factor in that decision.
48. In my view the respondent discriminated against the complainant by denying them a gender congruent birth certificate. This is a service otherwise offered to people who identify as male or female. The complainant's gender identity and sex, as they intersect, was a factor in this discrimination.
49. Although T.A. did not attempt to change their sex designation. T.A. testified that they did not move forward with the application because:
- “Neither of those [male or female designations] was acceptable to me, so I did not wish to go through the process and pay the fee, only to be issued a document that still contains incorrect information, and therefore not be useful to me, and would continue to perpetuate the same problems that I have in carrying gender incongruent documents, or sex incongruent documents.”
50. The fact that T.A. did not proceed with a hopeless application does not alter the analysis. To put it concretely, a business that posts a sign that says, “No Irish Need Apply” cannot claim there was no discrimination because in fact, no Irish person applied.
51. The respondent's practice of only providing “male” or “female” sex designations on a birth certificate meant that T.A., and other non-binary individuals cannot get a gender congruent birth certificate. I am of the view that the policy of the respondent constitutes systemic direct discrimination. Effectively, the respondent's policy amounts to a statement that “non-binary” individuals need not apply (for a birth certificate).
52. But for the non-binary gender identity of the complainant a gender congruent birth certificate would have been issued by the respondent. I do not go so far, however, as to impute the existence of some overt stereotype or prejudice to the respondent impugned practice. However, in my view, the *Code* protected

characteristics of the complainant were a factor in the discrimination. (See *Stewart v. Elk Valley Coal Corporation*, [2017] S.C.J. No. 30).

53. I find that the complainant has made out a *prima facie* case of discrimination. The next step in the analysis is to consider whether *bona fide* and reasonable cause exists for the discrimination.

54. The Supreme Court of Canada has provided the following framework to determine whether *bona fide* and reasonable justification exists for this discrimination. The analysis requires me to consider if the respondent's policy is:

- (1) For a purpose or a goal that is rationally connected to the provision of the service
- (2) Adopted in good faith, in the belief that it is necessary for the fulfillment of a legitimate service-related purpose or goal; and
- (3) Reasonably necessary to accomplish the legitimate service-related purposes.

(See *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union*, [1999] 3 S.C.R. 3 ("Meiorin") and *British Columbia (Superintendent of Motor Vehicle) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868. ("Grismer"))

55. The respondent submits that the legislative requirement to display a sex designation pursuant to section 32(3) amounts to a *bona fide* and reasonable justification. The respondent's position is that the Director was not permitted either expressly by the *Act* or through interpretation of the *Act* to provide either no sex designation or an "X" sex designation.

56. The respondent argues that a proper interpretation of the word "sex" in the *VSA* is not reasonably capable of multiple interpretations. It refers to the strictly physiological, essential, concept of sex. It excludes any notion of gender identity or gender expression. They point to the definition of the term "sex" in the various dictionaries in support and to the United Nations Recommendations for a Vital Statistics System report. The respondent also relies on the well-known principles

of statutory interpretation as developed in the caselaw. (*Rizzo & Rizzo Shoes Ltd (RE)*, [1998] 1 S.C.R. 27; *Manitoba Housing v. Amyotte et al*, 2014 MBCA 54 in support of their argument. Any suggestion that the phrase “sex of the person” as it appears in section 32(2) of the *VSA* can be expanded to encompass the “social constructs of gender or gender expression” would result in the absurd scenario of the respondent being required to register the gender identity of newborn Manitobans. This interpretation must be avoided. The respondent submits the Agency’s actions were justified because they were simply following the legislation.

57. I disagree with the narrow definition of “sex” as it appears in the *Act* as advanced by the respondent. The difficulty with the respondent’s argument is that the *Act* refers to more than just “sex”. It also refers to “sex designation” under section 25 of the *Act*. The obvious legislative intent under section 25 of the *Act* is to provide a *choice* for an applicant to change their sex on their birth certificate and birth registration irrespective of their physiological sex.

58. Section 25(5) and 25(8) list the forms and requirements that must be completed for the director to consider a change of sex designation. There is no longer a requirement to prove transsexual surgery. An applicant must provide a statutory declaration to the director that they identify with the requested sex designation and that they are currently living full-time in a manner consistent with the requested sex designation and intend to continue to do so.² A supporting letter from a health care professional must be included that requires, among other things, a statement that they are of the opinion that the sex designation request is consistent with the sex designation with which the applicant identifies.³

59. If the director accepts the applicant’s application, that change will be reflected on any future birth certificates that are issued under section 32(3)(d) of the *Act*. The new “sex designation” permitted under section 25 becomes the “sex of the person whose birth is registered” on the certificate under section 32(3)(d).⁴

² Section 25(7)

³ Section 25(8)(c)

⁴ Section 25.1(2)

60. I interpret the phrase “sex designation” to refer not to the actual biological sex of the applicant, but rather a designation, category or marker, such as “Male” or “Female”. I also interpret section 25 as providing a choice to applicants to select a sex designation that aligns with their gender identity. It does not refer to the physical, physiological fact of the applicant’s biological sex.

61. Section 32(3) requires a birth certificate to contain the sex of the person whose birth was registered. For almost everyone born in Manitoba, who identify with their biological sex, this will accurately reflect individual’s sex and gender identity. For those for whom the sex designation does not reflect their gender identity, section 25 allows applicants to choose to have a different “sex designation” or marker listed on their birth certificate pursuant to section 32(3).

62. The *Act* does not limit or define what “sex designations” are available. In my view the appropriate interpretation must recognize non-binary sex designations. Read this way, the *Act* remains internally consistent and in harmony with the important human rights protections afforded by the *Code*. In my view this interpretation is the most plausible and compliant with the legislative text and is reasonable and just.

63. No evidence was presented to me that the denial of providing an “X” designation would frustrate the legitimate service-related purposes of the VSA and the Agency and its role in providing important vital statistics information to other agencies. Nor was any evidence proffered that established that the respondent would face undue hardship if they were required to accommodate non-binary sex designations.

64. Therefore, I find that the respondent has failed to reasonably justify discrimination.

Remedy

65. Section 43 provides jurisdiction to make a remedial order. Section 43 reads:

43(2) Where, under subsection (1), the adjudicator decides that a party to the adjudication has contravened this Code, the adjudicator may order the party to do one or more of the following:

- (a) do or refrain from doing anything in order to secure compliance with this Code, to rectify any circumstance caused by the contravention, or to make just amends for the contravention;
- (b) compensate any party adversely affected by the contravention for any financial losses sustained, expenses incurred or benefits lost by reason of the contravention, or for such portion of those losses, expenses or benefits as the adjudicator considers just and appropriate;
- (c) pay any party adversely affected by the contravention damages in such amount as the adjudicator considers just and appropriate for injury to dignity, feelings or self-respect;
- (d) pay any party adversely affected by the contravention a penalty or exemplary damages in such amount, subject to subsection (3), as the adjudicator considers just and appropriate as punishment for any malice or recklessness involved in the contravention;
- (e) adopt and implement an affirmative action program or other special program of the type referred to in clause 11(b), if the evidence at the hearing has disclosed that the party engaged in a pattern or practice of contravening this Code.

43(3) The amount of a penalty or exemplary damages ordered by an adjudicator under clause (2)(d) shall not exceed the maximum fine to which the contravening party would have been liable under subsection 51(1) as a result of a prosecution for the contravention.

Section 43(2)(a) : Do or refrain from doing anything in order to secure compliance

66. With regards to 43(2)(a) the complainant and Commission request the following:

- i. That there be an order requiring the Agency to allow the issuance of a birth certificate without a sex designation or in the alternative, they seek an amended birth certificate with a sex designation that specifies “X” or “inapplicable.”
- ii. That the respondent immediately cease their practice of requiring Manitobans to have only a binary or male or female sex designation on their birth certificate, and that the respondent develop an interpretation guide or policy to assist their staff in understanding the new policy or the new interpretation of section 25 and section 32(3)(c) to ensure that service is provided in an equal manner to all Manitobans.

- iii. They request an order be made for a public release or statement, utilizing both print, social and digital media, to reach the largest number of Manitobans as possible.
- iv. They request an order that the Commission compile a list of trans health providers in the province or to work with the respondent to prepare a list of trans health providers in order to ensure that health providers, physicians, counsellors, psychologist, psychiatrists, etc. who interact on a day to day basis with trans persons in Manitoba are aware of the new practice governing non-binary sex designations.
- v. That the respondent cease requiring transgender or non-binary persons to pay additional fees or provide additional supporting documentation to obtain a change of sex designation under 25 of the VSA.

67. The respondent rightfully points out that human rights tribunals do not have jurisdictions to grant a remedy that would declare sections of the *Vital Statistics Act* as invalid, or to compel the Legislature to amend it. They rely on *Tranchemontagne v Ontario (Director, Disability Support Program)*, [2006] 1 S.C.R. 513, 2006 SCC 14 at para. 36, and *Malkowski v. Ontario (Human Rights Commission)*, [2006] O.J. No. 5140 at para. 36.

68. However, in *XY, supra*, that tribunal found it could nevertheless order the respondent to not apply legislation that was found to be contrary to the Ontario Human Rights Code. (see *XY, supra*, at paras. 288-295). I do not have to consider this approach because in my view the *Act*, properly construed, allows for non-binary sex designations.

69. To be clear, I find that there is no barrier in the VSA to an alternative sex designation such as “X” to be displayed as “the sex of the person whose birth is registered,” under section 32(3). As I have already articulated, the “sex designation” is simply a reference, marker, or category that is congruent to an

applicant's gender identity. If the Applicant successfully changes their "sex designation" pursuant to section 25, then that designation will be displayed pursuant to section 32(3) of the *Act*. There is no reasonable justification to deny an applicant a non-binary sex designation, such as "X".

70. The respondent has urged me to consider that in light of the various approaches and changes taking place across the country to address the very concerns that have been raised in this complaint, that it would be premature to order a singularly precise mechanism by which the Director of Vital Statistics is to accommodate the needs of non-binary individuals in relation to the system for issuing birth certificates. I accept that it is the Director who is best positioned to implement the mechanisms to allow for non-binary sex designations in a manner that is consistent with this decision and with the Agency's mandate. For example, the Agency's preferred approach may be to accommodate non-binary individuals by allowing an option for no sex designation to appear on their birth certificate. In my view, this would be consistent with the *Code*.
71. Therefore, I order that within 180 days of the date of this Decision the respondent is to revise the criteria for changing sex designation to include recognition of non-binary sex designations. This order is made to secure compliance with the *Code*.
72. Within a further 30 days the respondent is ordered to take reasonable steps to publicize the revised criteria. I order the Manitoba Human Rights Commission to assist in publicizing and informing the relevant health providers in Manitoba of the new criteria.
73. I order the respondent to develop an interpretation guide or policy to assist their staff in understanding the new policy or interpretation of the *VSA* that will allow for non-binary designations to be displayed on birth certificates.
74. I decline to order the respondent to refrain from requiring individuals to pay additional fees or provide additional supporting documentation to obtain a change of sex designation under s.25 of the *VSA*.

Section 43(2)(c): Injuries to dignity, feelings, or self-respect.

75. In arriving at a just award under section 43(2)(c) I take into account the comments of Adjudicator Sim, in *Emslie v. Doholoco Holdings Ltd*, 2014 CanLII 71723 who quoted the following two part test from *Arunachalam v. Best Buy Canada*, 2010 HRTO 1880 (CanLII) which has been adopted by other tribunals:

[52] I turn now to the relevant factors in determining the damages in a particular case. The Tribunal's jurisprudence over the two years since the new damages provision took effect has primarily applied two criteria in making the global evaluation of the appropriate damages for injury to dignity, feelings and self-respect: the objective seriousness of the conduct and the effect on the particular applicant who experienced discrimination: see, in particular, *Seguin v. Great Blue Heron Charity Casino*, 2009 HRTO 940 at para. 16 (CanLII).

[53] The first criterion recognizes that injury to dignity, feelings, and self respect is generally more serious depending, objectively, upon what occurred. For example, dismissal from employment for discriminatory reasons usually affects dignity more than a comment made on one occasion. Losing long-term employment because of discrimination is typically more harmful than losing a new job. The more prolonged, hurtful, and serious harassing comments are, the greater the injury to dignity, feelings and self-respect.

[54] The second criterion recognizes the applicant's particular experience in response to the discrimination. Damages will be generally at the high end of the relevant range when the applicant has experienced particular emotional difficulties as a result of the event, and when his or her particular circumstances make the effects particularly serious. Some of the relevant considerations in relation to this factor are discussed in *Sanford v. Koop*, 2005 HRTO 53 (CanLII) at paras. 34-38.

76. The respondent submits that, effectively, there is no evidence that the complainant was harmed by having to produce their Manitoba Birth Certificate. The complainant confirmed that they would rely on a driver's licence to purchase tobacco or liquor, the complainant never recalled using a form of birth certificate to establish their age. The complainant was able to obtain a non-binary driver's licence and birth certificate without having a birth certificate that displayed a non-

binary designation. The respondent denies responsibility for how third parties may act in relation to gender incongruent documents being produced.

First Criteria: Objective assessment of injury to dignity, feelings, and self respect

77. In my view, from an objective perspective, I find the seriousness of the conduct to be the high end. Gender identity is a part of our concept of selfhood. The Director's practice to not allow non-binary designations of sex designation and only permit male or female designations was effectively the government refusing to acknowledge T.A.'s agency and personhood.

78. The difficulties faced by trans and non-binary individuals in our society are many. Human rights tribunals have long recognized the disadvantages faced by trans people, and non-binary individuals in society. That is why the *Code* was updated to recognize and protect gender identity. This protection was legislated in the *Code* before the *Agency* refused to issue a birth certificate with a non-binary sex designation to the complainant. Effectively, the practice of the *Agency* sent a message to the complainant that the *Code*'s protection of "gender identity" was illusory.

Second Criteria: The Applicant's particular experience

79. The complainant identifies as a queer, specifically pansexual, person of colour through their South African heritage in addition to non-binary. In early 2012, T.A. decided that they would like to pursue changes in sex designations for all of their identity documents. T.A. was "severely ill" at the time and experienced periods of hospitalization. T.A. was on long-term disability from work. T.A. decided it was important to their health and well-being to take steps to address the ongoing discrimination that T.A. had been facing in terms of their legal identity documents – specifically the binary sex designation. T.A. also experienced periods of "street homelessness" and difficulties accessing medical care. T.A. testified that the stress of undertaking these proceedings at times affected their health. T.A. also testified that there were significant costs associated to these proceedings.

80. I accept that the respondent is not directly responsible for the discrimination that T.A. faced by third parties. I also accept that the respondent likely was unaware of the many struggles that T.A. was facing when T.A. was denied a non-binary birth certificate. However, the plight of trans and non-binary individuals is and was well-known in 2013/2014. The respondent knew or ought to have known that people living as trans or non-binary are already facing multiple barriers in society.

81. Taking both factors into consideration, I conclude that the award for injury to dignity, feelings and self-respect must be significant. I accept the request by the Commission and the complainant and order an award of \$50,000 payable in 60 days from the date of this decision.

Section 43(3): Exemplary Damages

82. The complainant, but not the Commission, seeks exemplary damages of \$25,000. The complainant argues that exemplary damages should be awarded because the respondent is the government. Counsel for the complainant argues that we expect a different level of scrutiny and leadership from our governments, particularly with respect to legislation that is supposed to protect gender identity.

83. Section 43(2)(d) of the *Code* requires a finding of “malice or recklessness” to have been involved in the contravention. This section has been interpreted to require “deliberate and planned abuse of authority.” (See *C.R. v. Canadian Mental Health Association Westman Region Inc.*, 2013 CanLII 125). In this case, when I consider the evidence of the Director who testified at trial, I am satisfied there was no malice or recklessness on the Agency’s part nor deliberate and planned abuse of authority. Therefore, I decline to make an order under this section.

84. This tribunal makes the following orders:

1. Within 180 days of the date of this Decision the respondent is to revise the criteria for changing sex designation to include recognition of non-binary sex designations on Manitoba birth certificates.
2. Within a further 30 days the respondent is required to take reasonable steps to publicize the revised criteria.
3. I order that the Manitoba Human Rights Commission assist in publicizing and informing the relevant health providers for trans and non-binary individuals in Manitoba of the new criteria.
4. An award of \$50,000 payable to T.A. in 60 days from the date of this decision.

DATED: 4th day of November 2019



Adjudicator Dan Manning

PUBLICATION BAN

1. The *Code* provides the following relevant provisions with respect to publication bans.

39(3) Every hearing shall be open to the public, but in order to prevent undue prejudice to any party or witness, the adjudicator may prohibit publication or broadcasting of the identity of the party or witness until the adjudicator's final decision has been rendered.

39(5) The adjudicator shall cause sound recordings to be made of the proceedings at the hearing and shall make copies of the recordings and the documents filed at the hearing available on reasonable conditions for review or reproduction by any party who so requests.

46(3) The adjudicator may direct the Commission to delete any information that would disclose the identity of a party or a witness at the hearing from a decision, order or statement of reasons made available to the public under subsection (2) if the adjudicator believes that the disclosure would cause undue prejudice or hardship to the party or witness.

1. At the commencement of the hearing, publication bans were requested to protect the identity of the Complainant.
2. The complainant advised me that the disclosure of the identity of T.A. could lead to significant risk of injury or harm given the potential for prejudicial behaviour directed towards them as a pangender individual. T.A. is concerned about possible physical or verbal attacks and harassment against them if they were to be publicly identified as pangender.
3. Additionally, the complainant sought a publication ban with regards to private health and medical information which could identify the complainant. I was advised that given the small size of the trans community it would take only a little amount of information to glean the identity of the complainant.
4. At the hearing, I granted a publication ban with regards to any information that would disclose the identity of the complainant pursuant to section 39(3) and

section 46(3) of the *Code*. The publication ban restricted publication of the Complainant's: name, past or present address, or any other details which would identify them including any reference to gender, including transition, such as male to female or female to male. The order included oral and *viva voce* evidence and any documents that could be released to the public. An exception was provided that should any person from the media seek to lift the ban, I would revisit this issue and hear submissions from them. No one from the media made a request to revisit the ban.

5. I further order pursuant to section 39(5) that any transcript, exhibit, or any other document released to the public should be vetted by the Manitoba Human Rights Commission as to ensure compliance with this publication ban.
6. This order does not apply to any transcript, exhibit, book of document, etc., that is forwarded to a court of competent jurisdiction for judicial review. The record should remain pristine and unaltered for that purpose.