LGBT Rights: Climbing the Judicial Steps to Equality

by the

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EXECUTIVE SUMMARY

Forty years after Pierre Trudeau decriminalized homosexuality, thirteen years after "sexual orientation" was read into the *Alberta Human Rights Act,* and six years after same-sex marriage was affirmed by the Supreme Court of Canada, homophobia and transphobia still exist in Canadian law and society. Laws that govern lesbian, gay, bi-sexual, and trans-identified (LGBT) individuals, relationships and families are moving toward equality. However, full legal equality of LGBT people still does not exist.

While human rights for LGB people are included in the *Alberta Human Rights Act* and have been for twelve years, '**gender identity'** is not specifically written in. Ontario was the first province to have a case that said transsexuality is covered under the ground of 'sex' in the *Ontario Human Rights Code*, and the Northwest Territories, Manitoba and Ontario are the only jurisdictions that specifically cover 'gender identity' as a ground written into their human rights legislation. Presently, many provinces and territories include transgendered complaints in human rights legislation under the heading of 'sex' or 'gender'.

Legislation and policy seem to recognize rights for **trans-identified people** who have had some form of operation or hormone treatment, but cease to acknowledge a trans person who has not had some form of gender reassignment surgery. For a variety of reasons, many trans people have not had this surgery.

A key issue for trans people is whether they are permitted to use **bathrooms** and change-rooms as per their identified gender. Only a couple of lower court decisions have addressed this problem. Both of these cases are tribunal decisions that have not received much press and do not carry the same amount of legal weight as would a higher court decision. Many workplaces, bars, health clubs and schools have not yet thought about the human rights issues of trans people who need to use on-site washrooms and change rooms.

For **youth who are in secondary school**, the bathroom issue is even greater. Schools so far in Alberta do not have a policy on use of bathrooms by trans youth and so anecdotal reports by trans youth say that they are going to school and avoiding using the washroom for the entire day. These issues are, however, being addressed by the school boards in Edmonton and Calgary.

Gender reassignment surgery (GRS) is a medically necessary procedure used to treat gender identity disorder experienced by trans-identified people. GRS was delisted from health coverage in Alberta in the 2009/2010 budget. When GRS was delisted, news reports said that 23 Albertans filed human rights complaints. In early June, 2012, the Alberta government reinstated funding for sex-reassignment surgery effective June 15, 2012. Ontario had also decided to delist GRS over ten years previously, before having any consultation with the trans community or medical professionals. A 2006 case found

that it was discriminatory to de-list GRS and prevent those people who were already in process from continuing on with their surgery. However, it took until May 2008, after much lobbying by trans groups, for Ontario to relist GRS coverage.

A Female-to-Male (FTM) man has an added challenge in addressing his gender identity. In many provinces MTF bottom surgery is still considered experimental and therefore not covered. This puts FTM men in a difficult place in terms of addressing their feelings of having the wrong-gendered body. However, treatment is still available for hormone therapy and many FTM men get top surgery.

One case, where a trans woman could not continue with her plans for GRS, was the case of Synthia Kavanagh who was imprisoned partway through her transition. Synthia Kavanagh is an MTF trans woman who was in the process of taking hormone therapy when she was convicted of second degree murder. The tribunal found that a **blanket policy** that prohibited **inmates from sex-reassignment surgery** was not justified. This case was affirmed by the Federal Court of Canada. The case demonstrates a balancing of the inmates' rights to a safe rehabilitation process, and the rights of trans-identified inmates to safety in their living space. It does not give an answer to prison officials as to how to handle this balancing but suggests that a case-by-case analysis of each trans-identified inmate is necessary to determine his/her needs.

One of the more controversial topics in **family law** was granting same-sex couples relationship and family rights. Politically, it was a hot button topic. Support for same-sex marriage was split in Alberta. However, being federal law, same-sex marriage was permitted in every province and territory once the *Reference re Same-Sex Marriage* case was decided. While the law supports the **dissolution of same-sex couples** who are married (i.e., divorce), couples can sometimes find it difficult to find a **lawyer who is accepting and also knowledgeable about same-sex couples and marriage**. Lawyers that specialize in the area of same-sex couples are few and far between and cannot represent both parties. This is especially true in rural areas where there may only be one or two lawyers serving an area. Also, some polls have indicated that acceptance of same-sex marriage in rural areas is lower than in urban areas.

When a same-sex lesbian couple has a baby they are allowed to put both of their names on the **registration of birth**. However, the standard birth certificate has two places for names of parents, which is labeled "mother" and "father". There is a special form for same-sex couples that says "Parent" and "Parent". It is unclear why there is not just one standard form that says "parent" on it, instead of a need for two forms.

The *Alberta Human Rights Act* contains a section that prohibits **discrimination in publications based on sexual orientation or gender** (including transgender). Section 3 is balanced with provisions speaking to freedom of expression and exceptions where a contravention of the Act may be reasonable and justifiable. When someone makes statements that somebody else finds to be insulting, upsetting, in bad taste, or contrary

to their own beliefs, the *Human Rights Act* is not engaged. In order to engage the *Act*, statements must be connected to the grounds protected under the *Act* and must meet certain tests for determining whether a statement indicates discrimination, an intention to discriminate or is likely to expose a person or class of persons to hatred or contempt. Complaints of hate expression covered by provincial human rights legislation, may end up going to a human rights tribunal. These tribunals have jurisdiction over the claim and are provided with broad powers, as specified by legislation to determine appropriate remedies and awards under their respective governing legislation. Moreover, the *Alberta Human Rights Act* provides defenses and justifications for some statements. Some cases are summarized in **Appendix A** that provide insight into the current legal climate surrounding hate expression laws in Western Canada.

Adjusting one's gender on **federal and provincial identification** can be an important part in a trans person's journey of transition. For example, Alberta's *Vital Statistics Act* states that people can change the sex on their birth certificates if their "anatomical sex structure has been changed". What is **unclear is what surgeries must be completed** for one's anatomical structure to have changed. This presents an additional challenge for FTM trans men and non-operative trans women and men.

Presently, the **same-sex partner of a Canadian citizen can immigrate** to Canada as a married spouse, in a conjugal relationship, or as a conjugal partner. These three possibilities differ depending on the facts of the applicant's (non-Canadian citizen) situation. For same-sex couples who were legally married in Canada, immigration officials will recognize their relationship for the purposes of immigrating. Same-sex couples married in places like the Netherlands or Belgium, where same-sex marriage is legally recognized, may also immigrate if their marriage is valid. However, the Overseas Processing Manual #2, which is found online, still erroneously notes that "Same-sex marriages performed outside Canada are not recognized for immigration purposes."

After the *Ward* decision, it was generally accepted that gays and lesbians could make a claim for **refugee status** under section 96 of the *Immigration and Refugee Protection Act*. It was still unclear if bisexual and transgendered complainants could do the same. Studies of the actual refugee decisions demonstrate how **stereotypes and bias** can show up in other areas of the decision-making.

Rehaag notes the following assumptions applied to the facts of gay and lesbian refugee cases:

- using a westernized understanding of what gays and lesbians act like to determine if a claimant is a refugee based on sexual orientation;
- assuming that a lesbian looks very butchy and a gay man looks effeminate;
- assuming that violence against gays and lesbians happen in public spheres, and private violence is not an issue for a public body;
- using the lack of attendance to a gay bar to undermine a gay/lesbian claimant's credibility; and

- doubting a claimant's case if they have dated the opposite sex (i.e., are bisexual).

These assumptions make it difficult for gay and lesbian claimants to make a case demonstrating that they were in fear of persecution based on their sexual orientation. Whether **transsexual people can make refugee claims** as a persecuted group is yet to be determined in court.

LGBT and questioning youth are a vulnerable population because of their legal status and lack of legal status to make legal decisions for themselves. The issues affecting LGB youth in schools include: lack of representation of same-sex headed families; poor discussion of sexual orientation or sex and sexual orientation; assumption that all youth are heterosexual; bullying; difficulty finding a teacher/mentor who is LGB friendly; living in hiding as heterosexual; coming out of the closet; and accessing correct information on being LGB.

The issues facing trans-identified youth are: lack of discussion about trans youth and therefore lack of information on the topic; coming out to oneself but difficulty finding a mentor, parent, family member or representative for school issues; finding a bathroom that is safe to use based on one's gender identity and gender expression; figuring out if they are trans when many youth do not even know what the labels mean; exercising their gender expression in general; wanting to finally resolve the issue by taking hormones or having surgery; having proper identification for travel or school information that identifies the gender the youth expresses; and experiencing other issues including lack of inclusion in curriculum, social circles or gender-related activities.

In 2010, Alberta passed an amendment to the *Alberta Human Rights Act* that would allow **parents to make a human rights complaint** if their children are taught "subject-matter that deals primarily and explicitly with **religion, sexuality or sexual orientation**" without the parent's permission (section 11.1). To date there are no reported cases on Section 11.1 or guidance on the outcome of a claim under this section. Words in the section such as "primarily and explicitly" remain to be defined by Tribunals and Courts.

The section applies to "courses of study, educational programs or instructional materials, or instruction or exercises". The scope of the section will also be determined in future litigation. Subsection 11.1(3) says that the section does not apply to "incidental or indirect references", but the line between a course of study and an incidental reference has yet to be determined. The *Guide to Education* instructs teachers that a course that is explicitly about sexual orientation, but is not primarily on the subject-matter of sexual orientation does not fall under section 11.1. Alberta curriculum does not explicitly mention teaching sexual orientation. Future litigation may focus on whether sexual orientation is a subject that falls under section 11.1, when there is no place in the curriculum that primarily and explicitly focuses on it.

LGBT Rights: Climbing the judicial steps to equality

INTRODUCTION

Canadian laws regarding lesbian, gay, bisexual and trans-identified (LGBT) individuals and couples have drastically changed in the past twenty years. After same-sex marriage rights became a reality in early 2000, many people thought that human rights and equality for LGBT people and same-sex couples had been achieved. However, this perception does not play out in a detailed examination of the law, policies and accessing legal resolutions. In addition, same-sex marriage did not change the fact that the laws protecting trans-identified people still lag far behind those for LGB individuals.

Presently all provinces and territories include "sexual orientation" in their human rights legislation. A Supreme Court of Canada Decision[1] in 1998 read-in "sexual orientation" into the Alberta *Human Rights Act*[2]. Then, in 2010, the government formally wrote in "sexual orientation" by amending the *Human Rights Act.*[3] 'Gender identity' is not an enumerated ground in many human rights codes across Canada. The Northwest Territories includes the ground of 'gender identity' in its human rights legislation.[4] Manitoba recently amended its *Human Rights Code* to prohibit discrimination on the basis of "gender identity".[5] Ontario added "gender identity" to its *Human Rights Code* in 2012.[6] A bill was introduced in British Columbia which would add "gender identity" and "gender expression" to the ground of "sex".[7] Other provinces and territories, including Alberta, have included 'transgendered' under the ground of 'gender' or 'sex' but have not written it into the governing human rights legislation.

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[1] *Vriend v Alberta*, [1998] 1 SCR 493 [*Vriend*].
[2] *Alberta Human Rights Act* RSA 2000,c A-25.5 [*Alberta Human Rights Act*]. Formerly, the *Individual Rights Protection Act.*
[3] Bill 44, *The Human Rights, Citizenship and Multiculturalism Amendment Act,* Second Session, 27th Leg, Alberta, 2009 [Bill 44].
[4] *Northwest Territories Human Rights Act*, SNWT 2002, c 18, s 5.
[5] *The Human Rights Code Amendment Act*, SM 2012, c 38, in effect June 14, 2012.
[6] *Human Rights Code,* RSO 1990, c H.19, amended by SO 2012, c 7.
[7] *Gender Identity and Expression Human Rights Recognition Act*, Bill M 207 2011 s. 1.

LGBT Rights: Climbing the judicial steps to equality

This paper examines certain areas of the law in Alberta that affect LGBT communities. It endeavors to answer the question: "Who has been left behind?". Forty years after Pierre Trudeau decriminalized homosexuality,[8] thirteen years after "sexual orientation" was read into the *Alberta Human Rights Act,*[9] and six years after same-sex marriage was affirmed by the Supreme Court of Canada,[10] homophobia and transphobia still exist in Canadian law and society. Laws that govern LGBT individuals, relationships and families are moving toward equality. However, full legal equality of LGBT people still does not exist.

This paper outlines the areas where the law has not been amended to protect LGBT people and where its application results in differential treatment of LGBT individuals. The paper will begin with a history of LGBT rights in Alberta. It will then review legal areas that have the potential for continued change, interpretation and legislative review:

- human rights;
- family;
- hate crimes;
- rights specific to the trans community;
- refugees/immigrants; and
- schools and youth.

Finally, the paper will examine some of the potential *Charter*[11] and other legal challenges that LGBT people may bring to the courts in the near future. The history of LGBT rights demonstrates a patchwork quilt of laws and social acceptance that has slowly evolved. Over time there has been increased equality in the laws affecting LGBT populations. However, while this progression appears to be moving forward, there have also been many backward steps away from equality. In this paper, the Alberta Civil

[8] *Criminal Law Amendment Act, 1968-69* (SC 1968-69, c 38). Pierre Trudeau made sweeping changes to the *Criminal Code of Canada* in the late 1960's. He said, "the State has no place in the bedrooms of the nation." With that he changed the *Criminal Code of Canada* so that private anal sex was permitted between consenting adults, 18 years and older [Trudeau].
[9] *Vriend.*
[10] *Reference re Same-Sex Marriage,* [2004] 3 SCR 698, 2004 SCC 79 [*Reference re Same-Sex Marriage*].
[11] *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

Liberties Research Centre hopes to shine some light on the gaps to equality for LGBT communities and to open a conversation about how these gaps can be eliminated.

Language

The acronym that will be used to describe these communities is "LGBT". Some people have used a longer acronym such as LGBTTI2Q.[12] We have included the transsexual and transgendered communities with one T representing 'trans-identified'. This has been an accepted term in the trans community as it side steps the debate on whether "transsexual" or "transgendered" is the appropriate term. However, it is recognized that not all people will be happy with this choice and we acknowledge that the defining terms one uses to describe oneself are very important and personal.

We have not included the '2' for two-spirited or the 'Q' for queer. There are many names that community members identify with and an acronym with all of these names in it would be too long for the purposes of this paper. We recognize that aboriginal people who identify as two-spirited will have specific issues that affect their daily lived experience. This is one of the pitfalls of using an acronym; each community with its unique history, definitions, and struggles gets seen as one community with one struggle. This is a misleading portrayal of reality.

Finally, there will be times that we will drop the 'T' in LGBT and just use the acronym 'LGB' (for instance, in a discussion of marriage). This will be in cases when the discussion really focuses on sexual orientation and not gender identity. The struggles and legal successes of trans-identified communities will be highlighted throughout the paper under specific headings and areas that affect trans people.

[12] Lesbian, gay, bisexual, transgendered, transsexual, intersexed, two-spirited, queer, questioning.

HISTORY

Same-sex rights historically follow a pattern of legislative acceptance. Robert Wintemute outlines the "standard sequences" in "legislative recognition of homosexuality" developed by Kees Waaldijk:

1. Decriminalization, followed or sometimes accompanied by…
2. the setting of an equal age of consent, after which…
3. anti-discrimination legislation can be introduced, before the process is finished with…
4. legislation recognizing same-sex partnership and parenting.[13]

Sexual relationships between same-sex partners were decriminalized for the most part in 1969.[14] In Alberta, anti-discrimination legislation (with respect to sexual orientation) was introduced after the *Vriend* decision in 1998. After this time, the Alberta government began to contemplate how equal human rights for same-sex couples would affect the definition of spouse and the rights regarding children. On March 23, 1999, the Report of the Ministerial Task Force was released. Its purpose was to:

> [R]eview the need for protection within various provincial Acts to alleviate concerns the ruling could have wider implications (for example, definitional changes within legislation to clarify the meaning of 'spouse' or possible future use of the notwithstanding clause where appropriate).[15]

It focused on foster parenting, adoption, employee benefits, education, marriage and benefits for common-law couples. The Report, along with a review of a 1998 survey on how Albertans felt about LGB people gaining rights, was a snapshot of where Alberta stood on same-sex rights in 1999. Many Albertans really did not have a concern about how the law was changing and were supportive of more rights for LGB populations.

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[13] R. Wintemute, "Sexual Orientation and the Charter: The Achievement of Formal Legal Equality (1985 – 2005) and Its Limits" (2004) 49 McGill LJ 1143 at para 8.
[14] Trudeau.
[15] Alberta, Alberta Justice and Attorney General, *Report of the Ministerial Task Force* (Edmonton: Alberta Justice and Attorney General, 1999) online: http://justice.alberta.ca/publications/Publications_Library/ReportoftheMinisterialTaskForce.aspx/DispForm.aspx?ID=36.

The Alberta Justice study[16] attempted to take the temperature of Albertans and their "tolerance" of LGB relationships. The results showed that, for the most part, over half of participants agreed with most gay rights or did not really care (were neutral) one way or the other.

Half of participants in the Alberta Justice study were aware of the *Vriend* SCC decision to add "sexual orientation" to the *Human Rights Act*. Seventy-seven percent (77%) were either neutral, agreed somewhat or agreed strongly that the Government should not use the notwithstanding clause to block the SCC *Vriend* decision. The survey asked if participants would agree with a government decision that would allow gays and lesbians to marry, adopt and foster. Fifty-sex percent (56%) said that they were either neutral, agreed somewhat, or agreed strongly that the Government should not fight a court decision such as this. These statistics demonstrate some strong support by participants for LGB rights in some cases (for instance, in most questions about 1/3 of participants strongly agreed with LGB equality). Even in the case of adoption, 42% agreed somewhat or agreed strongly that gays and lesbians should be allowed to adopt. There were no equivalent studies done on trans people or the issue of gender identity.

Human Rights & Sexual Orientation

In 1991, 25-year-old Delwin Vriend was fired from his teaching position at King's College because he had been open about being in a same-sex relationship. He turned to the Alberta Human Rights legislation[17] to file a complaint that he had been discriminated against based on "sexual orientation". However, he soon found out that "sexual orientation" was not covered under the Human Rights legislation, and that to have his rights upheld he would have to take his claim through the courts up to the Supreme

[16] Alberta, Alberta Justice and Attorney General, *Alberta Justice Issues Research: Final Report*, (Edmonton: Alberta Justice and Attorney General, 1998) online: <http://justice.alberta.ca/publications/Documents/alberta_justice_issues_research/index.html> Accessed September 23, 2011 [*Alberta Justice Study*].

[17] As it was then, *Individual's Rights Protection Act*, RSA 1980, c I-2 [*Individual's Rights Protection Act*].

Court of Canada. Mr. Vriend took the challenge and fought for seven years to have "sexual orientation" included under the Human Rights legislation. In 1998 the SCC said:

> In excluding sexual orientation from …[human rights] protection, the Government has, in effect, stated that 'all persons are equal in dignity and rights', except gay men and lesbians. Such a message, even if it is only implicit, must offend s. 15(1), the 'section of the *Charter*, more than any other, which recognizes and cherishes the innate human dignity of every individual' (*Egan,*[18] at para 128).[19]

The case opened the doors for LGB people to make complaints of discrimination under Alberta's human rights law.[20] However, after a seven-year battle, Mr. Vriend decided not to pursue a case of discrimination at the Human Rights Commission. Therefore, he never did file a complaint against King's College for firing him because he was gay. However, more importantly, he had succeeded in getting "sexual orientation" as a protected ground under Alberta's human rights law so that future claimants could put their case forward.

Thereafter, the Human Rights Commission accepted complaints based on sexual orientation, however it was not actually written into the Act until an amendment in 2010.[21] The Alberta Human Rights Commission, however, did amend its Information Sheets to include "sexual orientation" as a protected ground. They also wrote an Information Sheet entitled "Sexual Orientation".[22] So, while the words were not in the legislation, they were in the informational materials that the public could access online.

[18] *Egan v Canada*, [1995] 2 SCR 513.
[19] *Vriend*, at para 104.
[20] *Individual Rights Protection Act*, as it was then.
[21] Bill 44.
[22] Alberta, Alberta Human Rights and Citizenship Commission, *Sexual Orientation Information Sheet*, 2007, online: http://www.albertahumanrights.ab.ca/SexualOrientation.pdf.

In that 2010 amendment, the words "sexual orientation" were written into the *Alberta Human Rights Act* under Bill 44. Bill 44[23] also proposed an amendment to the Act that would allow parents to make a human rights complaint if their children are taught "subject-matter that deals primarily and explicitly with religion, sexuality or sexual orientation" without the parent's permission.[24] The media and public gave the Bill mixed reviews. LGBT communities and allies were happy to have "sexual orientation" actually in the legislation, however, many felt that the limiting of discussion regarding religion, sexuality and sexual orientation reduced the quality of education and, nevertheless, had been already allowed under the *School Act.*[25]

Bill 44 can be traced back to a private member's bill proposed in 2006. Bill 208[26] proposed changes to three Alberta statutes: the *Alberta Human Rights, Citizenship and Multiculturalism Act*,[27] the *School Act*,[28] and the *Marriage Act*.[29] Basically it provided three amendments:

- Protection against a human rights complaint to people who 'express or exercise' their beliefs in opposition to same-sex marriage.
- Protection to marriage commissioners who refuse to perform same-sex marriage.
- The ability for students to opt out of classes that teach "that marriage may be a union between persons of the same sex"; and requiring advance parental notice for such classes.

Bill 208 was defeated, but Bill 44, which passed in 2010, had a similar, if not broader, section on teaching about sexual orientation and gender identity in schools. This history of attempting to limit material about LGBT people in the classroom must be seen against the backdrop of major support for LGBT human rights by the Alberta Teachers' Association. In 1999, one year after the *Vriend* decision, the ATA amended its *Code of*

[23] Bill 44.
[24] For further discussion on this section, see the "Schools and Youth" section of this paper.
[25] *School Act*, RSA 2000, c S-3 [*School Act*].
[26] Bill 208, *Protection of Fundamental Freedoms (Marriage) Statutes Amendment Act.*
[27] Currently the *Alberta Human Rights Act.*
[28] *School Act*.
[29] *Marriage Act,* RSA 2000, c M-5 [*Marriage Act*].

Professional Conduct to include "sexual orientation" and in 2003 it amended its *Code* to include 'gender identity'. Since then, much work has been done by the ATA and specifically its Sexual Orientation and Gender Identity Sub-committee[30] on improving the lives of LGBT students and teachers.[31]

Some of the human rights issues that affect LGBT people are discussed throughout this paper. There will be a focus however on legislation and the application of law and policies that have an inequitable effect because of a person's sexual orientation and gender identity.

Human Rights and Gender Identity

While human rights for LGB people are included in the *Alberta Human Rights Act* and have been for twelve years, 'gender identity' is not specifically written in. Ontario was the first province to have a case[32] that said transsexuality is covered under the ground of 'sex' in the *Ontario Human Rights Code*.[33] As noted, the Northwest Territories, Manitoba and Ontario are the only jurisdictions that specifically cover 'gender identity' as a ground written into their human rights legislation.[34] Presently, many provinces and territories include transgender complaints in human rights legislation under the heading of 'sex' or 'gender'. In Alberta, the Human Rights Commission information sheets notes that "gender includes male, female or transgendered."[35]

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[30] SOGI Committee, Alberta Teaching Association website: www.teachers.ab.ca and follow the links: Professional Development - Diversity, Equity and Human Rights – Sexual Orientation and Gender Identity.

[31] For more information on the history of these kind of amendments see the Alberta Teaching Association website: www.teachers.ab.ca and follow the links: Professional Development - Diversity, Equity and Human Rights – Sexual Orientation and Gender Identity – Publications - History of ATA Sexual Orientation and Gender Identity (SOGI) Initiative, online: http://www.teachers.ab.ca/For%20Members/Professional%20Development/Diversity%20and%20Human%20Rights/Sexual%20Orientation/Publications/Pages/A%20History%20of%20ATA%20SOGI%20Initiatives.aspx.

[32] *Forrester v Peel (Regional Municipality) Police Services Board (No. 2),* 2006 HRTO 13.

[33] *Ontario Human Rights Code,* RSO 1990 c H.19.

[34] As of this writing, Bill C-279 is before Parliament, which will amend the *Canadian Human Rights Act* and the *Criminal Code* to include gender identity and gender expression and British Columbia has introduced Bill M 207, to include gender identity and gender expression under the ground of "sex".

[35] Alberta, Alberta Human Rights Commission, Protected *Areas and Grounds Under the Human Rights, Citizenship and Multiculturalism Act* (Alberta Human Rights Commission, March 2007) online:

The human rights issues that arise for trans-identified people include harassment, losing one's job because of gender identity, using the bathroom and change rooms associated with one's gender identity, changing identity documents to match gender, and the delisting of gender-reassignment surgery.

Cases have addressed some of these issues, but there is still much misunderstanding by employers and unions as to their human rights responsibilities regarding trans employees. While some employers are aware of the rights of trans people, others still need more education on the issues facing this community. This is changing over time as employers gain more human rights knowledge and trans legal rights become more known in society. However much of the legal issues regarding gender identity have not been tested by higher courts, so there are many issues still outstanding.

While there seems to be an opening of rights in the last decade for trans people, there are still many hurdles to face. Most human rights legislation covers trans people but the legislation often does not specifically note this coverage. Some Commissions have addressed this inequity by publishing information sheets on the issues facing trans people.[36] Still more awareness and education of this issue would help to protect these rights more fully.

Rights regarding children

The *Alberta Justice Study* showed support, by about half of the population, for LGB equality. This should dispel the stereotype that all Albertans are against LGB equality. Closer examination demonstrates that Albertans were just beginning to gain an understanding of LGB families and they were still struggling with these families having

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http://www.albertahumanrights.ab.ca/publications/bulletins_sheets_booklets/sheets/history_and_info/protected_areas_grounds.asp .

[36] Ontario, Ontario Human Rights Commission, *Policy on discrimination and harassment because of gender identity* (Toronto: Ontario Human Rights Commission, 2000, updated 2009) online: http://www.ohrc.on.ca/en/resources/Policies/PolicyGenderIdent/pdf .

completely equal rights. For instance, while 42% of participants thought that gays and lesbians should be able to act as adoptive parents in any circumstances, these same participants agreed with adoption only if it was: with one of the natural parents (73%), with permission of the natural parents (63%), or regarding a Ward of the Government where no one else will adopt (57%). So in the late 90's there was a sense that equality should have some strings attached to limit the ways in which these rights would be used. These numbers show that a gay couple adopting a child who was the natural child of one of them was more palatable to the public than a gay couple adopting an unrelated child. There were no equivalent studies done on trans people and public opinion regarding adoption and children.

Parental Status

Adopting your partner's child

The question of adoption of children by the partner of a natural parent was resolved in the courts the year after the *Alberta Justice Study* was released. In response to an upcoming case,[37] the Government of Alberta had changed its adoption legislation so that it used the term 'step-parent adoption' rather than 'spousal adoption' to describe adoption of a partner's natural child by his/her spouse. The case of *Re: A* noted that the government had said that changing the term 'spouse' to 'step-parent' would:

1. recognize other types of relationships, such as same-sex couples;
2. ensure that a judge does not define 'spouse' in the legislation as including same-sex partners and thereby change the definition of spouse from applying only to heterosexual couples.[38]

However, the legislation failed to define 'step-parent' as such and therefore it was case law that later used the above comments to define "step-parent". In one case, two lesbian couples, who had conceived children through artificial insemination, each

[37] *A (Re),* 1999 ABQB 879 [*Re A*].
[38] *Re A,* at para 23.

wanted to adopt their respective partner's natural child.[39] In the court application, one of the questions the Court of Queen's Bench had to answer was whether the definition of 'step-parent' under the *Child Welfare Act*[40] included same-sex partners. The Court examined Hansard debates such as the one above and answered 'yes', thereby allowing same-sex partners to apply for private adoption of their partner's natural child.[41]

Government and agency adoption

Same-sex couples did not, however, have access to government adoptions until 2006. Newspaper clippings during that time period show that Lance Anderson and Blair Croft were the first open same-sex couple to adopt a child from a government agency in 2006.[42] Although it is unclear whether earlier gay couples applied to adopt as single people to avoid homophobic stereotypes. Mr. Anderson and Mr. Croft were two gay men who had applied for government adoption and been approved in 2004. Very quickly after their approval, news reports say that Children's Services put up extra protocols for gay adoptions such as looking to see if the child would have contact with people of the opposite sex. There are, however, no records of these protocols other than in newspaper reports.[43]

Adoption by same-sex couples through private agencies has been permitted for many years, and at least since 1999 with the *Re: A* decision. At private adoption agencies, the birth mother, for the most part, looks through a series of couples and chooses for herself who will adopt the baby. If she chooses a gay or lesbian couple then that couple gets to adopt. Recently there have been a number of gay male couples that have

[39] *Re A.*

[40] The *Child Welfare Act*, SA 1984, c C-8.1, was subsequently amended and renamed the *Child, Youth and Family Enhancement Act*, RSA 2000, c C-12 [*Child, Youth and Family Enhancement Act*].

[41] I have used the phrase 'partner's natural child', but in reality these children were wanted, planned and cared for by both partners making both partners social mothers of the child. However, in legal terms only one partner was seen as a birth or 'natural' mother. Later I will discuss caselaw that recognizes both mothers as legal parents from the moment of birth.

[42] *Gay Couple leaps 'walls' to adopt son,* Feb 19, 2007.online: Canada.com http://www.canada.com/edmontonjournal/news/story.html?id=643c0d39-9ccb-43d8-a7f1-9a034e83b06e (accessed Oct 20/11) [Gay Couple].

[43] Gay Couple.

adopted children through private agencies. Anecdotal reports say that these experiences have been very positive and couples feel accepted and welcome in the adoption experience.[44]

Foster parents

In Alberta, foster parenting has somewhat of a different history than adoption. In 1997, there was a high profile foster parent, Ms. T, who had fostered 70 children over 18 years.[45] When it was discovered that she was a lesbian, the Minister of Children's Services instituted a policy whereby gays and lesbians could no longer become foster parents.[46] The new policy was upheld after a change in Ministers. However, after the *Vriend* case was decided it was denied that there was a policy against gays and lesbians, but instead decisions were made according to the best interests of the child. Ms. T's rights to foster were reinstated.

Between the 1998 *Vriend* decision and about 2006, the requirements about who could be a parent dramatically changed. Alberta went from being a province that did not protect sexual orientation in its human rights legislation and did not allow gay parents to foster children, to a province that includes same-sex parents in the definition of 'step-parent' and allows adoption by same-sex parents, and finally graduated to a province that allows lesbian parents to directly and immediately register a baby as both of theirs upon birth.[47]

Trans Parents

Trans-identified parents have been in a more precarious place. Stereotypes abound on how gender identity disorder will affect children. Courts examine in each case what is in the best interest of the child, and therefore trans parents do sometimes face the

[44] Discussions with Same-sex Parents Group of Calgary Outlink: Centre for Gender and Sexual Diversity from April to August 2010.
[45] David M. Rayside, *Queer Inclusions, continental divisions: public recognition of sexual diversity in Canada and the United States*, (Toronto: University of Toronto Press, 2008) at 176 [Rayside].
[46] Rayside.
[47] *Fraess v Alberta (Minister of Justice and Attorney General)* (2005), 56 Alta LR (4th) 201 (ABQB) [*Fraess*].

difficulty of explaining whether there will be a negative effect on their children. However, most of these cases are not published, with negotiations between former spouses happening in mediation or behind closed doors. This is still a developing area of law, and a topic of grave concern to trans parents and their supporters.

Marriage and Spousal Relationships

In Ontario, in July 2002, the first Canadian court ruled in favour of legalizing same-sex marriage.[48] Subsequently, between 2002 and 2004, all but New Brunswick, the Northwest Territories, Nunavut, Prince Edward Island and Alberta recognized same-sex marriages. Finally, the issue was put to rest in 2004, with the Supreme Court of Canada reference case[49] and a subsequent Federal Bill that made marriage across Canada a "union of two persons".

Meanwhile, in Alberta in 2000 the *Marriage Act*[50] passed into legislation. This Act addressed the solemnization of marriages, but also invoked the notwithstanding clause to say:

> "marriage" means a marriage between a man and a woman;

The *Marriage Act* was put into place just as legal battles began to heat up on the issue of same-sex marriage. The government of the day hoped that court cases allowing same-sex marriage in Canada would be stopped at the Alberta border by stating in the *Marriage Act* that Alberta would continue to use the opposite-sex definition of marriage notwithstanding (i.e., despite) the fact that it violated the *Charter*.

Later, when marriage was officially available to same-sex couples across Canada, Alberta found that its provincial powers did not include the ability to define marriage as excluding same-sex couples. Therefore, that section of the *Marriage Act* was outside of

[48] *Halpern et al v Canada* (2002), 95 CRR (2d) 1 (Ont Sup Court).
[49] *Reference re Same-Sex Marriage.*
[50] *Marriage Act*, ss 1-2.

Alberta's legislative powers and of no force or effect. The *Marriage Act* is still in force today and deals with the solemnization of marriage, something that is within the province's powers. The words defining marriage between a man and a woman are still in the preamble:

> WHEREAS marriage is the foundation of family and society, without which there would be neither civilization nor progress;
>
> **WHEREAS marriage between a man and a woman** has from time immemorial been firmly grounded in our legal tradition, one that is itself a reflection of long standing philosophical and religious traditions; [emphasis mine]

Subsection 1(c) of the Act still defines "marriage" as "between a man and a woman", but section 2, where it used to say: "This Act operates notwithstanding the …Charter"…now states that this is no longer in effect. In summary, the Act has not incorporated the new definition of marriage as between two persons, but has taken out the reference to using the notwithstanding clause to impose this definition on Albertans.

The *Marriage Act* came into being shortly after a decision in Ontario[51] finding that the definition of 'spouse' included a same-sex partner. In 2000, the Federal government enacted Bill C-23, the *Modernization of Benefits and Obligations Act.*[52] This Act was in response to the court case[53] where two women (known as "M" and "H") split up after a ten-year relationship. M wanted financial support from H but their same-sex relationship was not covered under the definition of "spouse" in Ontario's *Family Law Act*.[54] The Supreme Court of Canada[55] found that denying same-sex couples access to support was discriminatory. After this decision many other jurisdictions in Canada amended their definitions of 'spouse' in various pieces of legislation.

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[51] *M v H,* [1999] 2 SCR 3, 171 DLR (4th) 577 [*M v H*].
[52] *Modernization of Benefits Act,* SC 2000, c 12.
[53] *M v H.*
[54] *Family Law Act*, RSO 1990 c F3 s 29.
[55] *M v H*, at 73-74.

Alberta responded by enacting the *Adult Interdependent Relationships Act.*[56] This Act amended 69 other statutes such as, Alberta's *Family Relief Act*[57] and *Wills Act*.[58] However, the *AIR Act* applied not only to common-law spouses but also to any two people who lived in a relationship of interdependence for over three years. Therefore, a senior and his/her adult daughter could be seen as interdependent partners for the purpose of the Act. While the Act gave same-sex partners certain spousal rights it did so in a way that did not value those relationships as unique to any other two people living together. It gave any two people living in a relationship of interdependence, whether they were two brothers, grandmother/granddaughter, or two female partners certain rights that normally would have only been applicable to a common law couple. While their legal rights were satisfied through adult interdependent partnership legislation, there was still great reticence throughout the province to recognize same-sex couples as valid, lasting, loving, intimate relationships. Even in 2005, as the rest of the country celebrated same-sex marriage, Alberta continued to threaten the use of the notwithstanding clause to prevent same-sex couples from marrying in Alberta.[59] Two gay men applied at the registry office for a marriage license but were refused.[60] They filed a complaint with the Human Rights Commission, which eventually was dropped when the Alberta Government admitted that they had no legal recourse against same-sex marriage.[61]

Despite the reticence to recognize same-sex couples, there were still many Albertan supporters of same-sex marriage. For instance, MP Jim Prentice voted in favour of the federal government's marriage bill[62] after hearing from his constituents. Also, an

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[56] *Adult Interdependent Relationships Act* SA 2002, c A-4.5 [*AIR Act*].
[57] *Family Relief Act*, RSA 2000, c F-5.
[58] *Wills Act*, RSA 2000, c W-12.
[59] *Alberta may invoke notwithstanding clause over same-sex marriage,* CBC News, July 27, 2005 Accessed July 15, 2010, online: <http://www.cbc.ca/canada/story/2005/07/27/Alberta-same-sex-050727.html>.
[60] Keith Purdy and Rick Kennedy's complaint was accepted by the Human Rights Commission, but same-sex marriage became accepted law in Alberta before their complaint was heard.
[61] CTV News, *Alberta backs down on gay marriage*, CTV News, July 13, 2005.online: <http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/1121195450282_34/?hub=Canada>
[62] Bill C-38*, The Civil Marriage Act,* 1st Sess, 38th Parl, 2005.

EKOS/CBC poll in 2002 found that 40% of Albertans would answer 'yes' to the question of whether the federal government should change the definition of marriage to include same-sex couples. In the poll, this turned out to be more support for same-sex marriage than in Manitoba or Saskatchewan.

Later, when the debate heated up about whether the Federal government could use the notwithstanding clause to deny marriage to same-sex couples, law professors from across Canada signed an open letter[63] to Stephen Harper, in support of same-sex marriage. University of Calgary Law Professors were among the many professors who signed this open letter.

While the progression of same-sex rights in Alberta has been blocked, litigated and denied, the above examples of commitment to LGBT human rights demonstrate that there is still support on all sides for LGBT rights in Alberta. Now, several years after same-sex marriage has come to Alberta, there is little debate on the issue and not much controversy. However, even as Albertans settle into a new age of equality there are still threats of moving backward. For instance, a candidate in the Wildrose Party, as recently as 2012 made homophobic comments during the election.

The next sections review present day laws and policies. In these sections, we examine what the law is, how it is applied and whether there are upcoming legal challenges in particular areas. The legal areas discussed have been split into: human rights, family, hate crimes, benefits, refugees, and schools and youth. While the preceding section examined how these laws came to be, these sections will specifically focus on the present and the future. The history demonstrates how much has changed in the past ten years, while the present shows how some of the same political ideology that affected past homophobia is now playing out in how laws are being applied.

[63] "Open letter to The Hon. Stephen Harper from Law Professors Regarding Re-opening Same Sex Marriage" online: Equality for Gays And Lesbians Everywhere (EGALE), online: <http://www.egale.ca/index.asp?lang=E&item=1273> Accessed July 15, 10.

HUMAN RIGHTS

The *Human Rights Act* protects Albertans against discrimination and harassment in areas such as schools, restaurants, bars, tenancy, unions, work, and volunteer activities. There are five areas covered by the *Act*:

- employment and employment advertising;
- goods, services, accommodation, facilities customarily available to the public;
- publications, notices, signs, symbols;
- tenancy; and
- trade unions, employers' organization, occupational association.

There are 13 grounds covered under the Act : race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status and sexual orientation.

"Sexual orientation" was read into the Act after the *Vriend* decision in 1998 as discussed earlier. After the 1998 *Vriend* ruling, it was not actually written into the Act until 2010. The amendment added a section covering parents as well to indicate that parents could make a complaint under the Act if they did not give permission for their child to take part in curriculum that focuses on 'sexuality, sexual orientation or religion'. There is no case law on the interpretation of this section as of yet.

'Transgendered' people are covered under the ground of gender. It is unclear how long complaints have been accepted for transgendered people but information sheets at the Commission have listed gender identity as included for many years. As noted, only some other jurisdictions, such as Ontario, Manitoba and the Northwest Territories, has gender identity specifically written into its human rights legislation.

A note on bisexual human rights in Alberta and Canada: there are few cases that ever mention bisexual rights as being separate and apart from lesbian and gay rights. Bisexuality is protected in the abstract by protecting individual's rights when they are in

a same-sex relationship. There are legal and social issues that arise for bisexual people; however, when judges address many of these issues they do so in a lesbian/gay dichotomy not acknowledging that complainants are bisexual. The issue with handling cases this way is that bisexual complainants become rather hidden. Another issue for bisexual claimants is that sometimes their bisexuality is used against them. This happens in the refugee context where adjudicators may presume a claimant is not eligible because they have had opposite-sex partners.

The Alberta Human Rights Commission has diligently promoted the fact that sexual orientation and transgendered rights are covered under the Act. They do so in information sheets, on their website and in education seminars to corporations and community groups.

Some examples of complaints that might arise under the human rights legislation are:

- firing an LGBT person from their work because of their sexual orientation or gender identity;
- posting a sign that promotes hatred against an LGBT person or community;
- refusing to hire a gay man in a daycare because of a incorrect stereotype that gay men are pedophiles;
- refusing to accommodate a trans person at work as they transition;
- refusing to rent to a lesbian couple; and
- harassment or denial of rights of an LGBT person by a union.

Complaints filed with the Human Rights Commission based on sexual orientation and gender identity made up 2% of the 803 complaints filed in 2009/10.[64] However, many complaints are settled before they make it to a tribunal. Complaints that get settled before making it to a tribunal do not set any legal precedent.

[64] Alberta Human Rights and Citizenship Commission, "Grounds of discrimination cited in complaint files opened April 1, 2009 to March 31, 2010" in *Alberta Human Rights and Citizenship Commission Annual Review, April 1, 2008 – March 31, 2009, (*Edmonton: Alberta Human Rights and Citizenship Commission, 2010) at 11, online: http://www.albertahumanrights.ab.ca/documents/AHRC_Annual_Review_2009_10_web.pdf

On October 1, 2009, Bill 44 was enacted into legislation with the exception of the parental rights clause. The amendment had the following effect on LGB Rights:

- Added "sexual orientation" into each of the areas covered under the Act; and
- Took out the opposite sex definition of 'marital status' so that same-sex couples would be included as well.

By September 2010 the rest of Bill 44, which had the section on a parent's rights discussed in the *History* section came into force.

Trans Human Rights

Some key issues in the field of trans human rights seem to center around what stage a trans person is at in his or her actual physical transition. Legislation and policy[65] seems to recognize rights for trans people who have had some form of operation or hormones treatment, but ceases to acknowledge a trans person who has not had some form of gender reassignment surgery. Many trans people have not had this surgery. This stems from a variety of reasons: they are too early in the process and still doing the real-life test[66], operations are expensive and there are few facilities that perform them,[67] the operation for female-to-male trans men is still considered by some provinces to be experimental, or (for some trans people), they are happy living in their identified gender without having an operation to alter physical body parts.

A key issue for trans people is whether they are permitted to use bathrooms and change-rooms as per their identified gender. Only a couple of lower court decisions have addressed this problem. For instance, in *Ferris*[68] an MTF[69] transsexual woman was

[65] See for instance, policies pertaining to identification and changing one's gender on driver's licenses, birth certificates, etc.

[66] Under the Benjamin Standard a trans person is required to go through a real-life test before they can undergo certain surgeries. This involves living in the gender they identify with at work, with family and/or with friends, for a period of 3 to 12 months. These standards have been recently updated and can be found online: GID Reform Weblog by Kelly Winters at idreform.wordpress.com/2011/09/25/new-standards-of-care-for-the-health-of-transsexual-transgender-and-gender-nonconforming-people/ .

[67] No facilities for genital surgery exist within Alberta and so patients must fly out of province for these.

[68] *Ferris v Office and Technical Employees Union, Local 15* [1999] BCHRTD No 55.

[69] Male-to-female trans person who was born male but identifies as female.

employed for 20 years by the same company. A coworker complained that she should be using the men's washroom. The union did not investigate the situation properly and did not fight against the company's treatment of Ms. Ferris. Expert evidence in front of the Tribunal noted that trans people are particularly vulnerable to discrimination. This kind of disrespectful treatment takes an emotional toll on trans people. Refusing the use of the women's washroom had a detrimental effect on Ms. Ferris and challenged her identity as truly a woman. The Union was found to have discriminated against Ms. Ferris.

Another case that addressed the issue of using gendered washrooms happened in a nightclub[70] when a male to female (MTF) trans woman was refused use of the women's washroom. The British Columbia Human Rights Commission found that this was discriminatory treatment. A doctor speaking about trans rights said that using the appropriate washroom was "significant" in the identity of a transsexual person.

Both of these cases are tribunal decisions that have not received much press and do not carry the same amount of legal weight as would a higher court decision. Many workplaces, bars, health clubs and schools have not yet thought about the human rights issues of trans people who need to use on-site washrooms and change rooms. Adults can often navigate their way through these issues by using single non-gendered washrooms or, if they easily pass in their identified gender, using a washroom without being noticed. However, the stress of having to find a single washroom space or hoping one will not be recognized can add an additional stress to a trans person's everyday life, and especially if they do not have identification to support their gender identity.

For youth who are in secondary school, the bathroom issue is even greater. Schools so far in Alberta do not have a policy on use of bathrooms by trans youth and so anecdotal reports by trans youth say that they are going to school and avoiding using the

[70] *Sheridan v Sanctuary Investments Ltd*, [1999] BCHRTD No 43, 33 CHRR D/467 (BC Trib) [*Sheridan*].

washroom for the entire day. Parents, who are supportive, feel helpless to find a solution when there is no law or policy that will support them. Youth are much more vulnerable because of their age and stage of life and so the issue of what bathroom they use can become a constant issue in their daily lives.

These issues are however being addressed by the school boards in Edmonton and Calgary, and this is discussed in the section on Youth and Schools.

Gender Reassignment Surgery

Gender reassignment surgery (GRS) is a medically necessary procedure used to treat gender identity disorder experienced by trans-identified people. GRS was delisted from health coverage in Alberta in the 2009/2010 budget.[71] When GRS was delisted news reports said that 23 Albertans filed human rights complaints.[72] The move was to reduce the health and wellness budget of $15 billion by $700,000. After the announcement there were many who protested the decision. The Health Minister said that he would allow those who were waiting for GRS to still have their surgeries covered. In April 2010 the Government agreed to cover up to 20 surgeries per year, phasing out the funding in 2015. However, in order to be included in these last GRS procedures the individual had to have been signed up with a recognized physician by April 2009 and met a list of qualifying criteria.[73] In early June, 2012, the Alberta government reinstated funding for GRS effective June 15, 2012.[74]

[71] Government of Alberta Budget 2010 Online:< http://budget2010.alberta.ca/index.html> Accessed July 27/10.
[72] *Transgendered Albertan File Human Rights Complaint,* April 15, 2009. Online: CBC News <http://www.cbc.ca/news/canada/calgary/story/2009/04/15/cgy-alberta-transgendered-sex-change-human-rights.html> (accessed May 25, 2011).
[73] Dr. Warneke, MD, Open letter to transgendered individuals April 27, 2010 re: GRS. Online: Facebook http://www.facebook.com/topic.php?uid=85048933488&topic=14486 (Accessed September 30/11).
[74] Mercedes Allen *Alberta reinstates funding for sex reassignment surgery (plus, why it's necessary)* rabble.ca online: http://rabble.ca/blogs/bloggers/mercedes-allen/2012/06/alberta-reinstates-funding-sex-reassignment-surgery-plus-why-i.

Several trans people had filed human rights complaints with the Alberta Human Rights Commission for the denial of services. Interestingly, over ten years ago, Ontario had also decided to delist GRS, before having any consultation with the trans community or medical professionals. A 2006 case[75] found that it was discriminatory to de-list GRS and prevent those people who were already in process from continuing on with their surgery. However, it took until May 2008, after much lobbying by trans' groups, for Ontario to relist GRS coverage.

Trans people who have decided to go ahead with a physical / hormonal transition must first see a psychologist and be approved for these procedures. Part of the approval process is to go through what is called a real-life test and live, for a period of time, in the gender to which the person identifies. For instance, if the trans person is male-to-female, the real-life-test means dressing for work as a female, using the women's washroom, and/or presenting at family events as female. This presents some challenges, such as the potential for employers to deny use of the women's washroom, personal identification that still has the birth gender on it, and potentially coming out as transsexual to family, friends or co-workers.

An FTM man has an added challenge in addressing his gender identity. In many provinces MTF surgery is covered, but bottom surgery is still considered experimental and therefore not covered. This puts FTM men in a difficult place in terms of addressing their feelings of having the wrong-gendered body. Treatment is still available for hormone therapy and many FTM men get top surgery.

Trans Prisoner's Rights

One case, where a trans woman could not continue with her plans for GRS, was the case of Synthia Kavanagh, who was imprisoned partway through her transition. Synthia

[75] *Hogan, Stonehouse, AB and McDonald v Her Majesty the Queen in Right of Ontario As represented by the Minister of Health and Long-term Care,* 2006 HRTO 32.

Kavanagh is a MTF trans woman who was in the process of taking hormone therapy when she was convicted of second-degree murder. She had been in and out of institutions since she was a young child and had lived as a woman since she was in her teens. The convicting judge recommended she be allowed to serve her sentence in a female institution but Correctional Services of Canada (CSC) put her in a male prison. Initially, she was not allowed to continue with the hormone therapy that she had already started. This resulted in her losing her female secondary characteristics. Eventually CSC settled with Ms. Kavanagh and she was allowed to go back on hormones and undergo GRS. The case, however, went on to address two areas of concern in CSC's policies regarding trans inmates: the placement of pre-operative trans inmates in male or female institutions based on their birth gender, and the availability of GRS to inmates.

The policy of the CSC on gender dysphoria at the time, had three key components:

1. An inmate who had already started hormones, monitored through a recognized gender program, may continue to do so.
2. Unless there had already been GRS then the birth gender would be used to determine whether the inmate would be incarcerated in a male or female facility (i.e., If the inmate is born male and hasn't had surgery, then the inmate would be in a male facility, even if their identity is female).
3. GRS will not be allowed while incarcerated.

The court also discussed whether GRS was an 'essential service' and therefore covered under CSC medical treatment. In the past, CSC doctors had said that it was an elective procedure even though the Harry Benjamin Standard[76] stated, "Sex reassignment is not 'experimental', 'investigational', 'elective', 'cosmetic', or optional in any meaningful sense. It constitutes very effective and appropriate treatment for Transsexualism or profound GID."[77]

[76] World Professional Association for Transgendered Heath, "*The Harry Benjamin International Gender Dysphoria Association's Standards Of Care For Gender Identity Disorders, Sixth Version"* online: World Professional Association for Transgendered Heath www.wpath.org/documents2/socv6.pdf.
[77] *Kavanagh v Canada,* [2001] CHRD No 21, [2001] DCDP No 21, para 38 [*Kavanagh*].

CSC argued that the rights of other prisoners to be in a safe place would be hindered by the placement of an MTF inmate in a female institution. They noted:

> Part of the rehabilitation process for female offenders involves placing them in a safe environment, where they can begin to address the problems that got them into trouble in the first place. This includes teaching them how to deal with men in a more positive fashion. These are disadvantaged women, counsel says, who are dealing with their own issues, and we have to be realistic about their ability to cope. Forcing such women to deal with a pre-operative male to female transsexual in their midst, and the risks that such individuals could pose, is not a realistic expectation, nor is it an appropriate priority. [78]

Human rights principles would usually expect that other people's dislike or discomfort with diversity be taken into consideration minimally when deciding how to address the discrimination. However the Tribunal noted that prison inmates are a vulnerable group, just like transsexuals, and they may have painful life experiences that would make it particularly difficult to understand that an MTF trans woman is in fact female. Even with some education, the background of prison inmates would make it more challenging to accept an MTF trans woman in their midst.

The tribunal found that while the CSC had not justified their strict policy, it did take the 'special vulnerability' of trans people into consideration on an *ad hoc* basis.[79] The Canadian human Rights Tribunal found that a policy should:[80]

1. "…recognize the differential effect that housing inmates in accordance with their anatomy has on transsexual inmates.
2. …acknowledge their susceptibility to victimization within the prison system.
3. …require individualized assessment of each transsexual inmate…in consultation with qualified medical professionals…"

Therefore, the tribunal found that a blanket policy that prohibited inmates from sex-reassignment surgery was not justified. This case was affirmed by the Federal Court of

[78] *Kavanagh* at para 151.
[79] *Kavanagh,* at para 166.
[80] *Kavanagh,* at para 166.

Canada.[81] The case demonstrates a balancing of the inmates' rights to a safe rehabilitation process, and the rights of trans-identified inmates to safety in their living space. It does not give an answer to prison officials as to how to handle this balancing but suggests that a case-by-case analysis of each trans-identified inmate is necessary to determine his/her needs. In addition, it notes that prison physicians are not equipped to assess gender identity needs of trans inmates. This should be left to a recognized gender identity disorder clinic.[82]

FAMILY

Same-sex couples can form families, in the eyes of the law, by becoming Adult Interdependent Partners (AIRs),[83] by getting married, or by being defined as common-law partners under other pieces of legislation. Each piece of legislation has a different requirement for when couples (heterosexual or same-sex couples) are determined to be spouses or common-law partners under that act. For instance, under the *Adult Interdependent Relationships Act* any two people will become AIRs once they live together in an interdependent relationship for three years, if they have a child (by birth or adoption) together, or if they sign an agreement stating that they are AIRs. However, under Canada's *Income Tax Act,* two people are considered to be common-law partners once they have cohabited in a conjugal relationship for more than 12 months, or if they have a child together. Therefore, inclusive definitions of 'spouse' and 'common-law partner' outline when a same-sex couple can access the rights and responsibilities under a particular piece of legislation and when they cannot.

Marriage

One of the more controversial topics in family law was granting same-sex couples relationship and family rights. Politically, it was a hot button topic that caused the

[81] *Canada (Attorney General) v Canada (Canadian Human Rights Commission)* [2003] FCJ No 117; [2003] ACF No 117 [*Canada v Canada*].
[82] *Canada v Canada,* at para 45.
[83] *Adult Interdependent Relationships Act,* SA 2002 A-4.5.

Alberta government to attempt to legislate that marriage was "between a man and a woman".[84] Voices against legalizing same-sex unions ranged from promoting a separate sphere for same-sex couples whereby couples could become legal partners, to outrage that a same-sex couple could be seen on equal footing to a heterosexual married couple. And yet, an EKOS/CBC poll in 2002 found that 40% of Albertans would answer 'yes' to the question of whether the federal government should change the definition of marriage to include same-sex couples. While this is less than half the population, it was higher than some other provinces and did represent a considerable amount of support in the population. A survey by Alberta Justice[85] asked participants: "What is the definition of a family?" Two options were given for answers: "Heterosexual pair, including a single parent and his/her children" OR "Any pair or group". Forty-two percent (42%) agreed that family was 'any pair or group'. So the support for same-sex marriage was split in Alberta. However, being federal law, same-sex marriage was permitted in every province and territory once the *Reference re Same-Sex Marriage* case was decided.

It is unlikely that this law would be revoked in a similar fashion to what has happened in California.[86] Here in Canada the government would have to invoke the notwithstanding clause to take away same-sex marriage. The government under Stephen Harper voted in 2006 against legislation to limit same-sex marriages and Harper said that he would not re-open that debate even when he won a majority.

While the law supports the dissolution of same-sex couples who are married (i.e., divorce), couples can sometimes find it difficult to find a lawyer who is accepting and also knowledgeable about same-sex couples and marriage. Each partner must determine the lawyer they will feel most comfortable with. Lawyers that specialize in

[84] *Marriage Act*, ss 1-2.
[85] Alberta Justice Study.
[86] On November 5, 2008 a ballot on Proposition 8 was successful in changing the Californian Constitution to define marriage as between a man and a woman. In Canada, our *Charter* is a federal document and cannot be changed by an individual province.

the area of same-sex couples are few and far between and cannot represent both parties. This is especially true in rural areas where there may only be one or two lawyers serving an area. Also, some polls have indicated that acceptance of same-sex marriage in rural areas is lower than in urban areas.[87]

Lawyers who ascribe to stereotypes about gay or lesbian couples may find it difficult to represent their clients properly. Lawyers will not be able to represent clients without bias if they are looking for one partner to take on the 'male' role and the other, the 'female' role; or if they believe that the person who makes more money in a relationship is likely the more male-identified person in that relationship. This can be especially confusing if it happens in the family law context. For instance, the opposing lawyer may presume that one partner is not the birth mother because that partner looks more "butch" and is in a more male profession than her ex-spouse. Alternatively, a lawyer might presume that a child was conceived though alternative insemination rather than a birth child of one of the parties.

Lawyers will need to have a good understanding of the rights of trans parents in divorce cases to suitably represent a trans client. Discriminatory ideas about the gender of a trans client, such as that an FTM is not a "real man", could bias the process. These ideas are based on stereotypes and create awkwardness in the legal process that makes gay and lesbian couples feel like they are misunderstood and misrepresented in the legal system.

Registration of birth

The 2005 *Fraess v Alberta* case allowed same-sex couples who had planned a baby together to register the baby as belonging to both parents at the time of birth, thus

[87] Polls have suggested that there is less support for same-sex marriage in rural areas than in urban areas. For instance, in a 2003 Ipsos-Reid poll it was found that 65% of those living in rural areas were more likely to oppose same-sex marriage, compared to only 45% in urban areas. This poll is no longer online but is cited on the Religious Tolerance website online: http://www.religioustolerance.org/hom_marb38.htm; accessed April 2011.

avoiding the adoption process. Until October 2005, babies born through artificial insemination were technically supposed to go through an adoption process whereby the birth mother would give permission for her partner to adopt the child. Many heterosexual couples side-stepped this requirement by keeping the fact that there was no genetic link to the father a secret. Lesbian couples could not do the same because it was obvious that the baby could not be born to both women.[88] In October 2005, the *Family Law Act*[89] was proclaimed. It said under section 13:

> Assisted conception
> 13(1) In this section, "assisted conception" means the fertilization by a male person's sperm of a female person's egg by means other than sexual intercourse and includes fertilization of a female person's egg outside of her uterus and subsequent implantation of the fertilized egg into her uterus.
>
> (2) A male person is the father of the resulting child if at the time of an assisted conception he was the spouse of or in a relationship of interdependence of some permanence with the female person and
>
> (a) his sperm was used in the assisted conception, even if it was mixed with the sperm of another male person, or
> (b) his sperm was not used in the assisted conception, but he consented in advance of the conception to being a parent of the resulting child.

In *Fraess v. Alberta* a lesbian couple, which had planned and conceived a child together, challenged this section. They argued that it violated the *Charter* section 15 and conferred rights on heterosexual male fathers that lesbian mothers could not access. The Minister of Justice and Attorney General argued in court that:

1. an inclusive definition would alter the historical and universal definition of 'mother' and 'parent'; and that this would extend parental rights to lesbian women based on the intention to be a parent rather than biology; and

[88] Before the *Re: A* decision, in 1999, lesbian couples could not adopt their partner's child even if the child was intentionally planned by both of them.
[89] *Family Law Act*, SA 2003, c F-4.5 s 13.

2. defining the language of 'mother' and 'parent' involves policy implications that should be left to the legislature. [90]

Justice Clarke noted that the reason the legislation existed was to extend parental responsibilities to those who had *intended* to be a parent from birth. Excluding lesbian couples from this definition was discrimination under the *Charter.* Since this ruling in 2005 lesbian couples have been able to add both of their names to the birth registry and receive a valid birth certificate with both of their names on it.

When a same-sex lesbian couple has a baby they are allowed to put both of their names on the registration of birth. However, the standard birth certificate has two places for names of parents, which is labeled "mother" and "father". There is a special form for same-sex couples that says "Parent" and "Parent". It is unclear why there is one standard form that says "parent" on it, and instead a need for two forms.

In 2010, *Family Law Act* Section 13 was repealed.[91] The situation of assisted reproduction was addressed in a new section 7, which states (in part):

> **Rules of parentage**
>
> **7(1)** For all purposes of the law of Alberta, a person is the child of his or her parents.
>
> **(2)** The following persons are the parents of a child:
>
> ….
>
> (b) if the child was born as a result of assisted reproduction, a person identified under section 8.1 to be a parent of the child;
>
> …
>
> **(4)** A person who donates human reproductive material or an embryo for use in assisted reproduction without the intention of using the material or embryo for his or her own reproductive use is not, by reason only of the donation, a parent of a child born as a result.
>
> **…..**
>
> **8.1(6)** Unless the contrary is proven, a person is presumed to have consented to be a parent of a child born as a result of assisted reproduction if the person was married to or in a conjugal relationship of

[90] *Fraess,* at para 10 – 11.
[91] SA 2010, c 16, s 1.

interdependence of some permanence with,

(a) in the case of a child born in the circumstances referred to in subsection (2), the male person referred to in that subsection,

(b) in the case of a child born in the circumstances referred to in subsection (3), the female person referred to in that subsection ….

These amendments were intended to address some of the new realities with respect to parentage and reproductive technologies, including same-sex partners who have used assisted reproduction to form their families.

HATE CRIMES

Canada has various laws to address issues of discrimination in the form of hatred aimed at LGBT individuals. In Alberta, there are currently three pieces of legislation that inform the discussion of hate laws: The *Alberta Human Rights Act*, the *Canadian Charter of Rights and Freedoms,* and the *Criminal Code of Canada.*[92] There are a number of parallels and similarities between federal and provincial human rights statutes; however, each law sets out its own protections, the areas in which discrimination is prohibited and the procedures and remedies;[93] that is, the means by which a right is enforced or the violation of a right is prevented, redressed or compensated.[94] Each law has anti-discrimination provisions and each law indicates the forum a complaint or criminal charge is to be heard. For example, cases falling under the *Alberta Human Rights Act* are pursued through a human rights tribunal, whereas *Charter* and *Criminal Code* cases are typically pursued through the courts.[95]

[92] *Criminal Code*, RSC 1985, c C-46.
[93] Joseph R. Nolan M.J. Connolly eds. *Black's Law Dictionary,* 5th ed. West Publishing Co. St. Paul's Minn. 1979.
[94] Ray-Ellis, Soma. *Halsbury's Laws of Canada - Discrimination and Human Rights*, III. DISCRIMINATION, 1. Federal and Provincial Human Rights Legislation (1) Introduction (a) The Charter and Human Rights Legislation (i) Provincial and Federal Human Rights Legislation Compared A. Procedure and Available Remedies [Ray-Ellis].
[95] Ray-Ellis, Soma *Halsbury's Laws of Canada* - Discrimination and Human Rights, III. DISCRIMINATION 4. Hate Communications (1) Introduction, HDH-227 *Jurisdictions prohibiting hate messages* [*Jurisdictions prohibiting hate messages*].

LGBT Rights: Climbing the judicial steps to equality

Anti-discrimination and anti-hate laws in Canada aim to balance freedom of expression with the eradication of discrimination. Hatred is detrimental to any society for numerous psychological and social reasons. The group who is targeted by hate propaganda, such as gays and lesbians, may be stripped of their sense of personal dignity and self-worth or even respond aggressively, while those whom the hate-monger seeks to influence are harmed.[96]

Under the *Alberta Human Rights Act*, the prohibition against hate messages includes statements, publications, notices, signs, symbols, emblems or other representations and it protects on the grounds of sexual orientation and gender for transgendered people.[97]

Moreover, the law enforced in a given legal matter depends on the particular situation, the allegations and the parties involved. Someone who commits a crime and is found to violate the prohibitions against hate propaganda under the *Criminal Code* will be prosecuted under criminal law, whereas a newspaper that publishes discriminatory and hateful comments about the trans community, may be investigated under s. 3 of the *Alberta Human Rights Act* and may need to pay damages. Finally, there have been numerous cases in the past twenty years of individuals who argue that the federal government has limited their freedom of expression and these cases develop into *Charter* cases.

The *Charter*

The *Charter* reads at s. 2 (b):

> Everyone has the following fundamental freedoms:
>
> …

[96] *R v Keegstra* (1984), 19 SCC (3d) 254 [*Keegstra*].

[97] *Jurisdictions prohibiting hate messages*. Under federal human rights legislation, until 2012, hate messages were prohibited in the area of "telephonic communications". In 2012, in response to concerns that this section violated the *Charter*, it was repealed.

> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.[98]

Under Canadian law, all activities conveying or attempting to convey meaning are 'expression' for the purposes of s. 2(b). However, no rights or freedoms are unlimited, and so, for instance, when people express their thoughts through physical violence they may find that this type of expression is limited. The Supreme Court of Canada has a two-step process to determine whether an individual's freedom of expression has been infringed.[99] The court must determine:

1. whether the individual's activity falls within the freedom of expression;[100] and
2. whether the purpose or the effect of the government action is to restrict the freedom.[101]

The Supreme Court of Canada has given broad interpretation to freedom of expression. However, the Court has also made it clear that freedom of expression may be restricted under s. 1 of the *Charter* which indicates that the rights and freedoms guaranteed in the Charter are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".[102] For example, public expression that is deemed to incite hatred and deliberately attack the basic human dignity of a woman because she belongs to, or is perceived to belong to, the gay and lesbian community (an identifiable target group) is known as "hate expression", "hate propaganda", or "hate speech".[103]

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[98] *Charter.*

[99] Canadian Charter of Rights Decision Digest, Section 2(b), June 2004 online: http://www.canlii.org/en/ca/charter_digest/s-2-b.html#_Toc68429547 [Canadian Charter of Rights Decision Digest].

[100] Canadian Charter of Rights Decision Digest.

[101] *Ross v New Brunswick School District No. 15*, [1996] 1 SCR 825 [*Ross*].

[102] *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 at s 1 :

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[103] Alberta Civil Liberties Research Centre, *Freedom of Expression and Its Limitations in Canada: Background Materials and Learning Actvities* (2004), p. 69 [ACLRC 2004].

The right conferred by s. 2(b) of the *Charter* embraces a broad continuum of intellectual and expressive freedom—"freedom of thought, belief, opinion and expression".[104] Above all, the purpose of s. 2(b) is to permit free expression with the goal of promoting truth, political or social participation and self-fulfillment. That purpose extends to the protection of minority beliefs that the majority regards as wrong or false.[105] While expression taking the form of violence, terror, or directed towards violence or terror is unlikely to find shelter in *Charter* guarantees, most freedom of expression arguments most often involve a tension between the majoritarian view of what is true or right and an unpopular minority view.[106] To this end, the tension between individual freedom of expression and the right to be free from discrimination has been seen in court cases involving LGBT legal issues.

Criminal Code of Canada

In Alberta and in other provinces, where the provincial human rights codes prohibits publication of material that promotes hatred, a wider range of minority groups, including LGBT people, are protected, and different remedies may be sought, from monetary remedies to an apology.[107] In addition, Canadian Parliament and provincial legislatures have implemented controls on hate expression under criminal law using the *Criminal Code's* hate propaganda provisions at s. 318 to s. 320.[108] The court in *Keegstra,* discussed below, held that while section 319(2) of *Criminal Code* infringes freedom of expression provisions of the *Charter* by prohibiting willful promotion of hatred, it is a justified limitation.

The Supreme Court of Canada laid out the legal definition of "hatred" in 1990 in the case *R v Keegstra.*[109] James Keegstra was a teacher in Alberta who was charged with

[104] *R v Sharpe*, [2001] 1 SCR 45, para 25.
[105] Canadian Charter of Rights Decision Digest.
[106] Canadian Charter of Rights Decision Digest.
[107] ACLRC 2004.
[108] ACLRC 2004, at 74.
[109] [1990] 3 SCR 69.

unlawfully promoting hatred against an identifiable group by communicating anti-Semitic statements to his students. If the students did not reproduce Keegstra's views on exams, their marks suffered. The definition of hatred as laid out in *Keegstra* indicates that hate expression has a common set of basic messages and purposes.[110] Therefore, looking at hatred against the LGBT communities, the core message of hate expression is that the targeted group, or LGBT people, is seen as different and inferior (this may be rooted in perceived historical, genetic, cultural, moral, ethical, behavioral or religious inferiority).[111] A second message generally follows, that the LGBT people have either harmed or threatened to harm the speaker's group. These two messages combined result in the target group, in this example LGBT people, being perceived as not worthy of the same rights, dignity and respect as the rest of society.[112] Sometimes hate expression goes further to conclude that LGBT people should be physically eliminated from society, or that the groups' political, civil and human rights should be eliminated.[113] In *Keegstra,* the court analyzed the guiding philosophy behind the freedom of expression provisions in the *Charter:*

> The question is always one of balance. Freedom of expression protects certain values, which we consider fundamental -- democracy, a vital, vibrant and creative culture, and the dignity of the individual. At the same time, free expression may put other values at risk. It may harm reputations, incite acts of violence. It may be abused to undermine our fundamental governmental institutions and undercut racial and social harmony. The law may legitimately trench on freedom of expression where the value of free expression is outweighed by the risks engendered by allowing freedom of expression.[114]

A school board has a duty to maintain a positive school environment for all persons served by it. In the decision in *Keegstra*, the Supreme Court of Canada has reiterated the need for restriction of freedom of expression of teachers if it is in conflict with a positive

[110] ACLRC 2004, at 70.
[111] ACLRC 2004, at 70.
[112] ACLRC 2004, at 71.
[113] ACLRC 2004, at 71.
[114] Ray-Ellis.

educational environment.[115] *Ross v New Brunswick School District No. 15*,[116] agreed with this sentiment and said that "a school is a communication centre for a whole range of values and aspirations of a society. …[and] an arena for the exchange of ideas and must, therefore, be premised upon principles of tolerance and impartiality so that all persons within the school environment feel equally free to participate."[117] It follows that LGBT students also have the right to equally participate, however this is not always the case in a homophobic or transphobic environment.

To charge someone under the hate propaganda provisions of the *Criminal Code*, a very high threshold must be met. According to s. 319(1) of the *Criminal Code*, a person can be sentenced to up to two years in prison for making statements in a public space that incite hatred against any identifiable group, provided those statements are likely to lead to a breach of the public peace and order. "Identifiable group" includes gays and lesbians, and is defined as "any section of the public distinguished by colour, race, religion, ethnic origin or sexual origin or sexual orientation".[118] Also, a person can be sentenced to up to two years in prison for making statements that willfully promote hatred against any identifiable group, other than in private conversation. The statements covered by the prohibition against hate expression are not limited to language alone, and may include spoken, written or recorded words, as well as gestures signs or other visual representations.[119] Also, "public place" can include any place to which the public has access.

Even if this high threshold is met, there are a number of defenses to the crime of willfully promoting hatred, and no one will be convicted if:

- the accused establishes that the statements communicated were true;

[115] *Ross v New Brunswick School District No. 15*, [1996] 1 SCR 82 at para 42 [*Ross*].
[116] *Ross.*
[117] *Ross,* at para 42.
[118] *Criminal Code,* at s 318(4).
[119] *Criminal Code,* at s 319(7).

- the accused in good faith expressed an opinion on a religious subject or an opinion based on a belief in a religious text;
- the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds the accused believed them to be true; or
- the accused in good faith intended to point out, for the purpose of removal, matters producing feelings of hatred toward an identifiable group in Canada.

The *Criminal Code* may seem to be in conflict with freedom of expression guarantees in the *Charter*, however, the Supreme Court of Canada has said that the infringement of individual freedom of expression can serve an important anti-discrimination objective.[120] The court further found that the limitation of individual freedom of expression is to be balanced with the objective of anti-discrimination, so the limitation of hate expression was not excessive.[121] This is still though a highly debated area of law.

Alberta Human Rights Act

The *Alberta Human Rights Act* contains a section that prohibits discrimination in publications based on sexual orientation or gender (including transgender). Section 3 is balanced with provisions speaking to freedom of expression, exceptions where a contravention of the Act may be reasonable and justifiable. Section 3 reads:

> No person shall publish…or cause to be published… before the public any statement…that…is likely to expose a person or a class of persons to hatred or contempt because of the race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation of that person or class of persons.[122]

The section also reads that: "Nothing in this section shall be deemed to interfere with the free expression of opinion on any subject".[123] When someone makes statements that somebody else finds to be insulting, upsetting, in bad taste, or contrary to their own beliefs, the *Human Rights Act* is not engaged. In order to engage the *Act*,

[120] *Keegstra.*
[121] *Keegstra.*
[122] *Alberta Human Rights Act,* s. 3.
[123] *Alberta Human Rights Act,* s. 3.

statements must be connected to the grounds protected under the *Act* and must meet certain tests for determining whether a statement indicates discrimination, an intention to discriminate or is likely to expose a person or class of persons to hatred or contempt.[124] Complaints of hate expression covered by provincial human rights legislation, may end up going to a human rights tribunal.[125] These tribunals have jurisdiction over the claim and are provided with broad powers, as specified by legislation to determine appropriate remedies and awards under their respective governing legislation.[126] Moreover, the *Alberta Human Rights Act* provides defenses and justifications for some statements. For example section 11 of the *Act* reads that a complaint cannot be made out under the Act so long as it is shown that the alleged contravention was reasonable and justifiable in the circumstances.[127] Some cases are summarized in Appendix A that provide insight into the current legal climate surrounding hate expression laws in Western Canada.

While the prohibitions against hate expression exist in law, the cases discussed in Appendix A demonstrate the difficulties courts have in making a successful case on hate expression. Hatred can be addressed under three pieces of legislation in Alberta; that is the *Criminal Code of Canada*, *Charter* and *Alberta Human Rights Act*. The *Criminal Code* addresses criminal actions that are based on hate, while the *Charter* protects freedom of expression, even if it is hateful, but not if it is promoting hatred that will lead to imminent violence. The *Charter* also addresses only government action and will only come into play when there is an issue of discrimination by a government body, law or action. In terms of day-to-day interactions with other non-governmental bodies, the *Alberta Human Rights Act* allows people to make a complaint if there has been hate expression that willfully promotes hatred against an identifiable group. Even combined,

[124] Alberta, Alberta Human Rights Commission, *Detailed Discussion of Section 3 of the Alberta Human Rights Act,(2010), online:* Alberta Human Rights Commission http://www.albertahumanrights.ab.ca/other/statements/what_to_know/section_3_discussion.asp [Detailed Discussion of Section 3].
[125] Ray-Ellis.
[126] Ray-Ellis.
[127] Detailed Discussion of Section 3.

all three pieces of legislation do not easily limit expression, but act as balancing instruments to ensure that the value of freedom of expression is protected in Canada. Presently the debate rages on as to where this boundary lies.

IDENTIFICATION DOCUMENTS FOR TRANS PEOPLE

Adjusting one's gender on federal and provincial identification can be an important part in a trans person's journey of transition. Canadian and Alberta laws make it clear that Gender Reassignment Surgery (GRS) or in the case of driver's license, the intention to complete GRS, is required before documentation can be altered to reflect any other gender than was previously noted. In this section, the varying requirements to adjust gender information on an applicant's passport, citizenship documentation, Certificate of Indian Status (aka Indian Status Card), birth certificate, operator's license (i.e., driver's license) and provincial identification card are explored. This issue has a grave effect on a trans person's human rights because it has the potential to affect where one can work or travel and who gets to know the medical history of a person having been born a particular gender.

Federal Identification

Passport

According to Passport Canada, passport applicants may adjust their information, including gender identification. According to the *Canadian Passport Order*,[128] Passport Canada may request an applicant to provide further information, material, or declarations respecting any matter relating to the issue of the passport or the delivery of passport services. It follows that Passport Canada is authorized to convert the information into digital biometric information, as it does to any information submitted by any applicant.

[128] *Canadian Passport Order SI/81-86* Online: Department of Justice http://laws.justice.gc.ca/eng/regulations/SI-81-86/FullText.html (accessed October 31, 2011).

The *Canadian Passport Order* contains a schedule entitled "Sex".[129] This section indicates that a passport applicant may be requested to "provide an explanation", if the sex indicated in an application for a passport is not the same as that set out in that applicant's birth certificate. The schedule further states that in the event an application indicates that "a change of sex of the applicant has taken place", Passport Canada may request the applicant to submit a certificate from a medical practitioner to substantiate the statement. Nowhere in the *Canadian Passport Order* or its schedules, does it make explicit that GRS must be completed as a condition of changing the gender on a passport. Therefore, it is not made clear at what stage of transition a "change of sex" would be recognized by Passport Canada (i.e., psycho-therapy, hormone treatment or full-fledged GRS.)

Citizenship Documentation

A Citizenship Policy Manual published in June 2010 by Citizenship and Immigration Canada entitles, *CP3 Establishing Applicant's Identity*[130] contains instruction on how to establish identity of the applicant after GRS. This document is produced in regards to verifying the identity of applicant for a proof, grant, retention, renunciation, resumption of citizenship, and search of records. The manual states that "except in special and unusual circumstances", the information initially provided to the Department of Citizenship and Immigration Canada will be the information reflected on documents issued by the CIC. Should someone require replacement documents, all replacement certificates will be the same as the previous citizenship certificate, unless the applicant provides a statement from a surgeon confirming the surgical procedure, as well as a statement from another person to the effect that he or she knew the applicant prior to the surgery and that this person is one and the same.

[129] A schedule is an attachment to a legislative or legal document containing supplementary details.
[130] *Citizenship Policy Manual CP3 – Establishing Applicant's Identity* Online: Citizenship and Immigration Canada www.cic.gc.ca/english/resources/manuals/cp/cp03-eng.pdf (accessed October 31, 2011).

The CIC makes clear at section 6.7 of the policy manual that amendments to gender on immigration documents "are not done during the gender reassignment process. In all cases where an applicant wishes to amend the gender on citizenship records, the surgical procedures must be complete." Moreover, the CIC requires that all statements from the surgeon confirming surgical procedure "must indicate that the gender reassignment procedures are completed and that the person is now anatomically a male or female."

Section 6.5 and 6.6 indicate that the CIC requires an official statement from the surgeon who performed gender reassignment surgery, as well as a statement from another person who knew the applicant before the surgery, to amend the existing gender on Record of Landing or Confirmation of Permanent Residence. Otherwise, the gender indicated on the certificate will be the sex shown on the person's birth certificate or Immigration document.

Section 6.8 indicates some documents that can be used to establish gender, including: an official statement from the surgeon who performed gender reassignment surgery; a statement from a person known to the applicant prior to GRS; a birth certificate; and an immigration document.

Certificate of Indian Status (aka Indian Status Card)

The Registrar of the Indian and Northern Affairs Canada, Southern Alberta Field Services Office, indicated in a telephone communication[131] that the Indian Registry System is informed by an applicant's birth certificate. Therefore, if the birth certificate is changed to adjust the gender information, the Indian Registry System will be updated. Furthermore, this means a Status Card will not be changed unless GRS has been completed (see below).

[131] Private Conversation, Friday, June 10, 2011, INAC Southern Alberta Field Services Office, Phone: (403) 292-5901.

Provincial

Birth Certificate

According to s. 22 (1) of the *Vital Statistics Act*,[132] a person may adjust his/her gender information to another gender other than what appears on the birth certificate only after his/her anatomical sex structure has been changed. Then, the person may apply to the Director of Vital Statistics to have the gender designation changed on the birth certificate. Section 22 (1) of the *Vital Statistics Act* indicates that the person must submit to the Director, two affidavits of two physicians, and each affidavit must give evidence that the anatomical sex of the person has changed. The Director also must be satisfied through the production of evidence by the person as to the identity of the person.

Section 22(2) indicates that if the procedure set out in s. 22(1) is completed, then the Director shall "cause a notation of the change to be made on the registration of sex", if the sex of the person is registered in Alberta. If the sex of the person is registered outside Alberta, the Director must transmit to the officer in charge of the registration of births and marriages in the jurisdiction in which the person is registered, a copy of the proof of the identified sex. Finally, section 22 (3) indicates that "every birth or marriage certificate issued after the making of a notation under this section shall be issued as if the registration had been made with the sex as changed." Therefore GRS is the required step in transition, in order to have a birth certificate reflect a gender other than the original registered gender. This is a problem for non-operative trans individuals who choose not to get surgery, cannot afford it, or where the surgery is still in an experimental stage.

Driver's License or Alberta Identification Card

The Service Alberta website [133] indicates that people may adjust their gender information before or after GRS has been completed. However, there are a few steps

[132] RSA 2000, c V-4.
[133] Service Alberta Online: http://www.servicealberta.ca/1692.cfm

that must be completed and the gender may be readjusted if timelines of GRS are not met. An applicant must submit two letters: one requesting the gender change with the applicant's information and another letter from a psychologist or psychiatrist stating that changing the sex designation is appropriate. After GRS has been completed, the applicant must submit two affidavits: one from the surgeon or clinic that completed the procedure and one from the attending psychologist or psychiatrist, within 90 days of completion of the GRS. If the applicant decides not to complete the GRS, they must notify the Motor Vehicles office within 90 days.

Prerequisites to changing identification

The various forms of provincial and federal identification discussed above refer to various procedures including "change of sex", "completed gender reassignment procedures", "anatomical sex change", "Gender Reassignment Surgery" as prerequisites to have gender information adjusted on their respective documents. What remains unclear is what procedures qualify as GRS or an anatomical sex change for the purposes of proving that a person's gender meets the requirements to change his/her identity.

Trans men can get "top" surgery (such as mammaplasty and/or chest reconstruction) or "bottom" surgery (such as a hysterectomy, phalloplasty or liposuction). Many FTM trans men choose not the have bottom surgeries for a number of reasons including the fact that it is costly, some procedures are considered to be still in the experimental stages, and surgeries such as phalloplasty come with the risk of damaging sensation.

Alberta's *Vital Statistics Act* states that people can change the sex on their birth certificates if their "anatomical sex structure has been changed". What is unclear is what surgeries must be completed for one's anatomical structure to have changed. This presents an additional challenge for FTM trans men and non-operative trans women and men.

In general, changing one's identity documents is a complex process that takes time and knowledge to complete. The guidelines are not always clear enough to make the process a smooth one. While identity documents are being changed, a trans person may end up with conflicting genders on different documents, which can result in discrimination or safety issues.

REFUGEES/IMMIGRANTS

Refugees and immigrants to Canada are regulated by the *Immigration and Refugee Protection Act*.[134]

Immigration Rules

Until the *Immigration and Refugee Protection Act*[135]amendments in 2002, same-sex partners of a Canadian person had difficulty entering Canada. The legislation required that couples had to have lived together to prove that they were in a committed relationship. This was often impossible for same-sex partners. It was also difficult for many same-sex couples where one partner lived in a country that had laws or societal values that frowned on same-sex relationships. To get around this, some same-sex partners were admitted to Canada under a provision that allowed for the Immigration process to take into account 'humanitarian and compassionate' reasons.[136]

Presently, the same-sex partner of a Canadian citizen can immigrate to Canada (1) as a married spouse, (2) in a conjugal relationship, or (3) as a conjugal partner. These three possibilities differ depending on the facts of the applicant's (non-Canadian citizen) situation. For same-sex couples who were legally married in Canada, immigration officials will recognize their relationship for the purposes of immigrating. Same-sex

[134] Immigration and Refugee Protection Act, SC 2001, c 27 [*IRPA*].
[135] *IRPA.*
[136] *IRPA* s 67(1)(c).

couples married in places like the Netherlands or Belgium, where same-sex marriage is legally recognized, may also immigrate if their marriage is valid.[137]

However, the Overseas Processing Manual #2,[138] which is found online, still notes that "Same-sex marriages performed outside Canada are not recognized for immigration purposes." This is part of an interim departmental policy that was carried over after marriage was recognized across Canada in 2002.[139] The policy notes that the CIC will be examining this policy in light of the decision, however this policy remains online in its original form from 2006. This information, which is incorrect, can easily mislead applicants.

The Overseas Processing Manual #2 also says that trans people who "…change their sex legally, retain the sex they had at birth for the purposes of marriage."[140] This likely comes from the idea that the government has to be cautious about recognizing same-sex couples who are married, since, at the time it was written, same-sex marriage was illegal. It is unclear whether this policy still stands today or if it has been changed. The next two sections discuss the difference between conjugal relationships and conjugal partners and how these differences affect immigration.

Conjugal relationships

Canadians can sponsor members from the family class to come to Canada. This includes a person with whom the Canadian is in a 'conjugal relationship'. A 'conjugal relationship' is one that is 'marriage-like', and does not just mean a sexual relationship. In order for a same-sex couple to prove that they are in a conjugal relationship they must show that:

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[137] Canada, Citizenship and Immigration Canada, *Sponsoring your family: Spouses and dependent children-who can apply,* online:<http://www.cic.gc.ca/english/immigrate/sponsor/spouse-apply-who.asp> (accessed June 16, 2011).
[138] Canada, Citizenship and Immigration Canada, *Overseas Processing Manual #2: Processing Members of the Family Class* s.5.40. online: Government of Canada <http://www.cic.gc.ca/english/resources/manuals/op/op02-eng.pdf> (accessed June 15, 2012) [*OP-2*].
[139] Bill C 38, *Civil Marriage Act (An Act respecting certain aspects of legal capacity for marriage for civil purposes),* 1st Sess, 38th Parl, 2005 (assented to 20 July 2005) SC 2005, C 33 [*Civil Marriage Act*].
[140] *OP-2,* at *s.* 5.31.

- the relationship is one of some permanence,
- the individuals are financially, socially, emotionally, and physically interdependent,
- they share household and related responsibilities, and
- they have made a serious commitment to one another.[141]

The OP-2 indicates that this means some of each of the following elements must be present:[142]

- mutual commitment to a shared life;
- exclusive – cannot be in more than one conjugal relationship at a time;
- intimate – commitment to sexual exclusivity;
- interdependent – physically, emotionally, financially, socially;
- permanent – long-term, genuine and continuing relationship;
- present themselves as a couple;
- regarded by others as a couple; and
- caring for children, if there are any.

The OP-2 manual notes that just dating or trying out a relationship by living together is not a recognized conjugal relationship for the purpose of marriage. The above elements must be present for heterosexual and same-sex couples. Couples must show that they have a conjugal relationship and have been cohabiting for at least a period of one year or have done so in the recent past. However, because of stigma, stereotypes and anti-gay laws these rules are sometimes more difficult for same-sex couples. Therefore, the most recent amendments of the provisions affecting same-sex couples allows for two other methods of application. First, the partners may attempt to demonstrate that they were in a conjugal relationship but were unable to cohabit because of penal control (laws prohibiting same-sex relationships) or because of a fear of persecution or actual persecution. In this case the Visa officer will look at other types of evidence to determine the relationship is a conjugal relationship, such as whether the couple has travelled together, how long the relationship has been, measures taken to overcome customs, religion and family doctrines, sharing family events, and other documents such

[141] *OP-2,* at s 5.25.
[142] *OP-2*, at s 5.25.

as photographs. In this case the immigration process is open to proof that the relationship is a conjugal relationship but that it has been held back from cohabitation because of laws, traditions or persecution in the country of origin of the applicant.

Conjugal Partners

The applicant may also apply under the section for conjugal partners (not to be confused with conjugal relationships). This section was created for people in exceptional circumstances who are not able to show that they are in a conjugal relationship and also are unable to marry. The section covers a Canadian citizen or permanent resident who has a partner who is a foreign national, but not a partner who is already living in Canada. In order to prove the relationship, immigration officials are looking for a conjugal partner of at least one year and evidence that the couple is in a "committed and mutually interdependent relationship of some permanence and have combined their affairs to the extent possible."[143] In this way, the couple will still show that their relationship is similar to a conjugal relationship without the advantage of having had the opportunity to live together. They will, however, need to explain why they have not been able to live together for a year.

Conjugal partner rules as above have made it easier for same-sex couples to be together in Canada. There are still some presumptions about what a long-term relationship looks like. For instance, looking back at the list of elements of a conjugal relationship, the elements include exclusivity, mutual long-term commitment and caring for children together. However, heterosexual and same-sex couples today spend more time defining their own idea of relationship that are not always based on traditional ideals such as exclusivity. The important point is that to have your partner immigrate to Canada you must fulfill the list of ideals as outlined in the *IRPA*. Because same-sex couples range from traditionally-minded to creating their own ideals, these guidelines are usually not

[143] *OP-2,* at s 5.47.

discriminatory to same-sex couples any more than non-traditionally-minded heterosexual couples.

Refugees

A person may apply for refugee status if he/she fits the following definition:

> A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,
>
> > (*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or
> >
> > (*b*) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.[144]

This definition means that in order to be defined as a refugee, a person must show a connection between a fear of harm and one of the listed grounds of persecution, namely: "..race, religion, nationality, membership in a particular social group or political opinion". Gays and lesbians, who need to apply as refugees, will argue that they fall within the definition of 'refugee' and that their persecution stems from "political opinion", or "membership in a particular social group."

Initial decisions on sexual orientation demonstrated that the Immigration Refugee Board did not agree that gays and lesbians could make an argument for refugee protection based on being persecuted because of their sexual orientation.[145] However, by 1993 the Supreme Court of Canada in *Ward*[146] defined the term "particular social group" and included "sexual orientation" in the examples of types of groups covered. After the *Ward* decision it was generally accepted that gays and lesbians could make a claim for refugee status under section 96. It was still unclear if bisexual and transgendered complainants could do the same.

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[144] *IRPA, at* s.96.
[145] S. Rehaag, "Patrolling the Borders of Sexual Orientation: Bisexual Refugee Claims in Canada" (2008) 53 McGill L.J. 59-102 at para. 13 – 17 [Rehaag].
[146] *Canada (AG) v Ward,* [1993] 2 SCR 689, (1993), 103 DLR (4th) 1 [*Ward*].

A study[147] from 2001 to 2004 showed that 1,351 claims were made to the IRB based on sexual orientation. Of these, 19% involved female claimants, with the vast majority being male claimants. Of the total 1,351 claimants, 48% were granted refugee status. This compared with a granting rate of 45% of the overall 40,408 claims. Therefore, the granting rates in 2004 for refugee status based on sexual orientation was about the same as the overall rate of granting refugee status. However, studies of the actual refugee decisions demonstrate how stereotypes and bias can show up in other areas of the decision-making.

Rehaag[148] reviewed cases and an earlier finding by Millbank[149] to show how stereotypical images of gays and lesbians have affected IRB members' review of refugee applications. Rehaag notes the following assumptions applied to the facts of gay and lesbian refugee cases:

- using a westernized understanding of what gays and lesbians act like to determine if a claimant is a refugee based on sexual orientation;
- assuming that a lesbian looks very butchy and a gay man looks effeminate;
- assuming that violence against gays and lesbians happen in public spheres, and private violence is not an issue for a public body;
- using the lack of attendance to a gay bar to undermine a gay/lesbian claimant's credibility; and
- doubting a claimant's case if they have dated the opposite sex (i.e., are bisexual).

These assumptions make it difficult for gay and lesbian claimants to make a case demonstrating that they were in fear of persecution based on their sexual orientation. For instance, a woman who looks traditionally heterosexual may have a more difficult time demonstrating that she is in fact a lesbian, if lesbians are seen as mostly butchy women. Also some gay and lesbian claimants will not attend gay bars, just as some heterosexual people will not go out to bars in general. Bisexual claimants also have a

[147] Rehaag.
[148] Rehaag, at para 32-43.
[149] J. Millbank, "Imagining Otherness: Refugee Claims on the Basis of Sexuality in Canada and Australia" (2002) 26 Melbourne U.L. Rev 144 [Millbank].

difficult time proving their refugee status because dating the opposite gender is seen as casting doubt on their gay or lesbian status.

Gay, lesbian and bisexual refugees still have problems today with proving their fear of persecution based on sexual orientation. Younger claimants who have not had sexual relationships, attended gay bars or participated in gay life in their home country sometimes have difficulty demonstrating that they left because of a fear of persecution.[150] Yet, many claimants do not need to experience gay life in their home country to know how family, community and lawmakers will react.

Whether transsexual people can make refugee claims as a persecuted group is yet to be determined in court. Tanya Bloomfield is one of the more recent applications. She is a trans woman who made a claim in 2010 to the IRB. She was permitted to apply for refugee status,[151] but later dropped her legal battle and returned to Ireland. It is unclear how cases for transgendered applicants would be handled. This is an emerging issue that will be seen in years to come as more transgendered complainants make it through the system. Trans people are more and more open about their status and about seeking legal rights. This visibility makes them more open to discrimination and violence in their home countries.

SCHOOLS AND YOUTH

LGBT and questioning youth (LGBTQ) are a vulnerable population because of their legal status and lack of legal status to make legal decisions for themselves. Social issues affecting LGBTQ youth include:

- homelessness because of rejection by parents;

[150] For instance, see the case of Alvaro O. Online: Slap upside the head http://www.slapupsidethehead.com/tag/refugees/ (accessed July 4, 2011).
[151] See Online: CBC http://www.cbc.ca/news/canada/nova-scotia/story/2010/08/19/ns-transgender-refugee-eligible.html (accessed July 4, 2011).

- high-risk activities (i.e., suicide, drug and alcohol abuse) to numb the pain of rejection and lack of support; and
- limited mentorship, resources, and support groups.

These issues are exacerbated in rural areas where the resources and support that LGBTQ youth need may only be available in the nearest city. Some smaller centres, such as Medicine Hat, do offer support services through their HIV/AIDS organization.[152] Many of the issues affecting LGBTQ youth are discussed in detail in the Alberta Civil Liberties Research Centre publication, *Freedom to Be: Human Rights, Sexual Orientation and Gender Identity*.[153] This paper focuses on specific legal issues that impact youth in their coming out process or in learning about the LGBTQ communities.

Youth who grow up having romantic feelings for a person of the same-sex may feel confused if they have had no exposure or education on same-sex couples. Schools do not typically provide these resources, although some schools have begun Gay/Straight Alliances[154] to support youth. Setting up a Gay/Straight Alliance is sometimes limited by the principal of the school and, therefore, is not always an option that is open to students. Youth who need information may look on the internet or access services within the city they live. However, in elementary school and junior high youth are often sheltered from the outside world and trust those closest to them to provide information on personal topics.

Some youth come out so young that parents, family and school are the main places they receive most of their information. So for instance, an FTM trans boy who comes out at ten years of age will very likely need parental support to talk to the school about issues of what bathrooms he can use and what gender is noted on his record. Without a parent or family advocate it will be almost impossible for the youth to navigate these issues

[152] See Youthsafe.net for more information on resources and support services available across Alberta.
[153] Alberta Civil Liberties Research Centre, *Freedom to Be: A Teacher's Guide to Sexual Orientation, Gender Identity and Human Rights* (Calgary: Alberta Civil Liberties Research Centre, 2007).
[154] A group of gay and straight students who come together to educate, celebrate and learn more about the challenges facing LGBT students.

and the opinions/stereotypes of teachers and classmates. Many youth know at a very young age that they are LGBT and are still fairly vulnerable in terms of their dependence on the adults in their life. Therefore, enforcing their legal rights is often directly related to what supportive adults are in the youth's life, and how 'out' the youth is to those adults.

The issues affecting LGB youth in schools include: lack of representation of same-sex headed families, poor discussion of sexual orientation or sex and sexual orientation, assumption that all youth are heterosexual, bullying, difficulty finding a teacher/mentor who is LGB friendly,[155] living in hiding as heterosexual, coming out of the closet, and accessing correct information on being LGB.

The issues facing trans-identified youth are: lack of discussion about trans youth and therefore lack of information on the topic; coming out to oneself but difficulty finding a mentor, parent, family member or representative for school issues; finding a bathroom that is safe to use based on one's gender identity and gender expression; figuring out if they are trans when many youth do not even know what the labels mean; exercising their gender expression in general; wanting to finally resolve the issue by taking hormones or having surgery; having proper identification for travel or school information that identifies the gender the youth expresses; and experiencing other issues including lack of inclusion in curriculum, social circles or gender-related activities.

One of the more pertinent issues for trans youth is figuring out what bathroom they are permitted to use. Trans youth who have supportive parents will still face the steep learning curve of the school and administrators in addressing the youth's concerns. Many teachers and principals are very interested in supporting LGBT youth and have taken on this learning actively trying to find resources by attending conferences, joining

[155] There are of course many teachers who are LGBT friendly but it still takes some thought and consideration to find out who is a safe teacher with whom to discuss issues.

the ATA Sub-committee on Sexual Orientation and Gender Identity (SOGI), or taking on individual cases within their schools and ensuring teachers understand their rights and responsibilities to LGBT youth. However, there are issues for trans students that have yet to be decided in a legal venue. For instance, courts and tribunals have supported the right of a trans adult's use of the bathroom that matches with their gender identity. However, this issue has not yet been tested for youth.[156]

Another issue for trans youth who have made significant transition to the gender they identify with is who gets to know that they are trans: if youth are under medical care and have begun the transition process, does a new school get to know their gender identity differs from their birth gender? Presently this is addressed on a case-by-case basis. Often, someone at the school, usually the principal, will know the student's birth gender, but the student may not want this shared with teachers or other students. Some of this is determined by the fact that it is often not possible to change one's gender on identity documents and so allowing others to know about the student's gender is a request asked of the school principal. While there are people who are working on putting policies in place to address these kind of issues, they will be limited by the fact that even trans adults have trouble changing their gender on identity documents and courts have yet to look at the full privacy implications of releasing one's birth gender. When there is a trans youth entering the school system there are still legal / policy questions by supportive teachers and principals as to what they can offer the trans student.

However, there is a movement for supporting not only trans students, but other forms of diversity, in schools. The Alberta Teachers' Association (ATA) supports trans students by amending the *Code of Professional Conduct* in 2003 to include 'gender identity' as a

[156] See for instance: *Sheridan*, at para 111: "…if any inquiries by an employee of the Respondent need to be made to verify that an individual is a transsexual in transition, such inquiries must be made in a dignified, private, and non-confrontational manner, keeping in mind the immediate nature of the service required."

protected ground of discrimination for students.[157] It also amended its *Declaration of Rights and Responsibilities* for teachers in 2004 to include gender identity.

Both the Calgary Board of Education ('CBE') and the Edmonton Public Schools Board ('EPSB') are in the process of providing policies and guidelines on addressing sexual orientation and gender identity. In November 2011, the EPSB approved a sexual orientation and gender policy. Next, the EPBS will develop administrative regulations for implementation of the policy. The Calgary Board of Education is also working on its policies and administrative regulations. The Calgary Board of Education[158] commented:

> One of the core values of the Calgary Board of Education (CBE) is about acknowledging, celebrating and recognizing the diversity of our learners. Success for each and every student is the goal of our work. An inclusive and welcoming environment, in all aspects of our organization, is critical to achieving our goal. This includes attending to the well-being of LGBTQ (LGBTTIQQ) youth, staff and families.
>
> We are currently undertaking a reworking of all of our administrative regulations and procedures. As part of the overall review process, we are looking closely at our policies and practices related to diversity and inclusion. The review process began in May 2010 and it is anticipated that the changes will be implemented during the 2011-2012 school year. As such, one of the working groups has been asked to focus specifically on issues related to sexual orientation and gender identity (SOGI). The SOGI team has been examining current research, promising practices and the policies and ongoing work of other public school boards in Canada. They expect to have a draft document ready for review in the fall of 2011.
>
> Ultimately, our goal is for our policies to be living documents that reflect our day-to-day work and our commitment to creating and maintaining learning and work environments that are safe, welcoming, caring and conducive to learning. We are invested in determining what we must do, individually and collectively, to attend to every student, every day, no exceptions.

[157] For a history of the LGBT initiatives of the ATA see www.teachers.ab.ca and search for sexual orientation and gender identity.
[158] Information provided by Dianne Roulson, Manager, Diversity, Learning Services, Summer 2011.

These policy changes and the public reviews that go along with such a policy change creates an opportunity for the public to learn about the challenges facing LGBT students in school. Having administrative regulations protecting these students will be a huge leap in equality and safety for all students.

Notice to parents regarding religion, human sexuality and sexual orientation

On September 1, 2010 section 11.1 was added to the *Alberta Human Rights Act* through Bill 44 states:

> **11.1(1)** A board as defined in the *School Act* shall provide notice to a parent or guardian of a student where courses of study, educational programs or instructional materials, or instruction or exercises, prescribed under that Act include subject-matter that deals primarily and explicitly with religion, human sexuality or sexual orientation.
>
> **(2)** Where a teacher or other person providing instruction, teaching a course of study or educational program or using the instructional materials referred to in subsection (1) receives a written request signed by a parent or guardian of a student that the student be excluded from the instruction, course of study, educational program or use of instructional materials, the teacher or other person shall in accordance with the request of the parent or guardian and without academic penalty permit the student
>
> > (a) to leave the classroom or place where the instruction, course of study or educational program is taking place or the instructional materials are being used for the duration of the part of the instruction, course of study or educational program, or the use of the instructional materials, that includes the subject-matter referred to in subsection (1), or
> >
> > (b) to remain in the classroom or place without taking part in the instruction, course of study or educational program or using the instructional materials.
>
> **(3)** This section does not apply to incidental or indirect references to religion, religious themes, human sexuality or sexual orientation in a course of study, educational program, instruction or exercises or in the use of instructional materials.

The 2010 annual *Guide to Education: ECS to Grade 12*[159] was released to teachers and administrators with a discussion of section 11.1. The *Guide to Education* is signed by the Deputy Minister of Education. The main issue that a teacher will need to address under section 11.1: When do they need to notify a parent that the subject they are teaching deals "primarily and explicitly" with sexual orientation? The *Guide to Education* highlights the wording of section 11.1 and notes that the requirement to notify parents of courses of study, educational programs or instructional materials only applies to subject matter that is primarily **and** explicitly about religion, human sexuality or sexual orientation. Their interpretation is that if the course is explicitly about sexual orientation, but is not primarily on the subject-matter of sexual orientation then it does not fall under section 11.1.[160] They list specific courses that fall under the category of having outcomes that require notification under section 11.1. However, there are no courses in the programs of study for Alberta Education that talk about sexual orientation specifically. Therefore, there is no guidance on what information might fall under section 11.1 except to say that "locally developed courses that contain subject matter that deals primarily and explicitly with …sexual orientation" will also require notification to parents.

Section 11.1(3) of the *Alberta Human Rights Act* notes that it does not apply to "incidental or indirect references" to sexual orientation. The *Guide to Education* confirms that teachers should not avoid talking about these topics because an incidental conversation on a topic is not covered by the *Act*. Also it notes that section 11.1 does not mean you need to have permission to talk to a child about bullying (for instance, homophobic bullying) since this interaction is not related to "courses of study, educational programs or instructional materials, or instruction or exercises", but is part of student behavior and interactions.

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[159] Government of Alberta, Alberta Education, *Guide to Education: ECS to Grade 12* (Edmonton: Alberta Education, 2010) online: Government of Alberta <http://education.alberta.ca/media/832568/guidetoed.pdf> [*Guide to Education*].
[160] *Guide to Education,* at 71-3.

This interpretation of section 11.1 in the *Guide to Education* is one view of the section, however, it is not a legal interpretation of the Act. As parents make complaints to the Human Rights Commission, the Human Rights Tribunal and the courts will decide upon cases which in turn develop a legal interpretation of this section of the *Act*. Debates from the Legislature may inform how the Tribunal and Courts interpret the section, but no one can say for certain how terms like "primarily and explicitly" or "incidental or indirect" will be interpreted.

In the meantime, teachers will be left to decide whether a topic of education falls under the *Act* and therefore requires a notice to parents or falls outside the *Act* and does not. Some instances where the discussion of LGBT communities could be limited by section 11.1 are:

- When a child talks about her two moms during a discussion of families. The topic is primarily about families and all parents have a sexual orientation. The child is explicitly talking about sexual orientation. Of course, taken to the extreme this could have the ridiculous effect of limiting conversation of any parents because all parents have a sexual orientation.

- When a child's parent comes out as trans-identified and transitions to their identified gender. Will the teacher assume that gender identity is included under section 11.1? Will there be any possibility for discussion of this in the classroom if permitted by the trans parent?

- An anti-bullying course that is offered that is primarily about LGBT communities will explicitly talk about these communities to help foster an understanding and compassion toward LGBT people. Parents who ask to withdraw their kids from this class may be making it more difficult for teachers and staff to combat bullying in the school.

- When a course on LGBT issues or anti-bullying is offered, a parent who is notified of the course may give written notice to remove their child from the course. Their child may be LGBT and in grave need of information on this topic.

- When a teachable moment comes up about LGBT communities; the Guide to Education indicates that this is not covered by section 11.1 since it is not explicit or a primary topic. Will a teacher take that moment and make the best of it or will they hide behind section 11.1 and err on the side of caution?

Teachers have a conflicting responsibility with section 11.1; to take the opportunity to discuss controversial issues. "Studying controversial issues is important in preparing students to participate responsibly in a democratic and pluralistic society."[161] The *Guide to Education* notes that section 11.1 is not intended to limit the discussion of controversial issues. However, LGBT people in Alberta are seen by some as presenting controversial issues. How this section affects these communities remains to be seen.

In summary, section 11.1 creates a burden on teachers to ensure that they have parental permission when discussing certain topics in certain courses. The *School Act* already outlines this right but puts the onus on parents to indicate their wish that the child is pulled from certain subject areas. There is as of yet no case-law to determine how section 11.1 will be interpreted in law, what kind of complaints will actually be made and whether it has had an impact in the classroom. Therefore, while section 11.1 has some language that teachers can follow, it is far from clear on the topic of how that language will be interpreted. Each person may choose to interpret it differently.

Summary

The above discussion outlines the challenges that still face LGBT individuals and communities. These issues can be grouped into the following areas:

1. Discrimination and harassment based on stereotypes or hatred cause LGBT people to become involved in the legal system to resolve these issues.

[161] *Guide to Education,* at 70.

2. Lack of clarity of laws results in these laws being challenged as discriminatory against trans-identified people. This includes: what activities are protected under human rights law, altering the gender identification documents, use of bathrooms and change-rooms, funding of gender reassignment surgery and prisoners' rights, among other things.
3. New laws that are implemented and potentially discriminatory against the LGBT communities come with a cost (time and money), to LGBT litigants, as they challenge them in court (e.g., Bill 44, the heterosexual definition of spouse in some provincial acts).
4. There is little or no case-law addressing bisexual people. They are protected when they pass as lesbian or gay, but sometimes their legal case suffers when it is show that they have been in a heterosexual relationship (for instance, in immigration applications).
5. There is still a need to update many Albertan laws to reflect the equality that Courts have already ruled upon (for instance, the *Marriage Act*, and the definition of spouse in certain acts).
6. Legal services and caselaw that are based on stereotypical assumptions of gender and sexual orientation cause for substandard service to LGBT people, and misleading decisions (for instance, the assumption that the butch lesbian must be the non-birth mother, and rulings that make presumptions on what a same-sex couple would look like).
7. There is a lack of information and resources available on legal rights of LGBT people and legal responsibilities toward them. This is especially true in rural areas and also for youth in Alberta.

These seven areas summarize the legal issues facing LGBT claimants today. The law is quickly changing and this presents another challenge for LGBT people to keep apprised of what rights have been supported in the courts or amended in legislation. Upon closer examination, the main legal issues facing the lesbian and gay communities are about

how the law is applied and interpreted, amending incorrect laws, getting legal information, and general discrimination and harassment. The issues for bisexual people are the same as lesbians and gays, when they are in a same-sex relationship. However, the presumption that a person is heterosexual when in an opposite-sex relationship and other stereotypes about bisexuality create the main legal issues for those who identify as bisexual. When these stereotypes are used to determine legal rights, bisexual people are at a disadvantage. The issues for trans-identified people run deeper as many legal areas have yet to be decided upon. Whether it is the use of washrooms and change-rooms, or the amending of one's gender on identification documents, there is not much clarity on what is correct in law. Trans-identified people also suffer from stereotypes, discrimination and harassment, as education on the trans experience is only beginning to receive wider attention.

Some of these areas will change over time with more education and knowledge about the challenges facing LGBT populations. However, some issues still need legislative amendments or recognition. The final section of this paper explores some of the legal issues that may be seen in front of courts and tribunals in the near future.

POTENTIAL LEGAL ISSUES

There are a myriad of potential human rights issues that could arise in front of courts and tribunals in the future. Issues such as same-sex marriage appear to be in the past, but still hold such strong views in some populations that even this right may not be taken for granted. Just recently the Conservative party modified its policy on Family and Marriage. The modified version still defines marriage as between a man and a woman.[162]

[162] It does however eliminate the onus on the Conservative government to support legislation that defines marriage as such. Conservative Policy Resolution A – 050, s 68 *Family and Marriage*.

Many legal battles have been won, and this paper shows that, for gays and lesbians, rights are generally the accepted practice within most legal contexts. The gaps for gays, lesbians and bisexuals are in the potential for bias or stereotypes in applying laws and in some gays and lesbians not knowing their rights. The biggest gaps in actual law are seen in issues affecting the trans community. It is not even possible to list all of the legal issues that affect this community or will affect them in the future because the issues are still so new. However, there are some larger legal hurdles that are discussed below.

What follows are some *Charter* or human rights challenges that arise from the above review. The likely legal outcomes and the exact arguments that will be made in these challenges are beyond the scope of this paper. However, what will be presented is a short paragraph on each of several issues that could feasibly be seen in a court very soon.

Who is defined as a parent at birth, and how many legal parents can a child have?

With changing families and sharing of parenting responsibilities it is getting more difficult to say that it is always in the best interests of the child that s/he have only two legal parents. A key case,[163] that changed the ability of the court to declare a third parent, involved a lesbian couple who had conceived a child with a male friend. The legal parents of the child were the birth mother and the male friend. However, the child lived with and was primarily cared for by the lesbian couple. There was a gap in the law protecting the rights and responsibilities of the child's non-birth mother ('CC'). CC was unable to get the child airline tickets, a passport or a social insurance card. In addition, if the birth mother died CC would have no legal rights or ability to care for their child. The Court of Appeal used its *parens patriae* jurisdiction to find that CC was a parent of the child and in this case three parents were legally acknowledged.

[163] *AA v BB and CC* (2007), 83 OR (3d) 561 (ONCA).

Other cases have addressed this issue of becoming a parent. *Fraess* acknowledged that lesbian parents who used artificial insemination could put their names on the registration of birth and legally become parents without a formalized adoption. Another case[164] from Alberta involved two gay men who had a child with the help of a surrogate mother. All of these cases examine the definition of parent, how one is defined as a parent, and how many legal parents a child may have. The caselaw in this area is still developing.

Can medical treatment be refused to transsexual Albertans?

Re-listing GRS has been one step toward providing health and medical services for transsexual and transgendered Albertans. However, funding for GRS often does not include all forms of surgery that a trans person may require or desire. There has been little litigation as to where the line is for what surgeries should be covered to support a trans person in his/her transition. Surgery for female-to-male trans people is considered in many places to be experimental. Other surgeries are considered to be elective. We could see litigation in the area of health services and what is available to the trans community.

In addition, anecdotal stories from trans community members have indicated that doctors will sometimes treat them as trans first and ignore or forget to check obvious signs of illness that do not have to do with their trans status. Also trans people have related stories of doctors refusing to treat them or offer regular physicals because of their trans status. A claim such as this could be brought under the *Alberta Human Rights Act* as a refusal of services based on a person's transgendered status.

Clean up the legislation

An issue that has a lesser legal effect, but greatly affects the rights of LGBT communities is the fact that many pieces of legislation and the policies behind it have not been updated to include same-sex couples. Most of these laws will include same-sex couples,

[164] *DWH v DJR,* 2011 ABQB 608; additional reasons 2011 ABQB 791.

but still appear to exclude them. There are over 60 statutes[165] to be reviewed to consider whether the language, definitions or policies behind them should be amended to reflect current law. LGBT people who look at this legislation and do not know that their rights are protected may still think that they are not included in certain pieces of legislation. In order to change this legislation each statute must be challenged separately or the Government of Alberta must make amendments similar to how other provinces have changed the definition of spouse in their legislation.[166]

Refugees proving their status in a homophobic home country

Assumptions about LGBT communities make it difficult for claimants to demonstrate that they are in fear of persecution based on their sexual orientation or gender identity. As discussed above, Rehaag reviewed cases and found that certain assumptions applied to the facts of gay and lesbian refugee cases. Where these stereotypes do exist, gay and lesbian claimants will have an additional hurdle to overcome in proving their refugee status. Bisexual claimants who have dated people of the opposite sex are one group who will have to overcome the stereotype that there is a choice in who they date and therefore no persecution.

Whether transsexual people can make a refugee claim as a persecuted group is yet to be determined. Given human rights cases, it seems likely that a claim based on gender identity would be heard, however there are still few cases, even in human rights, addressing the rights of trans claimants and so the outcome of a refugee claim remains the subject of future litigation.

Challenges to Section 11.1 of the Alberta Human Rights Act

To date there are no reported cases on Section 11.1 or guidance on the outcome of a claim under this section. Words in the section such as “primarily and explicitly” remain to be defined by Tribunals and Courts.

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[165] Alberta Law Reform Commission *Recognition of Rights and Obligations in Same Sex Relationships* Research Paper No. 21, January 2002, at 11.
[166] See for instance, *Definition of Spouse Amendment Act*, SBC 2000: 4th Session, 36th Parl.

The section applies to "courses of study, educational programs or instructional materials, or instruction or exercises". The scope of the section will also be determined in future litigation. Subsection 11.1(3) says that the section does not apply to "incidental or indirect references", but the line between a course of study and an incidental reference has yet to be determined. The *Guide to Education* instructs teachers that a course that is explicitly about sexual orientation, but is not primarily on the subject-matter of sexual orientation does not fall under section 11.1. Alberta curriculum does not explicitly mention teaching sexual orientation. Future litigation may focus on whether sexual orientation is a subject that falls under section 11.1, when there is no place in the curriculum that primarily and explicitly focuses on it.

Is the limitation of hate speech a violation of freedom of expression?

The debate on whether prosecuting hate expression is too large a limitation on freedom of expression is highly applicable to the LGBT communities. These communities are sometimes at great risk of being hurt by hateful expression in environments where little or no other groups will stand up for their rights. LGBT people who experience hatred, even in the form of expression, can feel quite alone in their fight for equality. The debate rages on whether as a society we should limit hateful expression even though it violates full freedom of expression.

Civil libertarian organizations generally advocate for freedom of expression and are generally opposed to numerous forms of discrimination. While most civil libertarians would agree that Canadian society should be extremely concerned about prejudiced or discriminatory statements, civil liberties organizations in Canada have varying philosophies on how, when and if freedom of expression should be restricted. Some civil libertarians view hate expression laws as a way to censor unpopular forms of

expression, and see the potential for these laws to be misapplied.[167] In general, the Canadian Civil Liberties Association (CCLA) is of this view, stating:

> Canadian society should be extremely concerned about prejudiced or discriminatory statements. Individuals and organizations should speak out loudly against such comments – among friends, in our communities, in print media and online. Those individuals who express hateful opinions should be called out and criticized. However, the CCLA maintains that the *Criminal Code* prohibitions against hate expression should be in place to punish those who willfully promote hatred leading to imminent violence: the answer to hateful or offensive speech should be more speech, not censorship.[168]

The CCLA views hate speech as unacceptable and argues that *Criminal Code* prohibitions should remain in place to punish those who willfully promote hatred leading to imminent violence.[169] At the same time, CCLA was also a vocal critic of the hate speech provision in the *Canadian Human Rights Act,* arguing that it was a vague and unjustifiable restriction on freedom of expression that should be struck down.[170] Bill C-304, which is currently before the Senate, will repeal the hate speech provision (effective 2013).

The British Columbia Civil Liberties Association (BCCLA) has taken a more traditional civil libertarian approach, which supports freedom of expression, despite the message being offensive. The BCCLA said that it is not the government's job to decide which types of speech are of greatest importance to its citizens, and that there are many benefits that accompany speech of even the most unwelcome kind.[171]

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[167] ACLRC 2004, at 91.
[168] CCLA.ca, Press Release CCLA to intervene in Lemire v. Warman 'hate speech' case at Federal Court, April 9th, 2010, http://ccla.org/2010/04/09/ccla-to-intervene-in-lemire-v-warman-hate-speech-case-at-federal-court/.
[169] Canadian Civil Liberties Association, *CCLA to intervene in Lemire v Warman 'hate speech' case at Federal Court*, 2010, http://ccla.org/2010/04/09/ccla-to-intervene-in-lemire-v-warman-hate-speech-case-at-federal-court/ [CCLA to Intervene in *Lemire v Warman*].
[170] CCLA to intervene in *Lemire v Warman*.
[171] John Russell and Andrew Irvine, *Don't block free speech*, *Globe & Mail,* September 21, 2000, A13, online: http://www.bccla.org/othercontent/00dontblockfs.html.

On the other hand, supporters of stricter hate speech laws say the *Criminal Code* sections dealing with hate expression are too outdated and limited in the protection available to minority groups.[172] As a result, these critics have called for reform of hate speech law through a further expansion of the term "identifiable group" to include more criteria, or through the abolishment of the concept of identifiable group so that all expressions of hatred could be prosecuted.[173]

American civil libertarian groups tend to lean towards permitting the expression of all ideas and beliefs, no matter how offensive, guided by the philosophy that in a free market place of ideas the absurdity of hate speech will be exposed and ultimately rejected.[174]

Some cases that examine how the courts and tribunals determine what constitutes "hate expression" and how it should be limited under human rights legislation are discussed in Appendix A. These cases expand upon the debate on whether hate expression laws should have the power to limit freedom of expression in limited circumstances. While this debate rages on in the courts and society-at-large, LGBT populations will continue to be affected on a personal and daily basis. The answer to this debate is a matter of law and the development of policy and human rights. Only the future will tell how the courts handle this critical issue.

Protecting the rights of transsexual and transgendered people

It is difficult to pinpoint which legal issues will be isolated for a human rights challenge in the future based on trans human rights, but easy to know that there will be a number of them. Issues that arise from the process of coming out as a trans person, to the treatment of trans people as youth, to discrimination at work and harassment in general are all potential causes of court action. Trans people do not have as much legal

[172] ACLRC, 2004.
[173] ACLRC, 2004.
[174] ACLRC, 2004.

protection as LGB communities, and the laws that do protect them are still easily overlooked by policy and lawmakers. For instance, the recent temporary deregulation of GRS was received with much surprise given that gender identity is in the Diagnostics Statistics Manual and GRS is considered to be the medical cure for it.

Coming out and transitioning can be a difficult time for a trans person. Often medical standards require that they live in their identified gender for a period of time before surgery. This is often the first time a trans person will be out at work, to family, or to some friends. Strong protection against discrimination is needed during this time, but not all employers are aware of trans rights. The process of transitioning can take two to eight years, and during this time many people may discover the trans person's birth gender. While medical standards are necessary before a person has surgery that cannot be reversed, governments could help with this process by giving temporary identification or having privacy restrictions on a person's listed gender.

Trans youth are in a particularly precarious position. Medical professionals and parents will usually refuse to do any surgery until the youth is 18 years old, and yet the time between when the trans youth asks for surgery and the time he or she is able to have the surgery, is not protected by solid policies as of yet. School boards in Alberta are working on these policies to protect trans people, but they have few guidelines to work with given that there are few cases addressing youth who are trans. However, some of these trans youth are still living in the gender they identify with.

Young trans people are left avoiding school trips because they can not use the bathroom that matches the way they are dressed (for instance an FTM trans boy who everyone knows as a boy cannot go in the girls' washroom, but often will be prevented by school policy or teachers from using the boys' bathroom). There is a risk of teachers who know about the trans youth's birth gender outing them to others, and trans youth who do not reveal their birth gender live in fear of being found out.

Obviously education would go a long way to assist these youth but often teachers do not have enough information or proper education on this matter, or parents complain about kids learning about trans people at such an early age. Teaching about this is an extremely difficult topic unless the educator has some good solid knowledge. Nevertheless, anecdotal information has shown that some schools are addressing the issues for trans youth and finding ways to accommodate their needs. As policies develop, such as the Edmonton Public School Policy as mentioned earlier, it will be much easier for these schools to address trans youth thoughtfully.

Transgendered incarcerated individuals also face some important legal issues. Sometimes we think that the human rights asked for by one individual will have a drastic impact on policy of an entire institution but often these rights are only requested and/or needed by very few people. For instant in the *Kavanagh* case[175] the Judge noted that at the time of the hearing there were 12,500 incarcerated persons. Out of those only ten were transsexuals and four of the ten were seeking gender reassignment surgery. This amounts to 0.03% of the inmate population that the decision would affect. While these are important rights, they are not rights that will change the face of the penal system.

[175] *Kavanagh*, at para 45.

Appendix A

Kane (Re)

The Alberta freedom of expression case, *Kane (Re)*,[176] illustrates how provincial human rights bodies can balance the two competing interests at play in freedom of expression cases. This balance is achieved through the examination of the nature of the contentious statement in a full, contextual manner which recognizes the objectives and goals of the human rights legislation, in a manner that is sensitive to the *Charter*. The case involved Harvey Kane, the Executive Director of Jewish Defence League of Canada, and an article published in the *Alberta Report* (no longer in publication).[177] The article made several references to negative stereotypes about Jewish people in its discussion of a dispute relating to a failed property development project in Canmore. Kane made a formal complaint to the then-named Alberta Human Rights and Citizenship Commission stating that the article violated s.2 of the *Alberta Human Rights, Citizenship and Multiculturalism Act* (now, the *Alberta Human Rights Act),* which related to discriminatory publications. The court in *Kane* ultimately found that a person does not need to be involved in the publication, issuance or display of the discriminatory material in a "hands on" sense in order to be liable under the provincial human rights law. [178]

The court said that a person's liability will be determined by the degree of indirect involvement in the discriminatory publication, and this involvement will have to be determined on a case by case basis as part of a full contextual review.[179] The judge in *Kane (Re)* made his decision based on the principle that human rights legislation should have a broad and liberal interpretation. The case was very important for cases involving freedom of expression in Alberta, and hate expression. The Court found that it is essential that the Alberta Human Rights Panel consider the:

[176] 2001 ABQB 570 [*Re Kane*].
[177] *Re Kane.*
[178] *Re Kane,* at para 32
[179] *Re Kane,* at para 32.

1. nature and context of the expression,
2. degree of protection that the type of expression is afforded,
3. other provisions of the Charter which may come into play including equality rights, aboriginal rights, multicultural rights, sexual equality, and freedom of religion.[180]

Lund v Boissoin[181]

Another hate expression case that has received a lot of media attention involved a June 17, 2005 letter to the editor published in the Red Deer Advocate.

After reading the letter, Dr. Darren Lund of Calgary filed a complaint under the Alberta Human Rights, Citizenship and Multiculturalism Act (now, the Alberta Human Rights Act). The letter was entitled "Homosexual Agenda Wicked", and was written by Reverend Stephen Boissoin of the Concerned Christian Coalition. The letter is considerably long but we have published a short excerpt below so as to give the general intention of the letter:

> "[W]ar has been declared so as to defend the precious sanctity of our innocent children and youth, that you so eagerly toil, day and night, to consume...It's time to stand together and take whatever steps are necessary …Where homosexuality flourishes, all manner of wickedness abounds ... These [LGBT rights] activists…are perverse, self-centered and morally deprived individuals who are spreading their psychological disease into every area of our lives. Homosexual rights activists and those that defend them, are just as immoral as the pedophiles, drug dealers and pimps that plague our communities…It's time to start taking back what the enemy has taken from you..."

Shortly after, the *Red Deer Advocate* apologized to Dr. Lund, published a statement to that effect, and changed its policy regarding letters to the editor. As a result of these actions, the newspaper was not compelled to appear before the Human Rights Tribunal, and a complaint proceeded against Mr. Boissoin and the Concerned Christian Coalition. Mr. Boissoin argued that he did not believe the letter was discriminatory, nor did he

[180] *Re Kane at* para 32.
[181] ABHRT 2007 [*Lund v Boissoin* ABHRT], overruled 2010 ABQB 123 [*Lund v Boissoin* ABQB], currently on appeal to the Alberta Court of Appeal.

intend to discriminate against anyone based on their sexual orientation, but that he was hoping to generate some spirited debate in the community. Mr. Boissoin further argued that the war metaphor used was referring to a war of ideologies. The panel did not hear evidence from the Concerned Christian Coalition.

The panel found that the Coalition had contravened s. 3(1)(b) of the *Alberta Human Rights, Citizenship and Multiculturalism Act* (now the *Alberta Human Rights Act*) in the same manner as Mr. Boissoin had contravened the Act.[182] Dr. Lund argued that the letter met the legal test for exposure to hatred, as set out in the case *Canadian Jewish Congress v North Shore Free Press Ltd.*,[183] and argued that the letter dehumanizes people based on sexual orientation, had a militaristic tone, and is degrading, insulting and offensive.[184] Dr. Lund compared these statements to those made by James Keegstra in the 1980s.[185] Dr. Lund argued that Keegstra and Boissoin similarly exposed an identifiable group to hatred, said the groups threatened children, and both evoked fears that the groups posed a dangerous threat to Christian institutions. Dr. Lund relied on a number of legal arguments in starting an action against Mr. Boissoin, including a news item published two weeks after the letter to the editor, in the July 4, 2002, edition of the Red Deer Advocate. The news story became integral to the complaint and the Panel's decision on Boissoin's letter.[186] That news item reported that a gay teenager had been seriously assaulted in downtown Red Deer solely because he was gay, and also reported of the teen: "He doesn't feel safe reading the anti-gay statements like the ones in the Red Deer Advocate's June 17 letter to the editor from Stephen Boissoin of the Concerned Christian Coalition. 'I feel the letter was just encouragement for people to go out and stop the gay rights movement.'"[187] Lund testified that the reported assault and the teen victim's reference to Boissoin's letter triggered his complaint the

[182] *Lund v Boissoin* ABHRT at para 15.
[183] *Canadian Jewish Congress v North Shore Free Press Ltd.,* [1997] BCHRTD No 23 para 139-140.
[184] *Lund v Boissoin* ABHRT.
[185] *Keegstra*.
[186] *Lund v Boissoin* ABHRT at para 15.
[187] *Lund v Boissoin* ABHRT at para 15.

Commission.[188] Constable Doug Jones gave evidence at the hearing which confirmed that LBGT youth are more vulnerable in rural areas.

The Alberta Human Rights Panel decision held that Boissoin and the Concern Christian Coalition had, in a letter to the editor of a newspaper, expressed comments likely to expose gays and lesbians to hatred and/ or contempt due to their sexual orientation. Boissoin and the Concerned Christian Coalition subsequently applied for judicial review.

On appeal to the Alberta Court of Queen's Bench, Boissoin was successful in arguing that his letter was not a violation of s.3(2) of the *Alberta Human Rights Act*.[189] Mr. Lund appealed this decision to the Alberta Court of Appeal, and as of this writing, the decision has not yet been released. This case, and the following case out of Saskatchewan illustrate the challenges in proving hate expression.

Whatcott v Saskatchewan[190]

In 2001 and 2002 Bill Whatcott distributed flyers that advocated for the re-criminalization of sodomy, and attempted to convince readers that gays and lesbians posed a threat to Saskatchewan's children and educational system. The flyers were created under the name of the Christian Truth Activists, and were distributed to homes in Regina and Saskatoon bearing headings such as "Keep Homosexuality out of Saskatoon's Public Schools" and "Sodomites in our Public Schools."[191]

Four individuals complained to the Saskatchewan Human Rights Tribunal, which held that the materials promoted hatred against individuals based on their sexual orientation

[188] *Lund v Boissoin* ABHRT at para 15.
[189] 2010 ABQB 123 [*Lund v Boissoin* ABQB].
[190] *Whatcott v Saskatchewan (Human Rights Tribunal),* 52 CHRR D/264 (SHRT) [*Whatcott* SHRT], overturned 2007 SKQB 450 [*Whatcott* SKQB], which was overturned 2010 SKCA 26 [*Whatcott* SKCA], currently on appeal to the SCC, 2010 CanLII 62501 (SCC).
[191] Karen Selick. *Top court gets second chance to do right thing on free speech; Saskatchewan appeal could allow justices to rein in power of rights bodies*. *The Gazette*. Montreal, Que.: November 12, 2010, pg. A.21 Online: <A.21http://ezproxy.lib.ucalgary.ca:2048/login?url=http://proquest.umi.com.ezproxy.lib.ucalgary.ca/pqdweb?did= 2188440 761&sid =2&Fmt=2&clientId=12303&RQT=309&VName=PQD>

and that the material intended to expose gay and lesbian people to hatred and ridicule, and to belittle and otherwise affront their dignity. The Tribunal noted that the *Saskatchewan Human Rights Code*[192] was a reasonable limit on Whatcott's freedoms of religion and expression.[193] The Tribunal awarded each complainant money for "the loss of their dignity and self-respect and their hurt feelings".[194]

Whatcott appealed the Tribunal decision and the Court of Queen's Bench[195] found that the Tribunal erred in failing to identify the portion of the Code the flyers contravened. The case eventually went to the Saskatchewan Court of Appeal,[196] which overturned the lower court's findings and held that, taken in isolation, Whatcott's words were demeaning, but did not constitute hate expression.[197] However, the Judge held that the flyers did contravene section 14(1)(b), which prohibits hateful publications, because the flyers erroneously implied that gay people were likely pedophiles.

In the Court of Appeal, Whatcott argued that he was exercising his right to freedom of expression and freedom of religion and that the flyers did not violate the Code.[198] Alternatively, he argued that if the materials exhibited hate, it was directed toward sexual behaviour, which is not a prohibited ground.[199] If sexual behaviour is a prohibited ground within the meaning of sexual orientation, Whatcott argued that this is "overbroad and should be inoperative to the extent that it conflicts with s. 4 and 5 of the *Saskatchewan Human Rights Code* and s. 2 of the *Canadian Charter of Rights and Freedoms*.

The Saskatchewan Court of Appeal held that the Tribunal and Queen's Bench judge should have considered the situations and conditions in which the message was

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[192] *Whatcott* SHRT.
[193] *Whatcott* SHRT.
[194] *Whatcott* SHRT.
[195] *Whatcott* SKQB.
[196] *Whatcott* SKCA.
[197] *Whatcott* SKCA.
[198] *Whatcott* SKCA.
[199] *Saskatchewan Human Rights Commission v William Whatcott*, online: http://www.scc-csc.gc.ca/case-dossier/cms-sgd/sum-som-eng.aspx?cas=33676.

delivered. Furthermore, the court held that Whatcott acted in the context of a debate about the actions of the school board to include LGBT issues in the curriculum. In this context, the court said, "the flyers did not communicate the level of emotion required to expose persons on the basis of their sexual orientation to a sufficient level of hatred".[200] Furthermore, the court said that each inappropriate statement within each flyer did not constitute hate expression, therefore it was improper to impose limits on Whatcott's freedom of expression. The case is currently on leave to appeal to the Supreme Court of Canada.[201]

[200] *Whatcott* SKCA.
[201] *Saskatchewan Human Rights Commission v William Whatcott*, online: http://www.scc-csc.gc.ca/case-dossier/cms-sgd/sum-som-eng.aspx?cas=33676.