Human Rights, Transsexed Bodies, and Health Care in Canada: What Counts as Legal Protection?

Lane R. Mandlis

Introduction

The pursuit of rights is "rendered technical"[1] through the employment of a particular template; identity-based groups shape their demands into a recognizable format that infers the right to do identity-defining things including demanding rights.[2] Within Canada, rights protection is offered at different levels with different consequences through the Canadian Charter of Rights and Freedoms[3] and federal and provincial human rights legislation. The position of trans[4] communities within such legislation is contentious, forcing activists to make decisions regarding the most appropriate legal strategy (or identity-based template) to employ in order to prevent ongoing discrimination.

Following from the efforts of gay and lesbian lobbyists, the majority of efforts directed towards pursuing rights within trans activism in Canada have been through the insistence on specific protections—specifically the addition of a discrete or insular category of protection through the addition of the words "gender identity" and/or "gender expression." In this article I argue that this strategy is misguided. Through an examination of access to gender-confirming health care situations in two provinces, I demonstrate that the inclusion of specific protections would not necessarily have changed the outcome of these situations. Neither would this strategy

1 Nikolas Rose, *Powers of Freedom: Reframing Political Thought* (Cambridge: Cambridge University Press, 1999), 79.

2 Duncan Kennedy, "The Critique of Rights in Critical Legal Studies," in *Left Legalism/Left Critique*, ed. Wendy Brown and Janet Halley (Durham, NC: Duke University Press, 2002), 188.

3 The *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being schedule B of the *Canada Act 1982* (UK), 1982, c.11 [*Charter*].

4 I use the term "trans" as an umbrella term encompassing many different forms of gender-crossing embodiments including (but not limited to) cross-dresser, gender-queer, transgender, and transsex. When I am specifically referring to people who engage in forms of medically assisted transition (such as the use of hormone therapy and/or surgery) I use the term transsexed. For further explanation of the differences between different embodiments under the "trans" umbrella see Lane R. Mandlis, "Whose Crazy Investment in Sex?" *Journal of Homosexuality* 58, 2 (2011), 234; Krista Scott Dixon, "Introduction: Trans/forming Feminisms" in *Trans/Forming Feminisms: Trans-Feminist Voices Speak Out*, ed. Krista Scott-Dixon, 12–15 (Toronto: Sumach Press, 2006).

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overcome the obstacles and barriers faced by many trans Canadians as a result of systemic discriminatory practices. The insufficiency of this legal strategy is further exacerbated by the resources necessary to enact such changes to antidiscrimination legislation across the country and the shortfalls of legal remedies inflected by the liberal individualist perspective of courts. Although many theorists have argued that inclusion in antidiscrimination legislation is an insufficient but necessary step to substantive equality, this article demonstrates, as Margot Young has argued, that there is a danger that in some situations the pursuit of rights through antidiscrimination law may actually impede social change because legal discourse, especially when it reinforces and confirms dominant ideas, "speaks in authoritative timbre."[5]

The Process of Transphobia

Jurisprudence involving trans identified individuals in Canada has predominantly been engaged by transsexed individuals, and any potential victories have been seen as only affecting that discrete minority of the community. Because the majority of cases involve a judicial determination of the individual's sex, or a case of discrimination on the grounds of sex based on transphobia, and because the determination of the individual's sex is usually based on medical evidence of physical transition (either simply for a determination of sex or for a finding of discrimination based on sex), instances in which a trans person's gender has been confirmed by the court are considered by most activists only to effect transsexed communities, and not larger trans communities as a whole.[6] Within larger trans activist communities this has been a point of contention, with some activists calling for measures that will include all manner of trans embodiments, including those who do not engage in any form of medically assisted transition and those who engage only in temporary forms of cross-gender behaviours (such as cross-dressers).[7]

Activists have critiqued the use of currently existing categories, such as sex/gender or disability, arguing that they do not capture the specificity of transphobic discrimination;[8] protection in law is seen in this larger context as only being offered when "gender identity" and/or "gender

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5 Young, "Why Rights Now? Law and Desperation," in *Poverty: Rights, Social Citizenship, and Legal Activism*, ed. Margot Young, Susan B. Boyd, Gwen Brodsky, and Shelagh Day (Vancouver: UBC Press, 2007), 322.

6 Dean Spade, "Documenting Gender," *Hastings Law Journal* 59 (2008): 731; Barbara Findlay et al., *Finding Our Place: Transgendered Law Reform Project* (Vancouver: High Risk Project Society, 1996). See especially *Canada (A.G.) v. Canada (Canadian Human Rights Commission)* 2003 FCT 89, 228 FTR 231; *Kavanagh v. Canada (A.G.)* [2001] CHRD No. 21; *Kimberly Nixon v. Vancouver Rape Relief and Women's Shelter*, [2002] BCHRTD No. 1; *Magnone v. British Columbia Ferry Services and others* (No. 3), 2008 BCHRT 191; *Montreuil v. National Bank of Canada*, 2004 CHRT 7, 48 CHRR 436; *Sheridan v. Sanctuary Investments Ltd.* (1999), 33 CHRR D/467; *Mamela v. Vancouver Lesbian Connection*, [1999] BCHRTD No. 51; *Ferris v. OTEU, Local 15*, [1999] BCHRTD No. 55; *Vancouver Rape Relief v. British Columbia (Human Rights Comm)*, 2000 BCSC 889.

7 Findlay et al., *Finding Our Place.*

8 Ibid.

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expression" have been specifically named in legislation. This tactic appears to stem largely from the gay rights movement, which is unsurprising given the grouping of trans with sexuality in LGBTQ (lesbian, gay, bisexual, trans, queer) communities, sexual minorities studies, psychiatry, and so on. I am not, however, suggesting that queer communities have not sometimes been important allies for trans activism, or that trans communities and homosexual communities do not have many similarities and interconnections; I am asking that this direct link (usually made without thought) between lesbian and gay issues and trans issues, be questioned in order to identify and evaluate alternative legal strategies.

Trans communities represent themselves as not protected within legislation based on a conflation of the substantive inequalities faced by trans identified people on an everyday basis and a lack of a specific minority status as indicated by the inclusion of a discrete category of protection within antidiscrimination legislation throughout the country. I say "represent themselves," because as demonstrated later in this article, protections have been seen by human rights tribunals as already including trans identified people under the grounds of disability and sex; yet activists continue to push for specific inclusion of "gender identity" and/or "gender expression" in law.[9] The push for the creation of a discrete and insular minority category has been supported by groups within LGBTQ communities and has been characterized as a better route for trans communities than pursuits under already established grounds (such as sex and disability); however, the arguments used to support this position are problematic. For example, Findlay and colleagues argue that "gay, lesbian and bisexual communities have instead consistently demanded to be accepted as normal, medically and legally, and not ill or disabled."[10] This argument functions to further stigmatize people with disabilities, as well as to construct a template through which trans communities ought to demand equality. From this perspective, homosexual communities demanded that they be acknowledged as normal and equal through the construction of a new category of protection, rather than through the expansion of an existing category. Thus, a new category, rather than the expansion of an existing one, is seen as the strategy that best presents this acknowledgement of normalcy.

What is lost in the use of this template is that although there are many similarities between trans communities and homosexual communities and the barriers faced by each, there are also many significant points of rupture. Access to documentation is one of the most important legal

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[9] An important and timely example of this is the Private Members bill, *Bill C-389* (*An act to amend the Canadian Human Rights Act and the Criminal Code (gender identity and gender expression)*, 40th Parl., 3rd Sess., 2010), which passed readings in the Senate but was not passed into law prior to the election call in 2011. This bill was designed to add gender identity and gender expression to both the criminal code (for inclusion as a ground for hate crimes) and to federal human rights legislation. The bill was reintroduced as Bill C-276 in Parliament in September 2011.

[10] *Findlay* et al., *Finding Our Place*, p. 27.

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differences between gay and lesbian issues and trans issues.[11] A second important difference is the need for specific medical assistance, and the barriers to health care faced by trans individuals.[12] Although people who identify as lesbian or gay do not require medical intervention for their homosexuality, some trans identified people do require gender-confirming health care and medical intervention for their transness. Access to health care for trans individuals who do not require medically assisted transition can also be negatively impacted by transphobia. In medical situations, the exposure of the genitals makes transphobia quite likely, as medical workers most often assume that a person's genitals speak the "truth" about their sex and gender. This is not to say that homophobia does not cause barriers to health care in some instances, but rather that the situations faced by trans individuals are decidedly different than those faced by homosexual individuals. These two very significant differences—access to health care and access to documentation—are, perhaps, of more importance when thinking about legal strategy than any of the commonalities, because these are two of the main areas in which trans identified people regularly experience systemic discrimination.

Without government-issued ID, people are essentially located in a state of limbo; they cannot legally work, secure accommodation, or access any number of services that are vital to their health and well-being, physically, mentally, and socially. Gay and lesbian citizens do not face this kind of discrimination. Ubiquitous homophobia and heteronormativity may lead to discrimination and denial of access to many things, but documentation access is not a homosexual issue. ID allows gay men and lesbian women to secure legal employment and accommodation, to board aeroplanes and cross national borders, to get library cards and open bank accounts, to join clubs, play sports, and access health care. Nowhere on that ID does it state that the person is homosexual. So, although a homosexual person might experience discrimination in securing access to any of the things mentioned, that discrimination is fundamentally different in process from the discrimination faced by undocumented people, or by those whose presentation is incongruent with their ID. What this difference means is that transphobic processes operate differently from homophobic processes.

The differences in process between transphobia and homophobia make the trans activist position of using the homosexual template insufficient. But is this insufficiency harmful? I argue that it is. Moreover, the use of existing categories offers the potential to take advantage of and complicate these categories in ways that offer more substantive social change for all

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11 For an in-depth examination of documentation difficulties in the US see Spade, "Documenting Gender." For Canadian examples see Viviane K. Namaste, *Invisible Lives: the Erasure of Transsexual and Transgendered People* (Chicago: University of Chicago Press, 2000); Viviane K. Namaste, *Sex Change Social Change: Reflections on Identity, Institutions and Imperialism* (Toronto: Women's Press, 2005); Jean Bobby Noble, *Sons of the Movement: FtMs Risking Incoherence on a Post-Queer Cultural Landscape* (Toronto: Women's Press, 2006); Findlay et al., *Finding Our Place.*

12 See Namaste, *Invisible Lives*; Namaste, *Sex Change*; Spade, "Documenting Gender"; Dean Spade and Gabriel Z. Arkles, "Deregulating Gender: Transgender Rights in the U.S.," *Society for the Psychological Study of Lesbian, Gay and Bisexual Issues Newsletter* (2005), 18–19; Findlay et al., *Finding Our Place.*

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members of trans communities, not only those who enter into a medically assisted transition.

Access to Health Care

Publicly funded sex reassignment surgery (SRS)[13] is contested and is not universally available across Canada. Publicly funded health care in Canada is regulated through the Canada Health Act, which states its primary objective is to "protect, promote and restore the physical and mental well-being of residents of Canada and to facilitate reasonable access to health services without financial or other barriers."[14] Although gender-confirming health care, such as hormone treatment and/or surgery, is internationally recognized as necessary and appropriate medical intervention for some trans identified people, suggesting that it falls within the scope of the Canada Health Act and should therefore be funded, provincial governments have not always addressed it as such. The Canada Health Act offers a legal basis for courts to order provinces to fund medically necessary care, yet the courts have continually been reluctant to direct provinces to pay for particular medical services.[15] Access to gender-confirming health care has not been specifically tested through the Act, but it appears unlikely that it would be seen as an exception.

Further complicating this situation is the differing accessibility to gender-confirming health care across Canada, with five provinces refusing to fund surgeries for transsexed people and five dealing with funding on a discretionary basis.[16] Trans Canadians wishing to access gender-confirming health care outside the public system are still required to navigate the public system for all but final-stage surgeries, as the other services (such as hormone prescription,

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[13] SRS is also sometimes referred to as gender reassignment surgery (GRS). References to either are considered within the scope of this article to be referring to the same thing. Although academically there have been discussions about the most appropriate terminology (see Bernice Hausman, *Changing Sex: Transsexualism, Technology, and the Idea of Gender* (Durham, NC: Duke University Press, 1995); R.A. Heath, *The Praeger Handbook of Transsexuality: Changing Gender to Match Mindset* (Westport, CT: Praeger, 2006)), these debates are not relevant to the larger discussion of the requirement of surgery for documentation and/or the access to surgery through public health-care funding considered here. Access to surgical intervention is not the only barrier to health care, nor is it necessary or desired by all members of the community. It is, however, important to recognize that it is necessary and desired by some members of the community, and it is not readily available for many who need it. Moreover, the linking of citizenship documents and other government-issued ID with surgical status for trans people makes surgical access an important, although insufficient, point in any consideration of trans equality.

[14] *Canada Health Act*, RSC 1985, c. C-6, s.3.

[15] See, e.g., *Cameron v. Nova Scotia (A.G.)* (1999), 177 DLR (4th) 611, [1999] NSJ No. 297; [1999] NSJ No. 33; leave to appeal refused (2000), [1999] SCCA No. 531, 259 NR 397, [2000] 1 SCR viii; reconsideration refused (2001), SCC; *Brown v. British Columbia (Minister of Health)* (1990), 48 CRR 137, 66 DLR (4th) 444.

[16] As of 2010, British Columbia, Saskatchewan, Ontario, Quebec, and Newfoundland and Labrador provide funding on a discretionary basis; Alberta, Manitoba, Prince Edward Island, Nova Scotia, and New Brunswick do not fund surgeries. Data for the Territories is not available. "Provincial Updates" Canadian Professional Association of Transgender Health, http://www.cpath.ca/resources/provincial-resources/.

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psychological evaluation, and initial surgeries) are only available through the public system, and cannot be paid for out of pocket. For some, this means that their province of residence places them in a medical (and legal) limbo—unable to access gender-confirming health care without changing provincial residence. Difficulties in accessing gender-confirming health care are one of the ways that some trans people are discriminated against on a regular basis. Although it is not a problem for all trans identified Canadians, it offers an interesting opportunity to consider the legal strategies designed to prevent transphobic discrimination.

One strategy might be to take this kind of battle outside antidiscrimination law, and direct the challenge elsewhere. This is a strategy that would be especially effective in certain situations, such as access to documentation, but may also prove useful for access to gender-confirming health care. For example, a trans identified person could argue that the denial of access to gender-confirming health care is an unjustified interference with the liberty and security of the person. *R. v. Morgentaler*[17] would be useful in this claim. In *Morgentaler*, the Supreme Court of Canada ruled that section 7 of the Charter was offended by legislation prohibiting abortion because it interfered with the liberty and security of the person. Although the court was mainly concerned with the interaction of the criminal prohibition on abortions performed outside of public hospitals and the subsequent criminalization of women seeking abortions outside this process, the logic used in the ruling also considered the accessibility (or lack thereof) of abortions under these restrictions. In finding that a woman's right to liberty and security of the person was harmed by the limitations on access to abortions, Chief Justice Dickson and Lamer J. noted "State interference with bodily integrity and serious state-imposed psychological stress, at least in the criminal law context, constitutes a breach of security of the person."[18] They also found that the delay caused by the mandatory procedures of section 251 of the criminal code resulted in a second independent breach of the right to security of the person, and that the psychological harm of such delays was clearly established.[19] Although not directly similar, the logic of the reasoning offers the potential for it to be extended to include SRS.

SRS does not fall under a criminal law context, suggesting that it is outside the context envisioned as a breach of security in the first instance, but the barrier to necessary medical intervention produced by a refusal to fund SRS could still be seen as state inference with bodily integrity. Refusing to publicly fund SRS leads not only to significant delays in accessing bodily integrity for those wealthy enough to be able to pay out of pocket the tens of thousands of dollars for surgery, but also to an outright denial of service to those who are less well off. Furthermore, the denial of access to initial treatment required prior to the final-stage surgeries appears as an obvious

17 *R. v. Morgentaler*, [1988] 1 SCR 30, Dickson CJ, Lamer J [*Morgentaler*].
18 Ibid. at 32.
19 Ibid. at 33.

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interference with bodily integrity. The complications arising out of such delays or denials of care are well documented.[20] Could not the psychological stress of that denial, combined with the criminalization of almost any activities that might generate sufficient revenue in a short period (especially when combined with access to documentation issues), be seen as a serious breach of the right to security of the person?

This argument becomes even clearer when combined with the dissenting opinion of McIntyre and La Forest JJ, who stated that the assertion to be free of state interference needed to be limited to situations in which the imposition of stress or strain coincided with an infringement of another right, interest or freedom that also warranted protection under the idea of *security of the person.*[21] Although specific criminal sanction is not the concern with access to SRS, rights of citizenship and documentation are. This means that barriers to SRS and other gender-confirming health care not only impact the liberty and security of the person through an inability to access health care (a situation that could be seen as similar to access to abortion), these barriers also cause an infringement on access to documentation, and through that, ultimately, citizenship.

The relationship of health care access to documentation in the Alberta situation is an example of what some scholars have termed a "double bind" for trans people.[22] As trans legal scholar Dean Spade has argued in American jurisdictions,[23] by removing the funding for SRS, Alberta is in effect taking the position that SRS is not a legitimate medical intervention, that it is somewhat "cosmetic" or "experimental" or, minimally, that it is not important enough to deserve public funding. Yet, when considering policies for the changing of provincially issued ID, such as birth certificates,[24] Alberta is simultaneously taking the position that SRS is the only legitimate evidence of gender change. Essentially, then, Alberta is arguing that for the purposes of publicly funded health care, gender-confirming health care (in particular SRS) is not legitimate, but for the purposes of issuing ID, this health care is the standard of legitimacy. For most trans identified Albertans, this means that they will be unable to access gender-confirming health care because it is marginalized and dismissed through a lack of public funding, and then they will be unable to access ID because they do

20 See George R. Brown, "Autocastration and Autopenectomy as Surgical Self-Treatment in Incarcerated Persons with Gender Identity Disorder," *International Journal of Transgenderism* 12 (2010), 31; Danilo Antonio Baltieri, Fernanda Cestaro Prado Cortez, and Arthur Guerra de Andrade, "Ethical Conflicts over the Management of Transsexual Adolescents—Reports of Two Cases," *Journal of Sexual Medicine* 6 (2009), 3214; Pooja S. Gehi and Gabriel Arkles, "Unraveling Injustice: Race and Class Impact of Medicaid Exclusions of Transition-Related Healthcare," *Sexuality Research & Social Policy* 4 (2007), 7; R. Nick Gorton, "Transgender Health Benefits: Collateral Damage in the Resolution of the National Health Care Financing Dilemma," *Sexuality Research & Social Policy* 4 (2007), 81.

21 *Morgentaler* at 39, McIntyre and LaForest JJ, dissenting.

22 See Gehi and Arkles, "Unraveling Justice"; Gorton, "Transgender Health"; Spade, "Documenting Gender."

23 Spade, "Documenting Gender."

24 *The Vital Statistics Act*, RSA 2000, c. V-4, s. 22.

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not have proof of legitimizing health care. Moreover, trans identified individuals cannot merely choose to live in provinces that favour their needs in order to access services, as ID requirements are tied to factors, such as place of birth, that cannot be chosen or controlled.[25] Surely, this could be argued to constitute not only a stress or strain on the individual, through a lack of access to treatment, but also an infringement of another right, freedom, or interest, that of access to full benefits of citizenship through documentation?

What the above strategy does not do, however, is offer protection to those trans individuals who do not access gender-confirming health care. Although it may offer a different strategy for those trying to use the Charter as a means to ensure protection, and in particular for those interested in securing protections for transsexed individuals, there are obvious limitations to its effectiveness. I now turn to the situation in Ontario in 1998 in order to examine other legal strategies.

Case 1: Ontario 1998

In 1998, the province of Ontario was making deep cuts in all areas due to a financial crisis. During these cuts, the Ontario Health Insurance Plan (OHIP) removed funding for SRS. This was one cut to services among a number of other cuts; however, the process used to delist SRS was decidedly different than that used to remove other services. Transsexed community members affected by the cuts filed human rights claims, arguing that the removal of public funding for SRS constituted discrimination on the grounds of sex and disability. The case concluded in 2006 in *Hogan v. Ontario (Health and Long-Term Care)*[26], when OHIP was ordered to fund three of the four claimants' surgeries. Two years later, in 2008, SRS was voluntarily relisted by OHIP.

Both enumerated and analogous grounds of protection are guaranteed under the Charter. Most provincial legislation, however, restricts that protection to a finite list of grounds. Ontario[27] and Alberta[28] both use such restrictive legislation. For the claimants in *Hogan*, this meant that they were restricted in their legal strategy. They needed to argue discrimination on grounds already included in the provincial legislation rather than arguing that gender identity and/or gender expression ought to be read as analogous.

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[25] It is also important to recognize the problems inherent with suggesting that individuals be forced to move provinces in order to access health care or ID. Particularly when considering the barriers to legal employment already faced by many within this community, suggesting a move to another province only compounds the financial burden faced by those unable to access gender-confirming health care. Moving provinces also means moving away from family and social supports, increasing both psychological and financial stress for individuals. Moreover, all of the Canadian provinces require some form of legitimizing surgical intervention for gender re-classification. CED (West 3rd), "Vital Statistics," at § 141-146. Vital Statistics Act, RSNS 1989, c. 494, s. 25. Vital Statistics Act, SNB 1979, c. V-3, s. 34. Vital Statistics Act, SN 2009, c. V-6.01, s. 26. Vital Statistics Act, SPEI 1996, c. 48, s. 12.

[26] *Hogan v. Ontario (Health and Long-Term Care)* 2006 HRTO 32 [*Hogan*].

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

[28] *Alberta Human Rights Act*, RSA 2000 c. A-25.5.

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The claimants in *Hogan*, therefore, claimed they had been discriminated against on both the grounds of sex and disability.

The province of Ontario acceded to the idea that Gender Identity Disorder was a disability.[29] However, the province claimed that sex discrimination was an inappropriate ground. Ontario claimed that sex discrimination protected people from being discriminated against for being male or female, or for characteristics that distinguish women from men, like pregnancy. The claimants, as far as Ontario was concerned, had not been discriminated against in this way, but rather for transitioning between male and female, something that should not be covered under sex. The tribunal, however, was unconvinced. In their majority decision, Vice-Chair Patricia E. DeGuire and Member Ajit Jain wrote "the absence of a specific sex falls within the rubric of the term sex, just as atheism can fall within the ground of creed or religion. Gender ambiguity [. . .] is a form of sex. Because a person is mentally or anatomically not definitely male or female does not diminish one's status as a person."[30] The ground of sex in this reading, therefore, obviously includes trans-embodiments, and not merely transsexed embodiments, but all forms of trans embodiment.

What is most important in this ruling is not merely the inclusion of transsexed embodiments under the grounds of sex, but actually the wider inclusion of all trans embodiments. Legal scholarship about trans law usually focuses on how the court determines the sex of an individual, making judicial decision-making regarding gender classification the overwhelming focus of this scholarship.[31] However, these cases typically involve transsexed individuals, with the courts relying on medical, and especially surgical, evidence to determine the individual's sex. *Hogan* is clearly a departure from this, and offers the potential to make sense not only of transsexed bodies, but also of other forms of trans embodiment on the grounds of sex, while leaving open the categorization of a person as necessarily belonging to one of either male or female.

Unfortunately, this broad understanding of sex does not do away with the notion of a categorization of sex, or a court's desire to determine an individual's sex for a host of other purposes, such as housing within sex-segregated institutions. It does, however, offer the potential to understand non-surgical and non-medical trans bodies within law, and most especially within antidiscrimination discourse as it is already written. This appears to make the new

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29 *Hogan* at para. 17.

30 Ibid. at para. 125. The partially dissenting opinion did not contest this point.

31 Spade, "Documenting Gender." See, e.g., Lori Chambers, "Unprincipled Exclusions: The Struggle to Achieve Judicial and Legislative Equality for Transgender People," *Canadian Journal of Women and the Law* 19 (2007), 305; Carissima Mathen, "Transgendered Persons and Feminist Strategy," *Canadian Journal of Women and the Law* 16 (2004), 291; Paisley Currah and Shannon Minter, "Unprincipled Exclusions: the Struggle to Achieve Judicial and Legislative Equality for Transgender People," *William & Mary Journal of Women & Law* 7 (2000), 37; Sarah Lamble, "Unknowable Bodies, Unthinkable Sexualities: Lesbian and Transgender Legal Invisibility in the Toronto Women's Bathhouse Raid," *Social & Legal Studies* 18 (2009), 111.

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categories of gender identity or gender expression unnecessary, as the open-ended definition of sex used by the Ontario tribunal covers all forms of trans embodiments.

Case 2: Alberta 2009

In Alberta in 2009, then Health Minister Ron Liepert cut funding for SRS in what he and Premier Ed Stelmach termed a cost-saving measure. During question period at the Alberta legislature, Liepert defended the delisting saying that it was one of several "tough choices."[32] Liepert went on to comment that "Unless we get a handle on expenditures, we won't have a publicly funded health-care system."[33] Yet the only programmes removed from public funding were chiropractic services and SRS. According to Liepert, "the province had to reconsider the two services, given its tight budget situation."[34] Cutting chiropractic services was estimated to save the province $53 million per year.[35] Delisting SRS amounted to a cut of $700,000 within a health-care budget of $12.6 billion, amid a number of increases totalling $558 million.[36] These cuts also occurred in a health-care budget that saw the removal of insurance premiums, thereby reducing the income of the insurance plan by $1 billion.[37] Obviously, the financial climate in which these cuts occurred was radically different than in Ontario, and appears not to support Liepert's claims that this was a necessary removal of service based on difficult Cabinet decisions regarding the distribution of scarce resources.

Alberta did not consult with qualified experts prior to cutting SRS,[38] and Liepert mused in question period, that perhaps "the province needs an expert panel to determine what qualifies as a medically necessary service."[39] Notwithstanding Liepert's public comments that the financial climate in Alberta warranted this cut, the economic evidence suggests a different situation. When a lack of medical expertise in making the decision and the economic circumstances, as demonstrated in a budget with increases in many areas of spending, are combined with Alberta's historical positions against

32 Michelle Lang, "Sex Change Funding Cut to Spark Rights Complaints," *Calgary Herald* (April 14, 2009).
33 Trish Audette, "Alberta to Fund 50 Sex-Change Operations," *Dawson Creek Daily News* (April 15, 2009).
34 Michelle Lang, "Chiropractor Treatment Funding Draws Fire; Sex Change Surgery also Affected," *Calgary Herald* (April 8, 2009).
35 "Alberta Provincial Budget 2009," Government of Alberta (last updated April 24, 2009), http://budget2009.alberta.ca/albertans/index.html.
36 Ibid.
37 Ibid.
38 The two psychiatrists charged with overseeing the Alberta Healthcare GRS programme were not contacted. No other psychiatrists in Alberta are able to provide an initial diagnosis leading to funding for GRS under the previous programme or the current grandparenting scheme; therefore, no other psychiatrist in the province should be considered to be a qualified expert in this area.
39 Audette, "Alberta to Fund."

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minority groups, like the lesbian and gay communities,[40] the decision appears to be ideologically motivated rather than medically or fiscally driven.

If the economic argument is so obviously flawed in the Alberta case, what purposes do the financial comments of the Minister serve? Looking to *Hogan* for an answer, the financial arguments seem to play an invaluable role in a proactive strategy in two ways. First, the Tribunal's majority specifically noted that the current law regarding Cabinet's decisions holds that the court should not investigate the motives of Cabinet:

> Even in the light of human rights and *Charter* rights, and knowing that government may be motivated to take decisions or pass regulations by political, economic, social or *partisan* considerations, the courts recognise and uphold the concept that there is no duty on Cabinet to publish its reasons for decisions; nor is the motive, even when known, relevant in determining whether a regulation is valid [...] There is no evidence from which the majority might infer that [the Ministers], took the decision, individually or collectively, or unduly swayed Cabinet to take the decision to delist SRS. Even if there were such evidence, based on the current law, it would not have been relevant in determining the validity of the regulation or Cabinet's action in taking the decision to discontinue funding SRS.[41]

Because the Minister's or Cabinet's intentions cannot be known beyond their publicly stated reasons (reasons that they may not be compelled to publicly state), the financial reasons put forward by the Minister and Cabinet have to be accepted at face value. Moreover, as the Tribunal clearly states, the intent has no bearing on the legality or validity of the regulation. When this is considered in light of the evolution of judicial discourse to a more traditional notion of liberal rights that rights provide protection from state action rather than as positive guarantees of state action,[42] the dismantling of social hierarchies and the redistribution of resources towards such historically marginalized groups is highly unlikely.

A second way in which Alberta's case can be seen as strategically proactive is that, in keeping with the Supreme Court of Canada's ruling in *Irwin Toy Ltd. v. Quebec (Attorney General)*,[43] the majority in *Hogan* found that because Cabinet must have the ability to make a reasonable assessment when allocating scarce resources without undo judicial interference, the Tribunal's purpose in this regard was solely to determine whether the Cabinet decision was a reasonable assessment. The Tribunal was satisfied

40 One example of this is Alberta's repeated and deliberate choice not to include sexual orientation in provincial human rights legislation, as commented upon by Cory J. in *Vriend v. Alberta* [1998] 1 SCR 493, at para. 62 [*Vriend*].

41 *Hogan* at para. 73.

42 Young, "Why Rights."

43 *Irwin Toy Ltd. v. Quebec (A.G.)*, [1989] 1 SCR 927 at 989–990 [*Irwin Toy*]. In this case the Supreme Court of Canada found that the proper allocation of acutely limited resources requires the government to make difficult decisions regarding the balancing of competing interests, and how that balance is struck. This, the court found, is an imperative in which the government, as an elected, representative body, is in a better position to mediate these choices than the courts or tribunals.

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that the decision to discontinue funding SRS was a reasonable allocation of scarce resources, as the majority believed that Cabinet felt that SRS funding did not yield maximum benefits.[44] For this reason, its majority decision was more than reluctant to find that Ontario must fund surgery for any except the three successful claimants. The Tribunal avoided calling the validity of the legislation into question by presenting the situation as a very narrow one in which these three exceptional claimants ought to be accommodated, but not all transsexed people in Ontario. In reflecting on *Irwin Toy*, the majority stated:

> Individuals or groups will assert the need for benefits from the public purse, and the more or less vulnerable groups will too. Thus, the Supreme Court of Canada cautions that when reviewing the outcome of legislative choices, especially vis-a-vis the protection of vulnerable groups; where the law is premised on complex social science evidence, or where the law allocates sparse resources, courts and tribunals "must be mindful of the legislature's representative function."[45]

It appears, then, that Alberta is banking on protection from human rights claims based on its imperative to weigh the needs of different interest groups when distributing finite resources. However, I am left to wonder what is the purpose of judicial review, especially vis-a-vis the protection of vulnerable groups, if it must defer to legislative choices because they are "representative"? How are historically vulnerable groups to overcome disadvantage and vulnerability when they are often not represented in the legislature if the courts refuse to overturn discriminatory legislation?

In her partially dissenting opinion, Vice-Chair Mary Ross Hendriks cited Ontario's lack of medical, policy, budgetary, or other non-discriminatory rationale for its decision, as demonstrative of an arbitrary decision that was made so recklessly as to constitute an abuse of power.[46] In finding that the promulgation of the regulation removing funding for SRS was a form of systemic discrimination,[47] Hendriks noted that Ontario had neither relied upon nor weighed any competing credible scientific evidence.[48] She, then, also referred to *Irwin Toy*: "If the legislature has made a reasonable assessment as to where the line is most properly drawn, especially if that assessment involves weighing conflicting scientific evidence and allocating scarce resources on this basis, it is not for the court to second guess. That would only be to substitute one estimate for another."[49] The crux of her dissenting opinion was that Ontario did not make their decision based upon credible scientific (medical) evidence; neither did Alberta base its decision on medical evidence. In fact, Ontario actually had a medical committee to

44 *Hogan* at para. 103.
45 Ibid. at para. 104; *Irwin Toy* at 93.
46 *Hogan* at para. 260, Hendriks Vice-Chair, dissenting.
47 Ibid. at para. 263.
48 Ibid. at para. 379.
49 Ibid. at para. 378; *Irwin Toy* at 989–90.

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oversee their changes (although they did not make the recommendation that SRS be cut), whereas Alberta did not. Moreover, as Hendriks points out, in *Vriend*, the Supreme Court of Canada found: "although this Court has recognized that the Legislatures ought to be accorded some leeway when making choices between competing social concerns ... judicial deference is not without limits."[50] What is perplexing in *Hogan* is that the majority did not see clear to exercise such limitations on judicial deference as so unmistakably articulated both by Hendriks in her partial dissent, and by the Supreme Court in *Vriend*.

The Tribunal found that the duty to accommodate was insufficiently attended to because of the lack of a sufficient grandparent clause. Because the processes of transition are multiple and continue over a number of years, the majority concluded that the 35-day grace period specified in the grandparent provision in the regulation was insufficient to accommodate the needs of the three successful claimants.[51] These three were singled out as exceptional, because they had commenced treatment towards SRS prior to the decision by the government to discontinue funding. In light of this, the Tribunal found that: "Their exceptional circumstances give rise to the 'need' to accommodate them and inform the sufficiency of the accommodation."[52] They did not, however, offer a remedy commensurate with this finding to all transsexed people in the province in similar positions, but only to the three successful named claimants. Although this is in keeping with the finding that these three were "exceptional," it also demonstrates the deference of the Tribunal to Cabinet's decision-making—a deference that appears to extend beyond the reasonable limitations laid out by the Supreme Court, and a deference that furthers the marginalization of trans individuals in Ontario.

Alberta announced a phase-out programme for people in an irreversible state between genders in April 2010; this programme will continue to fund these "exceptional" cases until 2015, six years from the time of delisting.[53] Interestingly, the time frame equals that specified in *Hogan*, and the conditions of the phase out appear to deal specifically with the minimum conditions outlined in the majority's decision in *Hogan*. The particular inclusion criteria as well as the six-year window work against the financial

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50 *Hogan* at para. 380, Hendriks Vice-Chair, dissenting; *Vriend* at para. 126 [references omitted].

51 *Hogan* at para. 106.

52 Ibid.

53 This phase-out program was communicated via private correspondence. The information as presented here has been funnelled through medical channels to individuals affected by the change. The first public suggestion of such a program (but with no details as to scope or requirements) came about during question period in the Legislature when Liepert suggested first that there were 26 people waiting for surgery, and then amended that to add 20 more (Trish Audette, "Sex-Change Surgery List Doubles; Liepert Expands Funding After Media Reports Highlight Concerns," *Edmonton Journal* (April 15, 2009)). The source of Liepert's numbers is unknown, and seems to bear little, if any, resemblance to actual numbers of transsexed Albertans seeking SRS.

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justifications for the cut, while seeming to specifically address the findings in *Hogan*.[54]

One very important impact of this phase out programme is that it will delay any potential court action based on discrimination until after the phase out scheme is complete. That delay means that many people will be living within this legal limbo, caught between living in bodies with barriers to health care and documentation, and living in bodies that do not fit. Perhaps more important than the delay, however, is what *Hogan* clearly demonstrates: that even when trans discrimination is understood as covered by one (or more) protected grounds, judicial remedy falls short of ensuring substantive equality. Gender identity and gender expression were not required for the tribunal to understand trans embodiments as protected in *Hogan*, yet that protection did not extend to removing the barriers to health care or documentation.

Social Effects of Legal Strategies

Human rights mechanisms and antidiscrimination legislation are insufficient to ensure access to health care or government-issued ID because there is a gap between formal and substantive equality. As Dean Spade notes, "Even for those living in protected jurisdictions, lacking resources to obtain legal assistance, or lacking 'smoking gun' evidence of the discriminatory behaviour often precludes enforcement of these laws, and the damage of being 'outed' is irreversible."[55] Formal equality offers a highly symbolic form of recognition that functions to some degree as a condition of possibility of certain systemic/institutional discriminations.[56] Formal equality acts as a kind of proof that

54 The lone unsuccessful claimant in *Hogan* was unsuccessful because the majority found that he was not aware of Ontario's SRS program until after the funding had been cut, and that he had not begun treatment or transition prior to the delisting of SRS in 1998 (these are two of the criteria mentioned in the Alberta phase out). The six-year time frame specified in *Hogan* was based on actual documented timeframes for completion of SRS under the Ontario format. Alberta's timeframe appears to be based solely on that, with no consideration of whether the timeframes for Albertans are similar or not. As the referral system in Alberta functions differently from the Ontario system for medical transition, it should not be assumed that the timeframe for completion of SRS in both provinces is the same.

55 Spade, "Documenting Gender," 770.

56 Although, ostensibly, antidiscrimination legislation is designed to protect people from exactly these kind of discriminations, it is unable to do so for a number of reasons. This point has been made by many scholars in many contexts and is not limited to a trans context. Spade, "Documenting Gender," 777. See, generally, Nitya Iyer, "Categorical Denials: Equality Rights and the Shaping of Social Identity," *Queen's Law Journal* 19 (1993-1994), 179; Judy Fudge, "What Do We Mean by Law and Social Transformation?" *Canadian Journal of Law and Society* 5 (1990), 485; Harry J. Glasbeek, "Some Strategies for an Unlikely Task: The Progressive Use of Law," *Ottawa Law Review* 12 (1989), 387; Lise Gotell, "The Ideal Victim, The Hysterical Complainant, and The Disclosure of Confidential Records: The Implications of the Charter for Sexual Assault," *Osgoode Hall Law Journal* 40 (2002), 251; Judy Fudge, "Evaluating Rights Litigation as a Form of Transformative Feminist Politics," *Canadian Journal of Law and Society* 7 (1992), 153; Dean Spade, "Compliance is Gendered: Struggling for Gender Self-Determination in a Hostile Economy," in *Transgender Rights*, ed. Paisley Currah, Richard M. Juang, and Shannon Price Minter (Minneapolis: University of Minnesota Press, 2006), 217; Judy Fudge, "The Public/Private Distinction: The Possibilities of and the

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government, courts, and people are not able to act in discriminatory ways because there is legal recourse for those who are wronged. Yet, such recourse does little to actively prevent discrimination or to ensure substantive equality. Protection becomes almost wholly symbolic when remedies do not address these differences. Formal equality can then be seen as a barrier to substantive equality, because this symbolic protection offers a legal hiding spot for diffuse forms of discrimination.

If trans embodiments were not offered some form of legal protection, then the Alberta government's move would be more problematic. Albertans would have to consider whether or not human rights protection ought to include trans individuals, and whether or not the government's removal of funding from a marginalized group was in fact a form of discrimination. Symbolic protection makes the discussion of discrimination murkier, and offers the protection of side-stepping the discrimination question. It offers the government the opportunity to argue that the move was merely a difficult financial decision, not an ideological one. The proof that the government is not acting in a discriminatory manner is the symbolic equality, thus there is little reason to question the veracity of the financial argument. Without symbolic inclusion in antidiscrimination law, the government has to acknowledge the question of discrimination, as there is no legal hiding place from which to suggest that equality exists.

The creation of a new discrete and insular minority category can, therefore, be recognized as harmful for (at least) three reasons: First, the grounds of sex or gender can and do include trans embodiments, as is clearly demonstrated in *Hogan*. Pushing for such an understanding of sex/gender would help to disrupt the binary conception of sex/gender that functions as the foundation of all forms of transphobia and trans discrimination (as well as misogyny)—something that the inclusion of a separate category would not do. Expanding sex/gender categories in law to include other than male/man and female/woman would offer a step towards undermining the processes of transphobia embedded within law when transphobia is understood to mean the stigmatization of trans individuals as less real than non-trans individuals, as literally more constructed through the use of various somatic techniques.[57] A further benefit of properly interpreting sex rather than finding another ground is that it does not cover simply those who are transitioning from one category to the other, but, as demonstrated by the ruling in *Hogan*, also covers those who are neither definitively male or female. Although gender identity or gender expression have been suggested as inclusive forms of protection that would extend to all trans embodiments (as well as to those people who do not identify as trans but are nonetheless discriminated against for their apparent gender identity or expression),

Limits to the use of Charter Litigation to Further Feminist Struggles," *Osgoode Hall Law Journal* 25 (1987), 485.

[57] Lane R. Mandlis, "Art Installation as Method: 'Fragements' of Theory and Tape," *Qualitative Inquiry* 15 (2009), 1353–54.

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there has been considerable debate regarding the interpretation of who is covered under the term gender identity and what that coverage means in the US jurisdictions in which it has been enacted, such as San Francisco, New York, and Michigan.[58]

A second reason to understand the strategy of fighting for gender identity as a separate ground as harmful is that while it may provide formal legal equality and symbolic recognition, it fails to guarantee substantive equality and may act as a barrier to substantive equality. In other words, although the Charter and provincial and federal human rights legislation offer legal remedy for legal wrong-doings, they do not actively prevent the daily discriminations faced by many marginalized communities, including trans communities. While this may be the intent of antidiscrimination law, in practice it has little ability to prevent many forms of everyday discrimination.

Antidiscrimination law, according to Kimberle Crenshaw, contains an inherent tension between "equality as process and equality as result."[59] Crenshaw terms these two distinct rhetorical visions "expansive," which looks to real consequences, and "restrictive," which does not consider the results, but privileges the prevention of future occurrences of discrimination. The restrictive view, focusing on process, lends itself to a vision of discrimination in which acts of oppression are understood primarily as individual's actions against individuals, rather than as institutional actions against a particular group of people.[60] Systemic discrimination is difficult to prove under antidiscrimination law, because equality can refer to either the restrictive or the expansive vision. The granting of formal equality does not therefore equate to a commitment to end inequality. Under the restrictive view, antidiscrimination law constructs barriers to the eradication of systemic oppression because the law is then seen as facial neutral. As Crenshaw observes in relation to racial oppression of Blacks in the US, "to the extent that antidiscrimination law is believed to embrace colorblindness, equal opportunity rhetoric constitutes a formidable obstacle to efforts to alleviate conditions of white supremacy."[61] What this means is that there is no singular and self-evident interpretation of rights in and of themselves. Thus, if the rhetoric of equality is embraced without the commitment to end inequality, then acts that are embedded within bureaucratic mechanisms or hidden by recourse to common-sense assumptions or myths are unlikely to be viewed (from the dominant perspective) as acts of oppression that ought to be remedied through antidiscrimination law. In this way, antidiscrimination legislation is ill-equipped to offer sufficient protection or remedy to groups oppressed in systemic and diffuse ways. The complexity of systems of oppression facing trans identified Canadians is unlikely to be significantly altered by

[58] Spade, "Documenting Gender."
[59] Crenshaw, "Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law," *Harvard Law Review* 101 (1988), 1341.
[60] Ibid., 1342.
[61] Ibid., 1346.

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antidiscrimination law, and systemic transphobia and trans discrimination are unlikely to be seen by courts as discrimination.

While having some form of legal redress might make some people feel better about being discriminated against, it is doubtful that it will resolve the complex problems of transphobia faced by many in *trans* communities, most especially those with significantly more intersections of oppression (such as trans people of colour, trans people living in poverty, trans people with criminal convictions, trans people with addictions, and so on). Even without malicious intent to discriminate, many people reproduce barriers for trans people based in ignorance or discomfort. As Dean Spade notes, even in jurisdictions where specific antidiscrimination legislation has passed, for example in San Francisco and New York, "advocates report that these compliance guidelines are generally under-enforced in practice, because people are not aware of the rules and even city agencies fail to comply with them."[62] Moreover, it is only those most privileged within the community who have access to legal remedy. Those who are most marginalized often continue to experience discrimination regardless of antidiscrimination law, due to a lack of information, a lack of resources, and a lack of access to legal remedy.

It is also important to consider that for gender identity or gender expression to need to be enumerated into these codes there must not already be sufficient coverage under other grounds. If other grounds can be interpreted to include trans identified people, then there is no need to have gender identity or gender expression as a separate ground of prohibited discrimination. The inclusion of a separate category indicates that there is something about that category that makes it distinct from other categories. Therefore, to argue for its necessity is to posit a lack of coverage and to argue for an understanding of the current grounds as exclusionary of trans subjects. This places communities and activists in the strange situation of reinforcing the limbo of trans subjects; if trans embodiments are not included in sex, then trans becomes unintelligible in relation to the legal understanding of sex. If sex is only male and female, and gender is only man or woman and any other permutation or slippage or movement between these discrete categories is not covered, then trans is unintelligible. If trans can be understood within sex/gender, if movement or slippage or spaces between female and male or woman and man are understandable and protected within the categories of sex or gender, then a separate category is not required. Gender identity or gender expression would not be offering anything that is not already encompassed by the categories of sex or gender.

Activism that is centred on raising awareness of the insufficiency of rigid binary categories of sex or gender need not rely on the strategy of a separate and distinct category. This strategy was employed by homosexual communities; however, because the processes of homophobia and transphobia are

[62] Spade, "Documenting Gender," 777.

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different, and the relationship of those processes to other characters of persons that are covered is also different, the homosexual template may not offer the best legal strategy for trans communities. In fact the positing of the separate and distinct category suggests that a revisiting of the current categories is unnecessary; they are doing fine, there just needs to be a new one. If the situation is already covered by a current category why would another category be needed? What purpose does it serve to add another category, and to say that someone has been discriminated against based on both categories? If they were speaking to decidedly different situations, yes; but then the necessity for it suggests that the situations are different.

What would distinguish the line between discrimination based on gender identity and discrimination based on sex? In what circumstances would someone have been discriminated against under only one of them? If a woman was discriminated against for being pregnant, would that be a case of discrimination based on sex (as it is now) or based on gender identity? Surely, if she identifies as a woman then she is also being discriminated against based on her gender identity. If the same pregnant person identified as a man but was discriminated against for being pregnant, would that be discrimination based on sex or gender identity? Perhaps, in this case, it would merely be a case of sex and not gender identity discrimination because it is not his identification as a man that caused the discrimination, but rather his being female. This functions to construct the category of sex as something pointing to (perhaps) biology, or legal recognition of the person's registered sex, or maybe a common-sense understanding of someone's sex, in that the person who is able to be pregnant is being discriminated against as a woman. This actually functions to reproduce transphobia through the privileging of some biological or legal marker of sex. *Hogan* was clearly a departure from this kind of either/or understanding of sex, and appears to offer sex as a ground that can encompass all permutations of sex/gender without privileging one over another.

The addition of a separate category is also dangerous because essentially it requires trans communities to argue for their own exclusion from protection prior to an amendment that will include protection. This also means that having formal protection included in federal legislation[63] is likely to lead to a situation in which trans individuals will be forced, within certain provincial jurisdictions, to engage in a Charter challenge in order to secure protections provincially. If trans identified people require the ground of gender identity in order to be formally covered under antidiscrimination legislation (a requirement that means other grounds are insufficient to protect them), then they will no longer be covered under provincial legislation that does not include it. Because the provincial human rights legislation in provinces such as Alberta only covers specified and not analogous grounds, it is likely that courts will find that trans individuals have not been discriminated against based on a

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[63] This is what Private Members' Bill C-389 is trying to achieve.

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protected ground (such as sex or gender), but instead under an unprotected ground—that of gender identity.[64]

A third reason why the strategy of having gender identity enumerated as a separate category is harmful is that the resources required to mount such campaigns—financial as well as others—are massive. A lawyer is not necessary in order to file a human rights claim, but a *Vriend*[65] strategy engaging in a Charter challenge of the Alberta Human Rights Act would be very costly. Redirecting these resources towards other endeavours that act on the processes through which trans identified people are regularly disadvantaged, such as access to documentation, would be more beneficial to the communities. This redirection of resources is strategically important because the amount of resources needed to make changes is substantial, but the amount available to communities is not. Using the available resources efficiently and strategically will probably offer the best outcomes. Using a considerable amount of resources to lobby for inclusion in legislation that already includes the communities is unlikely to directly benefit the majority of people within those communities. Who has access to legal recourse through such legislation is also a concern, one that is an even larger issue in light of the federal government's 2006 dismantling of the Court Challenges Program.

Conclusions

Returning to the situation in Alberta, it is unlikely that the inclusion of gender identity or gender expression in antidiscrimination legislation at any level would have prevented the government from removing the funding, or from constructing the phase-out programme in response to *Hogan*. Alberta has clearly considered the majority findings in *Hogan*, and appears confident that the financial arguments will succeed. The Ontario case is instructive in this regard, as Ontario acceded to the claimants' protection based on disability. Ontario knew that they were acting in a discriminatory manner against a minority group expressly covered under the provincial legislation, yet they believed that they were legally allowed to do so because of financial considerations. This position is supported by the ruling in *Newfoundland (Treasury Board) v. Newfoundland and Labrador Assn. of Public and Private Employees (NAPE)*,[66] where the Supreme Court of Canada explicitly recognized that fiscal considerations provide a legitimate rationale for limiting Charter rights. When it comes to the weighing of what are seen as competing

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64 This was the case prior to the inclusion of sexual orientation within legislation. Courts dismissed cases brought by gay men under grounds other than sexual orientation precisely because the discrimination occurred under the ground of sexual orientation—a ground that was in fact not covered. See, e.g., *Damien v. Ontario Human Rights Commission* (1976), 12 OR (2d) 262 (HCJ); *A.-G. Canada v. Mossop*, [1993] 1 SCR 554, aff'g [1991] 1 FC 18, (1990), 71 DLR (4th) 661 (FCA), rev'g (1989), 10 CHRR D/6064 (Can. HR Trib).

65 *Vriend.*

66 *Newfoundland (Treasury Board) v. Newfoundland and Labrador Association of Public and Private Employees (NAPE)*, [2004] 3 S.C.R. 381.

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interests, those of the majority appear most likely to win out. Because financial arguments are essentially framed as impacting the greater good for the public at large, they are likely to be more compelling to the courts. Although antidiscrimination legislation includes a duty to accommodate to the point of undue hardship, it is possible that Alberta's justification of a budgetary crisis that compels tough decisions about the allocation of health-care resources could save their decision to delist in a discriminatory manner.

Can Alberta truly be seen to be suffering from financial hardship when the overall health-care budget increased? Should this form of systemic discrimination be allowed to hide under the guise of allocation of resources? The specific inclusion of gender identity in antidiscrimination law does not address these questions, and neither would its inclusion in law have prevented this situation in Alberta.

What these health-care situations demonstrate is that the rights template engaged by the gay and lesbian lobby—that of adding a separate and distinct category of protection—ought to be rejected by trans communities as a legal strategy. Trans issues are distinct from gay and lesbian issues, and the processes of transphobia are different from those of homophobia. This suggests that the appropriate legal strategies to overcome discriminatory practices should also be different. The discrete and insular minority approach may offer a symbolic equality, but an equality that leaves intact the processes of discrimination. By taking advantage of existing categories, such as sex, and thus simultaneously complicating and expanding them, trans activism is better positioned to strike at the processes of transphobia. Although this strategy may not offer the seductive appeal of the discrete and insular minority approach, it offers a significantly greater potential for substantial social change.

Abstract

Antidiscrimination legislation is the vehicle most commonly used by communities to demand equality, but how should such law best be employed? In this article, the Ontario Human Rights Tribunal decision in *Hogan v. Ontario (Health and Long-term Care)* is examined in relation to the removal of sex reassignment surgery from the Alberta Healthcare Insurance Plan in order to better understand the legal strategies designed to remedy different kinds of discrimination. This article argues that trans issues (involving people who identify as transgender, transsexual, or trans) ought not to be seen as additions to gay and lesbian issues legally or politically. Moreover, this article demonstrates that the fight for formal inclusion in legislation as a discrete or insular minority should be rejected by trans activists, as other legal strategies are better positioned to combat the processes of transphobia, thus potentially offering important steps towards substantive equality.

Keywords: transgender rights, transsexual rights, gender identity and law

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Résumé

La législation sur l'antidiscrimination est le véhicule le plus couramment utilisé par les communautés pour demander l'égalité, mais comment une telle législation pourrait-elle être employée le mieux possible? Cet article examine la décision prise par le Tribunal des droits de la personne de l'Ontario dans Hogan c. Ontario (Santé et Soins de longue durée)en ce qui concerne le retrait de l'inversion sexuelle chirurgicale du Régime de l'assurance-maladie de l'Alberta afin de mieux comprendre les stratégies juridiques conçues pour remédier aux différentes sortes de discrimination. Cet article soutient que les questions de trans (incluant les personnes qui s'identifient comme transgenre, transsexuelle ou trans) ne devraient pas être considérées comme des ajouts à celles concernant les gais et les lesbiennes, juridiquement ou politiquement. De plus, cet article montre que le combat pour une inclusion officielle dans la législation en tant que minorité distincte ou isolée devrait être rejeté par les activistes trans, car il existe d'autres stratégies juridiques davantage en mesure de combattre les processus de transphobie, ce qui constituerait ainsi une importante avancée vers une égalité réelle.

Mots clés : droits des personnes transgenres, droits des transsexuels, identité sexuelle et la loi

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