

**Beyond Binary:  
An Update on Gender Identity and Gender Expression**

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**Law Society of Upper Canada  
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**Introduction**

When the initial paper on this topic, *Gender Identity and Gender Expression in the Workplace: Who Needs It and What Does It Protect*,<sup>1</sup> was authored in 2014 for the Six-Minute Labour Lawyer series, it seemed as if transgender rights had reached a tipping point; Laverne Cox became the first transgender person to grace the cover of Time Magazine for its June 2014 issue, the television series “Transparent” was nominated for almost a dozen Emmy awards (and won many of them), and Canadian trans YouTuber, Gigi Gorgeous, obtained her 1 millionth subscriber.

Now, only three years later, it is evident that the visibility, acknowledgement and integration of transgender persons in public life has grown rapidly and continues to do so. For example, in February 2016, Kael McKenzie took his seat in the Manitoba court as the first transgender judge in Canada, and in November 2017, Julie Lemieux became the first openly transgender person to win office in Canada as mayor of Tres-Saint-Redempteur, Quebec. Further, nine out of thirteen provinces and territories in Canada now have human rights legislation which include gender identity and/or gender expression as a protected ground from discrimination.

Amongst the myriad of developments in transgender rights in Canada, it is apparent that our understanding of non-binary gender has also advanced dramatically in the last three years. Legal and policy developments in this area show that in addition to changes in attitude regarding male-to-female and female-to-male transitioning (e.g. transgender persons no longer need to provide medical “proof” of transition in order to be treated as their felt gender), there has also been a shift away from viewing gender as limited to either male or female.

The purpose of this paper is to (1) provide a background on transgenderism, including an overview of terminology and statistics as they relate to transgender people; (2) review new developments in public policy in the area of transgender rights over the last three years; (3) provide an update on employment-related cases dealing with issues of gender identity and/or gender expression accommodation; and (4) provide a summary of best practices and guidelines

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<sup>1</sup> Ryan Edmonds, “Gender Identity and Gender Expression in the Workplace: Who Needs It and What Does It Protect?”, Law Society of Upper Canada, Six-Minute Labour Lawyer, June 2014.

from large employers and industry associations with respect to embracing gender identity and gender expression in the workplace.

## **Background on Transgenderism<sup>2</sup>**

### *Terminology*

On the spectrum of sexual diversity, transgenderism remains a widely misunderstood area. Given that all transgendered people do not necessarily fit into a neat category for which one description could apply, “transgender” (or “trans”) is generally used as an umbrella term to describe transsexuals, trans-men (female-to-male), trans-women (male-to-female), cross-dressers, as well as other non-conforming gender identities such as gender variant, non-binary or gender queer.<sup>3</sup>

The following is non-exhaustive list of terminology that may be used to describe persons who identify as transgender:

*Transsexual* is used to describe people who were identified at birth as one sex, but who identify themselves differently. Transsexuals may seek or undergo one or more medical treatments to align their bodies with their internally felt gender identity, but this will not always be the case.

*Gender Queer, Gender Variant, or Non-Binary* describes a person whose life experience includes existing in more than one gender. This may include people who describe themselves as being on a “gender spectrum” or as living outside the categories of “man” or “woman”.

*Cross-dresser* describes a member of one gender who dresses as members of the opposite sex for emotional or sexual satisfaction. Cross-dressers are often confused with *Drag Queens*, who are individuals who dress as the opposite gender for the purpose of a stage performance.

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<sup>2</sup> Section adapted from “Gender Identity and Gender Expression in the Workplace: Who Needs It and What Does It Protect?”, *supra*.

<sup>3</sup> Ontario Human Rights Commission, *Preventing Discrimination Because of Gender Identity and Gender Expression* (Toronto: Ontario Human Rights Commission, 2014), online: <<http://www.ohrc.on.ca/sites/default/files/Policy%20on%20preventing%20discrimination%20because%20of%20gender%20identity%20and%20gender%20expression.pdf>>.

*Intersexual* describes a person who is born with underdeveloped or ambiguous sex organs, or sex organs of both genders. This term replaces the inappropriate term “hermaphrodite”.

Given the wide variety of subgroups that may possibly fall under the category of “transgender”, it is no surprise that the general public has misconceptions and misunderstanding of these groups.

### ***Who Are Trans People?***

Despite these misconceptions, society’s awareness of sexual diversity continues to develop. As this occurs, it is likely that the number of openly trans people in Canada will increase as people feel more comfortable being open with their gender identity.

Although specific statistics regarding the number of trans and transsexual people in Canada are not generally available, a US study has estimated that about 1 in 24,000-37,000 men and 1 in 103,000-105,000 women identify themselves as transsexuals.<sup>4</sup> However, it has also been suggested that the proportions are about the same among males and females.<sup>5</sup> Further, it is important to note that the proportion of trans people in the general population is set to rise as a result of an expanding view of what constitutes gender non-conformity.<sup>6</sup> Indeed, since all trans people are not necessary transsexuals, statistics on the prevalence of the latter are misleading.

Even though trans people are generally well educated – approximately 36% of all trans people completed college or university<sup>7</sup> – they are nonetheless among the most vulnerable and disadvantaged members of society. Studies report that 50% of all trans people earn less than \$15,000 annually, while a further 21% earn between \$15,000 and \$29,999.<sup>8</sup>

This economic vulnerability correlates with the vulnerability trans people face in the workplace. According to a study in 2007 from UCLA, up to 60% of transgendered people are estimated to be

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<sup>4</sup> Ontario Human Rights Commission, “Policy on Discrimination and Harassment Because of Gender Identity” (2000), online:

<[http://www.ohrc.on.ca/sites/default/files/Policy\\_on\\_discrimination\\_and\\_harassment\\_because\\_of\\_gender\\_identity.pdf](http://www.ohrc.on.ca/sites/default/files/Policy_on_discrimination_and_harassment_because_of_gender_identity.pdf) > at 17, citing an American Psychiatric Association study.

<sup>5</sup> L. Winfield & S. Speilman, *Straight Talk About Gays in the Workplace*, 2d ed. (New York: Harrington Park Press, 2001) at p.53.

<sup>6</sup> See Adrian Chamberlain, “Transgenderism Defined in Words and By the Numbers”, online:

<<http://www.timescolonist.com/transgenderism-defined-in-words-and-by-the-numbers-1.105737>>.

<sup>7</sup> Ontario’s Trans Communities and Suicide: Transphobia is Bad for our Health (Fact Sheet) (2010) Online: Trans PULSE E-Bulletin <[www.transpulseproject.ca](http://www.transpulseproject.ca)>.

<sup>8</sup> *Ibid.*

unemployed.<sup>9</sup> Of respondents who did report employment, shockingly upwards of 64% earned less than \$25,000 USD per year.<sup>10</sup> Furthermore, 56% of respondents reported to have been fired from their jobs at least once, and upwards of 47% reported they were unlawfully denied further employment opportunities.<sup>11</sup>

### ***Gender Identity: From Disability to Inherent Characteristic***

Transgendered people also continue to be misunderstood by the medical community. As recently as 2012, the Diagnostic and Statistical Manual of Mental Disorders (“DSM”) classified transgender people as having a “gender identity disorder”. This term had been highly criticized because it was seen as characterizing all transgender people as mentally ill.

In its newest edition, however, the DSM-V has now reclassified the term as “gender dysphoria”. This change is said to reflect a new perspective on gender identity. While the old DSM-IV focused on “gender identity disorder” as the incongruity between a person’s birth gender and the gender with which they identify, the new DSM-V seeks to emphasize the importance of distress about the incongruity in order for a diagnosis to be made.

The importance of this shift in DSM terminology is to recognize that a person experiencing an incongruity between birth gender and gender identity does not necessarily experience distress, and a person who is not distressed by their cross-gender identification should not be diagnosed with “gender dysphoria”. As a result, gender nonconformity is no longer inherently considered a mental disorder.

This approach is consistent with the layman (and inaccurate) view that transgenderism is more akin to a “sexual orientation” than a medical illness. While this is not correct, since gender identity and sexual orientation are different concepts that do not accord in any particular way, the shift towards understanding gender identity as an inherent characteristic have informed and continue to inform the development of public policy and law, such as the inclusion of gender identity and/or gender expression as separate protected grounds in Canadian human rights legislations.

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<sup>9</sup> M.V. Lee Badgett, Holding Lau & Brad Sears, “Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination” [unpublished, 2007], The Williams Institute of Sexual Orientation Law and Public Policy at UCLA School of Law, online: <<http://williamsinstitute.law.ucla.edu/research/workplace/bias-in-the-workplace-consistent-evidence-of-sexual-orientation-and-gender-identity-discrimination/>> [UCLA].

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

## New Developments in Public Policy

Development of public policy in the area of gender identity and/or gender expression, either through case law, legislation or governmental policies, is a strong indicator that the understanding and societal attitudes amongst Canadians has advanced. Over the last three years, there has been further movement in Canadian law towards providing transgendered persons with greater legal protections in a multitude of areas, such as government-issued identification documents, federal and provincial penitentiaries, and health services with respect to sex reassignment surgery (“SRS”).

### *Identification Documents*

The issue of sex identification on government-issued IDs has recently been considered by courts and revisited in Government policies.

In *CF v Alberta (Vital Statistics)*,<sup>12</sup> the Alberta Court of Queen’s Bench heard a *Charter* challenge with respect to gender/sex identification on a birth certificate. The Applicant, CF, was a trans female who had applied for a birth certificate stating her sex to be female. The Director of Vital Statistics refused her application on the grounds that the *Vital Statistics Act* (the “VSA”) required transgendered people to have SRS in order to have the sex indicator on their birth certificate changed.

CF argued that the VSA and Director’s interpretation discriminated against transgendered people, who are forced to have birth registrations that do not reflect their lived sex unless they submit to SRS. Justice Burrows agreed with CF, finding that the VSA birth registration system treated transgendered persons disadvantageously and differently than non-transgendered persons and transgendered persons who were willing to have genital surgery. Accordingly, he ruled that to the extent that the VSA did not permit CF to obtain a birth certificate that contained her lived sex, it was inconsistent with the *Charter* and was of no force or effect.

The Federal Court considered a similar issue in *Chedor v Canada (Minister of Citizenship and Immigration)*,<sup>13</sup> with respect to sex identification on a citizenship certificate. The Applicant, Chedor, was a naturalized Canadian who received her Canadian citizenship certificate in 2006. The certificate indicated her sex as “male” but the Applicant’s entire Canadian life had been lived in the female sex. The Applicant made an application to Citizenship and Immigration Canada (“CIC”) to modify her citizenship certificate. The CIC refused, stating that in order to make the

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<sup>12</sup> [2014] AJ No 420. See also *XY v Ontario (Government and Consumer Services)*, 2012 HRTO 726, in which the Ontario Human Rights Tribunal considered the same issue.

<sup>13</sup> [2016] FCJ No 1218.

change, CIC required an official declaration of a qualified surgeon confirming that the applicant had undergone SRS.

Chedor found the requirement to be discriminatory toward herself and the LGBTQ community and filed a complaint with the Canadian Human Rights Commission. The complaint resulted in a settlement between Chedor and CIC, whereby the defendant agreed to revise its departmental policies, application forms and guides within one year to remove the requirement for evidence of SRS in order to change the sex designation on citizenship certificates.

The Application before the Federal Court dealt with an alleged breach of the settlement agreement by the defendant. Chedor argued that CIC did not fully comply with the one-year deadline, as the requirement for evidence of SRS continued to exist as an alternative option or be required on a discretionary basis. Accordingly, the court found that CIC failed to comply with the settlement agreement and therefore homologated the settlement, making it an order of the court for enforcement purposes. The court noted, however, that it did not have the jurisdiction to go beyond such an order to make pronouncements on the legality or the reasonableness of the policies or actions taken by CIC.<sup>14</sup>

The events in *Chedor* catalyzed the federal government to implement policies that are now more in line with the changing requirements in many provinces, where SRS is no longer required to change sex/gender on birth certificates and other provincial documents. The CIC guide, *Application for a Citizenship Certificate for Adults and Minors (Proof of Citizenship) under Section 3 (CIT 0001)*, now states that proof of SRS is not required to amend the sex designation on documents. Rather, the CIC will accept a legal document issued by a provincial or territorial vital statistics organization, a court order, or an amended birth certificate showing change of sex designation.<sup>15</sup>

In addition to the changes above, the federal government has also made strides in the acknowledgement of Canadians who identify as gender-neutral. On August 31, 2017, CIC introduced an interim measure to allow people to identify their gender as “X” (i.e. unspecified) on their passports. The sex field is mandatory for travel documents under the International Civil Aviation Organization rules, which allow one of three markers: F for female, M for male, or X for “unspecified”.<sup>16</sup>

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<sup>14</sup> *Ibid* at para 68.

<sup>15</sup> Citizen and Immigration Canada, *Application for a Citizenship Certificate for Adults and Minors (Proof of Citizenship) under Section 3 (CIT 0001)* (Ottawa: Government of Canada), Appendix A.

<sup>16</sup> Peter Zimonjic and Bonnie Allen, “Canadians will soon be able to ID gender as ‘X’ on their passports,” *CBC News* (24 August 2017), online: <<http://www.cbc.ca/news/politics/transgender-passport-x-identify-1.4261667>>.

In Ontario, a similar option is available for individuals to identify as “X” gender on their drivers’ licenses. Additionally, the gender indicator was removed altogether from Ontario health cards in June 2016.<sup>17</sup> British Columbia has followed suit in some regards and now allows health cards to display “U” for “unspecified” sex.<sup>18</sup>

### ***Federal and Provincial Penitentiaries***

Transgendered persons have also been afforded additional protections within the corrections system. In 2015, the Province of Ontario developed a new policy, which permits inmates to be placed in facilities that take into account their own gender identity and preferences. The policy also provides that inmates be referred to as their chosen name and pronouns, be able to retain prosthesis used for gender expression, and have a choice in the gender of staff performing searches.<sup>19</sup>

Prior to the new policy, inmates were assessed on their “primary sexual characteristic”, i.e. their genitalia. Therefore, those who had not had SRS were often misgendered by staff and placed in facilities that did not match their lived gender. The policy recognizes that transgender inmates are more likely to experience violence, sexual assault and discrimination in correctional facilities than those who are cisgendered. As a result, these inmates are often placed in segregation for their protection, which unfortunately can have severe mental health consequences.<sup>20</sup>

The federal government established a similar policy this year with respect to federal penitentiaries. Correctional Service Canada (“CSC”) adopted an interim policy to consider transfers and other accommodations on the basis of gender identity rather than physical anatomy. Shortly thereafter, the first transgender inmate in a federal facility, Fallon Aube, was transferred to a women’s prison based on gender identity rather than physical anatomy. The CSC has also launched a broader review of all its transgender policies to ensure they comply with new laws to protect the human rights of transgender Canadians.<sup>21</sup>

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<sup>17</sup> Lina Givetash, “This B.C. baby’s ID says ‘U’ under gender. Here’s why that’s good, experts say,” *The Toronto Star* (9 July 2017), online: <<https://www.thestar.com/news/canada/2017/07/09/this-bc-babys-id-says-u-under-gender-heres-why-thats-good-experts-say.html>>.

<sup>18</sup> *Ibid.*

<sup>19</sup> Lauren Strapagiel, “Ontario will now assess transgender inmates based on identity, not anatomy” *National Post* (26 January 2015), online: <<http://nationalpost.com/news/canada/ontario-will-now-assess-transgender-inmates-based-on-identity-not-anatomy>>.

<sup>20</sup> *Ibid.*

<sup>21</sup> Kathleen Harris, “In historic 1<sup>st</sup>, transgender inmate wins transfer to women’s prison” *CBC News* (21 July 2017), online: <http://www.cbc.ca/news/politics/fallon-aube-transgender-inmate-1.4215594>.

## *Availability of Sex Reassignment Surgery*

While it is evident that many transgender Canadians choose not to undergo SRS and there is a need for the government to accommodate such decisions, it should be noted that there are other transgender individuals who need SRS to truly live their felt gender. This is why access to SRS has become an important issue in the transgender community and policies with respect to access to such health care services have seen changes in the last few years.

In 2015, Chrystopher Maillet, an Ottawa trans man, launched a *Charter* challenge against the Ontario government with respect to the *Health Insurance Act* regulation, which required trans people to obtain approval from the Adult Gender Identity Clinic at the Centre for Addiction and Mental Health (“CAMH”) before they could obtain public funding for SRS. CAMH was the only site for pre-operative approvals for persons in Ontario, Newfoundland and Labrador and Saskatchewan. This meant that trans individuals seeking SRS had to travel across provinces and endure lengthy wait times to access these services. At the time of Maillet’s *Charter* challenge, the wait time at CAMH was approaching two years.<sup>22</sup>

The Ontario government ultimately changed the funding criteria for SRS on March 1, 2016 and expanded the list of regulated healthcare professionals throughout the province who could assess and approve patients for the surgery.<sup>23</sup> Since the introduction of the regulatory change, CAMH’s waiting list has been cut in half, from 1,516 before the change to 761 now.<sup>24</sup> No decision has yet been released relating to Maillet’s *Charter* challenge.

In addition to the scarcity of healthcare professionals providing pre-operative approvals, transgender persons also face barriers to accessing genital-reconstructive surgery. Currently, there is only one clinic in Montreal that performs vaginoplasties and phalloplasties in the entire country. The Ontario government plans to alleviate some of the backlog at the Montreal clinic by beginning to provide genital-reconstructive surgeries for the first time in Toronto through Women’s College hospital in 2018.<sup>25</sup>

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<sup>22</sup> Kelly Grant, “Charter challenge launched over sex-reassignment surgery” *The Globe and Mail* (8 May 2015), online: <<https://beta.theglobeandmail.com/news/national/charter-challenge-launched-over-rule-on-sex-reassignment-surgery/article24334403/?ref=http://www.theglobeandmail.com&>>>.

<sup>23</sup> Kelly Grant, “Ontario to expand access to publicly insured sex reassignment surgery” *The Globe and Mail* (25 June 2015), online: <<https://beta.theglobeandmail.com/life/health-and-fitness/health/ontario-to-expand-approval-sites-for-publicly-insured-sex-reassignment-surgery/article25120580/?ref=http://www.theglobeandmail.com&>>>.

<sup>24</sup> Kelly Grant, “Toronto hospital to become second in Canada offering genital-reconstruction surgery” *The Globe and Mail* (22 June 2017), online: <<https://www.theglobeandmail.com/news/national/toronto-hospital-to-become-second-in-canada-offering-genital-reconstruction-surgery/article35441753/>>>.

<sup>25</sup> *Ibid.*

## Update on Transgender Rights in the Workplace

### *Gender Identity and Gender Expression as Prohibited Grounds*

On June 12, 2012, the Ontario government introduced “gender identity” and “gender expression” as prohibited grounds of discrimination under the *Human Rights Code*. Other provinces followed with similar amendments to their respective human rights legislation: Manitoba, Saskatchewan and the Northwest Territories included “gender identity” as a prohibited ground, while Prince Edward Island, Nova Scotia, Alberta, British Columbia, and Newfoundland and Labrador added both “gender identity” and “gender expression”.<sup>26</sup> As of June 2017, the *Canadian Human Rights Act* also lists “gender identity” and “gender expression” as prohibited grounds of discrimination.<sup>27</sup>

Notably, none of the above human rights statutes define “gender identity” or “gender expression”. The Ontario Human Rights Commission, however, provides some guidance regarding the interpretation of these terms in its *Policy on preventing discrimination because of gender identity and gender expression* (“OHRC Policy”):

Gender Identity is each person’s internal and individual experience of gender. It is their sense of being a woman, a man, both, neither, or anywhere along the gender spectrum. A person’s gender identity may be the same as or different from their birth-assigned sex. Gender identity is fundamentally different from a person’s sexual orientation.

Gender expression is how a person publicly presents their gender. This can include behaviour and outward appearance such as dress, hair, makeup, body language and voice. A person’s chosen name and pronoun are also common ways of expressing gender.<sup>28</sup>

The term “gender expression” was further interpreted by the Ontario Human Rights Tribunal (“HRTO”) in *Browne v Sudbury Integrated Nickel Operations*.<sup>29</sup> In this case, the applicant, who was a cisgender male, argued that the respondent’s “clean shaven policy”, which required employees

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<sup>26</sup> Trans Equality Society of Alberta, *Summary: Trans rights in Canada by province & territory* (Edmonton: Trans Equality Society of Alberta, 2016), online: <<http://www.tesaonline.org/human-rights-across-canada.html>>.

<sup>27</sup> Laura Peyton, “Senate approves transgender rights bill after delay” *CTV News* (14 July 2017), online: <<http://www.ctvnews.ca/politics/senate-approves-transgender-rights-bill-after-delay-1.3461359>>.

<sup>28</sup> Ontario Human Rights Commission, *Policy on preventing discrimination because of gender identity and gender expression* (Toronto: Ontario Human Rights Commission, 2014), online: <<http://www.ohrc.on.ca/en/policy-preventing-discrimination-because-gender-identity-and-gender-expression>> [OHRC Policy].

<sup>29</sup> [2016] OHRTD No 101 [*Browne*].

wearing respirator masks to be clean shaven, was discriminatory on the basis of gender expression. The HRTD disagreed with the applicant, stating the following:

“However, in my view, **interpreting ‘gender expression’ broadly to extend protection to the right of men to grow beards would do violence to the important and fundamental purposes sought to be achieved by human rights legislation.** There is nothing to indicate that bearded men suffer any particular social, economic, political or historical disadvantage in Canadian or Ontario society, absent any connection between the wearing of a beard and matters of religious observance or perhaps some link to a protected ground in the *Code* other than sex or gender expression.”<sup>30</sup> [Emphasis added]

Despite the foregoing, the HRTD in *Browne* recognized that while the vast majority of OHRC Policy is directed at the rights afforded to transgendered and gender non-conforming individuals, there may be some specific situations where the ground of “gender expression” may extend beyond that community. An example of such a situation from the OHRC Policy is where a non-trans woman is harassed and discriminated against for failing to behave and dress femininely.<sup>31</sup> Based on the HRTD’s decision in *Browne*, however, we now know that the ground of “gender expression” does not protect the ability of cisgendered men to grow beards<sup>32</sup> or engage in other gender conforming expression.<sup>33</sup>

Though not a case concerning gender identity or gender expression, the Supreme Court of Canada’s decision in *Stewart v. Elk Valley Coal Corp.*<sup>34</sup> cast important light on the distinction between “choice” and what may be called an “inherent characteristic” with respect to prohibited grounds of discrimination.

Recall that when it was first introduced, the ground of “gender expression” was questioned for protecting activity which, some critics would claim, constituted a “choice” (e.g. the manner in which one expressed their gender). In *Elk Valley Coal Corp.*, however, the Supreme Court of Canada ruled that the “choice threshold” for human rights protection is an undesirable analysis since it “[draws] superficial distinctions between protected grounds, like drug dependence or

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<sup>30</sup> *Ibid* at para 39.

<sup>31</sup> OHRC Policy, *supra* at p. 19.

<sup>32</sup> *Browne*, *supra* at para 42.

<sup>33</sup> See *Barksey v Four Corners Medical Walk In Clinic*, [2016] OHRTD No 1135 [Barksey].

<sup>34</sup> [2017] SCJ No 30.

sexual orientation, and conduct inextricably linked to those grounds, like drug use and sexual activity.”<sup>35</sup>

The Court used “gender expression” in particular to highlight the problem, noting the “[choice] threshold places a burden on complainants to avoid discrimination, rather than on employers not to discriminate”, and that such a situation is “irreconcilable with recently recognized statutory grounds that arguable implicate a complainant’s choices that are significant to their identity – such as ‘gender expression’”.<sup>36</sup>

While the Court’s commentary suggests that the ground of “gender identity” may inevitably be engaged when “gender expression” is raised in a human rights application, both the OHRC Policy and the HRTO itself have not closed the door to situations where “gender expression” is engaged as a standalone ground of discrimination.<sup>37</sup> Further decisions will be needed in order to understand what scope, if any, “gender expression” may have as a prohibited ground independent of “gender identity”.

#### ***Vanderputten: The Risks of Ignorance or the Duty to be Informed?***

Since the inclusion of gender identity and gender expression as prohibited grounds in human rights legislation is fairly recent, the number of employment-related cases considering these new grounds is limited.

Nonetheless, the cases that have been released suggest that employers must be proactive in educating themselves on issues affecting transgender employees, including the prevalence of harassment experienced by transgender employees at the hands of co-workers and the forms of accommodation that may be required.

*Vanderputten v Seydaco Packaging Corp. (“Vanderputten”)*<sup>38</sup> is the most recent example of this pronouncement. In *Vanderputten*, the Applicant was a transgender female who had transitioned from living as a man to living as a woman while working for the Respondent. She alleged that the Respondent had discriminated against her on the basis of gender identity when it dismissed her and failed to address the poisoned work environment in which she worked. In particular, the Applicant claimed that she had been subject to harassing comments about her gender identity from other employees, and that Seydaco contributed to this poisoned work environment through

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<sup>35</sup> *Stewart v Elk Valley Coal Corp.*, *supra* at para 100.

<sup>36</sup> *Ibid* at para 99.

<sup>37</sup> *Browne*, *supra* at paras. 41-42.

<sup>38</sup> [2012] OHRTD No 1946.

its insistence that the Applicant be treated like a man in all respects until she completed SRS, including requiring her to change in the men's change room and refusing to change her shift times so that the applicant could avoid changing with men.

Upon considering the evidence, the HRTO found the employer's conduct to be discriminatory. First, the adjudicator found that "the insistence that a person be treated in accordance with the gender assigned at birth for all employment purposes is discrimination because it fails to treat that person in accordance with their lived and felt gender identity."<sup>39</sup> It was therefore inappropriate for the employer to treat the Applicant like a man until it received acceptable documentation that she was a female.

The HRTO also found that the employer contributed to the poisoned work environment by failing to consider, explore, or implement any solutions that would have allowed the Applicant privacy while changing, despite the fact that she told management that this was a cause of the poisoned work environment.<sup>40</sup> The employer had also failed to properly investigate and respond to the Applicant's complaints of harassment.<sup>41</sup>

The Applicant was awarded \$22,000 for injury to dignity, feelings and self-respect given the seriousness of the violations of the *Code* and the length of time the poisoned work environment existed.<sup>42</sup> Furthermore, it should be noted that although the HRTO recognized that the lack of knowledge and understanding about transgender issues was not uncommon amongst employers when dealing with transgender employees, ignorance was not an excuse for discriminatory conduct:

"Moreover, Seydaco's managers were far from unique in their lack of understanding of transgenderism and their *Code* obligation in the circumstances; ignorance remains widespread in society. Discrimination, however, does not require intention and the *Code's* purpose is not to punish but to address the impact of discrimination on the persons affected. It appears that **despite having an openly transgendered employee in their plant for several years, Seydaco managers made little or no attempt to inform themselves about the issue.**<sup>43</sup>" [Emphasis added]

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<sup>39</sup> *Ibid* at para 66.

<sup>40</sup> *Ibid* at para 69.

<sup>41</sup> *Ibid* at para 72.

<sup>42</sup> *Ibid* at para 89-90.

<sup>43</sup> *Ibid* at para 77.

Accordingly, the HERTO also ordered that the Respondent retain a human rights expert to train its management employees and to assist in developing and implementing a human rights and anti-harassment policy that includes a complaint process.<sup>44</sup>

The decision in *Vanderputten* indicates that employers need to proactively inform themselves on issues affecting transgender employees, including the fact that they are particularly vulnerable to workplace harassment and violence, and train management to deal with such issues with sensitivity and respect.

### ***Application of Bill 132 (Sexual Violence and Harassment Action Plan Act)***

In addition to their obligations under the *Code*, employers owe other statutory duties to prevent and address workplace harassment under the *Occupational Health and Safety Act* (“OHS”) <sup>45</sup> and its recent amendment, Bill 132 (aka *Sexual Violence and Harassment Action Plan Act*).

Among its changes, Bill 132 expanded the meaning of workplace harassment to include “workplace sexual harassment”, the definition of which now specifically includes both “gender identity” and “gender expression”:<sup>46</sup>

“‘workplace sexual violence’ means,

**engaging in a course of vexatious comment or conduct against a worker in a workplace because of sex, sexual orientation, gender identity or gender expression**, where the course of comment or conduct is known or ought reasonably to be known to be unwelcome,” [Emphasis added]

It’s also important to note that Bill 132 introduces a new statutory requirement to maintain confidentiality over the investigation and reporting process. Previously the *OHS* did not contain any such requirements. Now, however, information – including identifying information – gathered about an incident or complaint of workplace harassment cannot be disclosed unless necessary for the investigation or the resulting corrective action.<sup>47</sup>

While this new obligation to protect identifying information will be a relief to trans employees who may not be “out” at their workplace, Bill 132 complicates the situation by requiring that the

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<sup>44</sup> *Ibid* at para 96.

<sup>45</sup> *Occupational Health and Safety Act*, RSO 1990, c. O.1 [OHS].

<sup>46</sup> *Ibid* at s. 1.

<sup>47</sup> *Ibid* at s. 32.06(2)(d).

outcome of the investigation and any corrective action be communicated to both the complainant and the respondent.<sup>48</sup> Since neither “results” nor “corrective action” are defined to provide guidance on what they include or do not include, employers will need to be especially mindful of protecting the privacy of any trans employee involved in a harassment investigation when balancing the new confidentiality and reporting requirements.

### Developing Workplace Policies & Guidelines

It is recommended that employers develop procedures, policies and training guidelines to avoid unnecessary conflict and potential discrimination on the basis of gender identity and gender expression in the workplace. Given advancements in both legislation and public awareness, any policies, rules, practices and procedures that promote gender conformity or fail to consider a diversity of gender identities and expressions may be found to be discriminatory.

How employers embrace gender identity and gender expression will depend on many factors including the organizational culture, workforce composition, the type of work, the physical layout of the workplace, and level of interaction between employees. As a result, while there is no single formula for addressing gender identity and gender expression in the workplace, the following provides a general overview of items that employers should carefully consider.

### *The Gender Transition Process*

Transitioning refers to the activities and processes that people may follow to help them live their felt gender identity.<sup>49</sup> Employers should note that it is up to the employee to decide when they are ready to inform people at work about their transition. When they do choose to tell someone, it is important that they feel supported and confident in knowing that discrimination or harassment of trans employees will not be tolerated. Training and/or awareness sessions should be provided in this regard to managers and employees.<sup>50</sup>

A trusted manager and employee should work closely together to develop a transition plan, which may address the following:

- The anticipated date for the change of name, personal details and social gender.

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<sup>48</sup> *Ibid* at s. 32.06(2)(e).

<sup>49</sup> OHRC policy, *supra* at p. 34.

<sup>50</sup> Public Services and Procurement Canada, *Support for trans employees: A guide for employees and managers* (Ottawa: Public Services and Procurement Canada, 2017), online: <<https://www.tpsgc-pwgsc.gc.ca/apropos-about/guide-et-te-eng.html#s57>> [Public Service Guide].

- An anticipated date for medical appointments, treatments, and surgical procedures (if any), and the type of leave to use.
- When to notify the pay and benefits section of the name change with legal documents, such as a new birth certificate.
- When to notify security for a new identity card and security clearance, if needed.
- When and how colleagues should be informed (the employee should decide who tells them, and also consider if gender identity issues training is needed).
- How to handle any harassment or hostile reaction.
- To take into consideration any accommodation measures that may need to be implemented.<sup>51</sup>

In all cases, the employee should guide the plan, including the level of detail contained within. It should be remembered that information contained in the document is of a confidential nature.

With respect to informing colleagues, the employer should let the employee determine the best communication approach to be used. There should also be an agreement between the employee and manager regarding who will disseminate the information and how broadly it will be disseminated.<sup>52</sup>

During transition, some transitioning employees may take time off work. Managers should collaborate with the employee to devise a return to work plan, which can include advance communications to colleagues prior to the employee's first day back to work.<sup>53</sup>

After transition, it will be important to monitor the work environment after the employee has transitioned, as the employee may be reluctant to mention a problem encountered. The manager should take steps to check in with the employee to see how things are going and be alert to workplace reaction.<sup>54</sup>

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<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

### *Medical Considerations and Leaves*

Some transitioning employees may require accommodation with respect to certain medical aspects of the transition process, such as speech/voice therapy, hormone replacement therapy, and gender-affirming surgery.<sup>55</sup> The employer should develop policies and procedures to address such requests.

Speech/voice therapy is usually undergone by male-to-female individuals transitioning in order to acquire a more feminine voice. This complex process can take a significant amount of time and may require the employee to refrain from speaking for extended periods of time in order to prevent strain on the vocal cords. Employers should be prepared to accommodate reasonable requests associated with voice/speech therapy and colleagues should be advised of this transition in advance in order to promote a safe, understanding, and respectful environment.<sup>56</sup>

Hormone Replacement Therapy (HRT), such as the taking of testosterone or estrogen, will play an important role in the individual's transition in order for them to acquire an appearance closer to their gender identity. The changes to the transgender employee's appearance will take place over time and the employer should advise other employees to remain respectful and understanding during this process.

Employees have a right to accommodation for gender-affirming surgery that is part of their transition, such as approval for leave.<sup>57</sup> It should be noted that the process of transition may require more than one surgery and several visits to various out-of-province surgical centres. It is important that the manager and employee discuss when leaves are needed for each step of the process.<sup>58</sup>

Finally, employers should remember that not all transitioning employees will have gender-affirming surgery for any number of personal reasons and that surgery in and of itself is not the goal or purpose of gender transition.<sup>59</sup> Accordingly, employers should definitely not require

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<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*

<sup>57</sup> City of Toronto, *Guidelines for Accommodating Gender Identity and Gender Expression* (Toronto: City of Toronto, 2017), online: <<https://wx.toronto.ca/intra/hr/policies.nsf/policies/016cf11dc15e227a85257da40051e7e2?OpenDocument>> [City of Toronto Guide].

<sup>58</sup> Public Service Guide, *supra*.

<sup>59</sup> Toronto District School Board, *Guidelines for the Accommodation of Transgender and Gender Independent/Non-conforming Students and Staff* (Toronto: Toronto District School Board, 2011), online: <<http://www.tdsb.on.ca/About-Us/Innovation/Gender-Based-Violence-Prevention/Accommodation-of-Transgender-Students-and-Staff>> [TDSB Guide].

confirmation of gender-affirming surgery in order to recognize (either formally or informally) an employee's lived gender.

### ***Changing Name and Gender Identity***

Employers should use an employee's identified name and pronoun in ways they have requested, e.g. on all documentation, such as e-mail address, mailing lists, phone directory, organization charts, schedules, employee personnel records, email address, identification card or access badge (as well as new photo if requested), door or desk name plates, and websites.<sup>60</sup> The only exception to this should be where the employer's records must match a person's legal name and the employee's identified name does not match their legal name.<sup>61</sup>

In everyday written and oral speech, the employee's identified name and pronouns should be used. The correct use of pronouns is an important component of accommodation based on gender expression and/or gender identity.<sup>62</sup> Intentionally addressing an employee by the incorrect name or pronoun may be considered a form of discrimination.<sup>63</sup>

### ***Privacy***

Disclosing a person's trans status can expose them to discrimination and violence. It is therefore important for an employer to keep an employee's trans/gender variant identity confidential by not disclosing it to others, unless the employee has authorized such disclosure in writing. Employers should adopt practices to avoid the inadvertent disclosure of such confidential information, consistent with its practices for protecting other sensitive personal information.<sup>64</sup> Further, it is also likely that information either requested or received with respect to an employee's gender transition or the accommodation of same is likely governed by the rules and processes set out in the *Personal Health Information Protection Act, 2004*.<sup>65</sup>

### ***Dress Codes***

An employer's expectations around employee dress and appearance should be flexible and not gender-specific. Employees should be able to dress in a manner consistent with their gender identity, regardless of whether they have indicated that they identify as trans or gender variant.

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<sup>60</sup> City of Toronto Guide, *supra*.

<sup>61</sup> Public Service Guide, *supra*.

<sup>62</sup> City of Toronto Guide, *supra*.

<sup>63</sup> TDSB Guide, *supra*.

<sup>64</sup> Public Service Guide, *supra*.

<sup>65</sup> SO 2004, c 3, Sch A. See s. 49.

Employers should not require an employee to choose between “men’s” and “women’s” clothing, as this reinforces the antiquated, binary notion of gender that legislative amendments and public policy advancements have tried to overcome.<sup>66</sup> In this regard, note that recent amendments to the *OHSA* from Bill 148 (*Fair Workplaces, Better Jobs Act, 2017*) prohibit an employer from requiring an employee to wear high-heels (unless that person is a “performer” in the “entertainment” industry).

### ***Work Assignments***

Where gender-specific work assignments or duties exist, employees should be assigned to duties which they feel safe and comfortable performing and, if requested, are consistent with their gender identity.<sup>67</sup> Employers should not require gender-affirming surgery or “proof” of an employee’s gender identity (e.g. by doctor’s note, identity documents, etc.) in order to assign the employee to gender-specific duties.<sup>68</sup>

### ***Washroom/Change Room Access***

Employees should be able to access and utilize facilities that they are comfortable using and that correspond with their gender identity. It is not appropriate to require an employee to “prove” their gender identity or status of medial transition in order to use certain facilities. Self-identification should be the only criterion required to determine which washroom people use.<sup>69</sup> Employers should also offer use of gender-neutral washrooms where appropriate, but transgender employees should not be required to use such washrooms.<sup>70</sup>

With respect to changing facilities, employers should consider how to balance privacy expectations of other users with legislated protections of trans persons. It may be appropriate to create and/or offer accessible gender-neutral change facilities. Alternatively, employers may offer a private space within a gender-specific change facility while awaiting the creation of gender-neutral spaces.<sup>71</sup> If an issue arises in the workplace, query whether employers should require that the protesting employee be the individual to use such facilities, rather than the trans employee.

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<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*

<sup>69</sup> City of Toronto Guide, *supra*.

<sup>70</sup> Public Service Guide, *supra*.

<sup>71</sup> City of Toronto Guide, *supra*.

### *Considerations for Unions*

Unions have a duty to represent all union members fairly and defend those workers whose rights are threatened or ignored. Unions also have a responsibility to enforce the employer's obligation to prevent harassment in the workplace and defend workers who are subject to harassment.<sup>72</sup>

One of the best ways for unions to provide protection for trans workers is to add clear collective agreement language with respect transgender-specific rights and needs. For example, unions could negotiate language regarding:

- The inclusion of gender identity and gender expression as prohibited grounds of discrimination and harassment under the collective agreement.
- Group benefit plans with coverage for the costs of transition-related expenses, such as sex re-assignment surgeries, not covered by provincial health plans.
- Leave with pay for medical procedures required during the transition period.
- Anti-harassment training that includes harassment based on gender identity and gender expression.
- Implementation of a general transition policy dealing with the issues referred to above.<sup>73</sup>

Unions should also support trans members and let them know that their voices will be heard. They can do this by including trans workers in union committees, including the human rights committee, publicizing the union's support of the rights of trans workers, and including transgender workers' issues in steward training, human rights courses and other educational sessions.<sup>74</sup>

### *Other Considerations*

In addition to addressing the above issues, employers should consider reviewing existing policies and practices given the rights and needs of trans employees. For example:

- Benefits policies: Transitioning workers may require transition-related health care needs, such as hormone therapy, wigs, breast prosthesis, voice therapy, counselling/

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<sup>72</sup> Canadian Labour Congress, *Workers in Transition, A Practical Guide about Gender Transition for Union Representatives* (Ottawa: Canada Labour Congress, 2010), p. 23.

<sup>73</sup> *Ibid* at p. 28, 29 and 32.

<sup>74</sup> *Ibid* at p. 33.

psychologists, and SRS. These healthcare needs should be treated in exactly the same way as any other medical treatment and there should be no discrimination in access to these benefits.<sup>75</sup>

- Recruitment and selection processes: Processes for recruitment should be reviewed for possible disparate impact or treatment of transgender workers (e.g. the name on a resume not matching the name on an educational degree). Recruitment teams and outreach organizations should be trained accordingly.<sup>76</sup>
- Diversity and inclusion initiatives: Transgender workers should be given the chance to join the employer's affinity groups and local outreach efforts, in addition to participating with internal programming and related training.<sup>77</sup> At the same time, however, it's important that employers not pressure these individuals into such activities, as many trans people simply wish to blend in and not be the "flag bearers" for their gender identity.

## **Conclusion**

Over the last three years, law and policy has developed significantly in the area of transgender rights. It is evident that many bureaucratic regimes within the government have moved away from a physical anatomy-centered approach to documenting gender towards an approach focused on self-identification. Canadians no longer need to provide "proof" of medical transition in order to change the gender/sex identifier on their birth certificates and citizenship certificates; nor is such proof required for placement in correction facilities which align with a person's lived gender.

It is also apparent from the recent developments that our understanding of non-binary gender has advanced dramatically. Canadians now have the option to leave gender as unspecified on the passports and Ontarians have a similar option with respect to their drivers' licenses. Furthermore, the gender identified on health cards were removed altogether in Ontario.

When it comes to the workplace, it remains critically important for employers to educate themselves on differing gender identities and gender expressions, and in particular, the concept of gender as a spectrum. While some employees may identify with a specific gender, others may consider themselves to lack a gender entirely. Accommodation will therefore need to be

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<sup>75</sup> *Ibid* at p. 14.

<sup>76</sup> Society for Human Resource Management, *Managing Gender Transition in the Workplace* (Alexandria, Virginia: Society for Human Resource Management, 2017), online: <<https://www.shrm.org/resourcesandtools/tools-and-samples/toolkits/pages/managinggendertransitionintheworkplace.aspx>>.

<sup>77</sup> *Ibid*.

individualized and respond to the unique needs of the particular employee. Through a combination of education, training, and an organizational commitment to progressive thought, however, any employer can ensure that its workers, regardless of their gender identity and/or gender expression, are treated with dignity and respect at all times.

### **About the Authors**

Ryan Edmonds and Nabila Khan are lawyers with Ryan Edmonds Workplace Counsel, a boutique firm that provides workplace law services to both employers and employees. Prior to starting the firm, Ryan practiced in the labour and employment law group of national law firm and clerked at the Ontario Labour Relations Board, where he was seconded during his articles. An academically-decorated graduate of Osgoode Hall Law School, Ryan has authored a number of award-winning law journal articles on labour and employment law and frequently contributes to various industry publications. Ryan is active in the community. In addition to being a former executive of the OBA's Equality Committee and Sexual Orientation & Gender Identity Conference, he was also a founding Director of Start Proud/Out on Bay Street.

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