LGBTQI2S+ Rights: Climbing the Judicial Steps to Equality, 2020

by the

Alberta Civil Liberties Research Centre

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Mailing Address:
2350 Murray Fraser Hall
University of Calgary
2500 University Drive NW
Calgary, AB T2N 1N4
Phone: (403) 220-2505
Fax: (403) 284-0945

Acknowledgments

Alberta LAW FOUNDATION

The Alberta Law Foundation
The Alberta Civil Liberties Research Centre is supported by a grant from the Alberta Law Foundation.

Board of Directors of the Alberta Civil Liberties Research Centre
Doreen Barrie Chair; Michael Wylie, Michael Greene, Anna-Maria Hubert, Patricia Paradis and Ola Malik.

Updated by Maddison Canuel, B.SC., [summer law student]

Principal Researcher and Writer, First Edition
Melissa Luhtanen, J.D.

Legal Research Assistant (First ed.)
Emma McAuliffe, B.A. (Hons) (Poli. Sci. & Hist) [summer law student]

Legal Editors
Linda McKay-Panos, B.Ed., J.D., LL.M., Executive Director.
Heather Forester, B.Comm., J.D., Human Rights Educator.

Project Management
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Linda McKay-Panos, B.Ed., J.D., LL.M., Executive Director.

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ISBN# 1-896225-70-5

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EXECUTIVE SUMMARY

Fifty years after Pierre Trudeau decriminalized homosexuality, twenty years after "sexual orientation" was read into the *Alberta Human Rights Act* (*AHRA*), and fifteen years after same-sex marriage was affirmed by the Supreme Court of Canada, heterosexism and cissexism still exist in Canadian law and society. Laws that govern lesbian, gay, bisexual, trans, queer, intersex, two-spirit, and other (LGBTQI2S+) individuals, relationships and families are moving toward equality. However, full legal equality of LGBTQI2S+ people still does not exist.

While human rights for LGBQ2S+ people are included in the *AHRA* and have been for twenty years, '**gender identity'** and '**gender expression**' were not specifically written in until 2015. Presently, all provinces and territories include sexual orientation, sex (gender in Alberta), gender identity, and gender expression (except for Manitoba and Saskatchewan) in their human rights legislation.

A key issue for trans people is whether they are permitted to use **bathrooms** and change-rooms as per their identified gender. Many workplaces, bars, health clubs and schools have not considered the human rights issues of trans people who need to use on-site washrooms and change rooms. Courts have taken the stance that not allowing trans people to use the bathroom of their preference is discrimination. However, this does not mean that discrimination of this kind is not still occurring.

For **youth who are in secondary school**, the bathroom issue can be even greater. The Alberta government has put out a best-practices document regarding gender diverse students, with specific practices on bathrooms. However, these practices may not be followed by all teachers and schools, putting the rights of trans students at risk.

Gender reassignment surgery (GRS) is a medical procedure that can be used to treat gender dysphoria experienced by trans people. GRS was delisted from health coverage in Alberta in the 2009/2010 budget. When GRS was delisted, news reports said that 23 Albertans filed human rights complaints. In early June 2012, the Alberta government reinstated funding for gender reassignment surgery effective June 15, 2012. Ontario had also decided to delist GRS over ten years previously, before having any consultations with the trans community or medical professionals. A 2006 case found that it was discriminatory to de-list GRS and prevent those people who were already in process from continuing on with their surgery. However, it took until May 2008, after much lobbying by trans groups, for Ontario to relist GRS coverage. Most provinces now cover GRS, however other desired surgeries such as breast augmentation, voice pitch surgery, tracheal shave, and facial feminization are often considered 'cosmetic' and are therefore not covered. Although these surgeries are now covered, the requirements for eligibility, including a diagnosis of gender dysphoria by a psychiatrist, can raise barriers to accessing this care.

One case where a trans woman could not obtain GRS was the case of Synthia Kavanagh, who was imprisoned partway through her transition. Synthia Kavanagh is a trans woman who was in the process of taking hormone therapy when she was convicted of second-

degree murder. The Canadian Human Rights Tribunal found that a blanket policy that prohibited inmates from obtaining GRS was not justified. This case was affirmed by the Federal Court of Canada. In 2017, Correctional Service Canada (CSC) published an interim policy that allows trans inmates to be placed in a facility that matches their gender identity, if that is their preference, unless there are "any overriding health or safety concerns which cannot be resolved". Trans inmates have access to GRS if a qualified health professional in the area of gender dysphoria indicates that the surgery is medically essential. This is a positive change, however, what constitutes an "overriding health or safety concern" is not explicitly defined. If this component is interpreted broadly, there is potential for many trans inmates to be imprisoned in a facility that is not their preference. As well, if the health professional does not deem GRS to be essential, an inmate will be prevented from obtaining this care.

One of the more controversial topics in **family law** was granting same-sex couples' relationship and family rights. Being federal law, same-sex marriage was permitted in every province and territory once the *Reference re Same-Sex Marriage* case was decided. While the law supports the **dissolution of marriages of same-sex couples** (i.e., divorce), couples can sometimes find it difficult to find a **lawyer who is accepting and knowledgeable about same-sex couples and marriage**. Lawyers that specialize in the area of same-sex couples are few and far between and cannot represent both parties. This is especially true in rural areas where there may only be one or two lawyers serving an area.

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

The ***AHRA*** prohibits denial of or discrimination based on sexual orientation, gender, gender identity, and gender expression, as well as other grounds, in the following specific areas: (1) goods, services, accommodation or facilities that are customarily available to the public; (2) tenancy; (3) employment practices, applications and advertisements; and (4) membership in trade unions, employers' organizations or occupational associations. The *AHRA* also prohibits the public display, broadcast or publication of messages that indicate discrimination or an intention to discriminate against a person or a class of persons or that are likely to expose a person or a class of persons to hatred or contempt. The legislation specifically states that this prohibition shall not be deemed to interfere with freedom of expression. Courts have emphasized that such references to freedom of expression require that a balancing act be performed between the objective of eradicating discrimination and the need to protect free expression. The Supreme Court of Canada in *Whatcott* provided clarification on the limits of hate expression stating that 'hatred or contempt' is restricted to extreme manifestations of the emotions of 'detestation' and 'vilification', and that words that ridicule, belittle or otherwise affront the dignity of persons do not rise to the level required to be deemed hatred under human rights legislation. Thus, publications or statements that are insulting, upsetting, in bad taste, or contrary to a person's own beliefs do not fall within the meaning of hate

expression. Human rights legislation also provides defenses and justifications for some statements and discriminatory actions. Human rights tribunals have jurisdiction over a complaint of discrimination or hate expression and are provided with broad powers to determine appropriate remedies. Some cases dealing with allegations of hate speech are summarized in Appendix A.

Adjusting one's gender on **federal and provincial identification** can be an important part in a trans person's transition. In 2020, identification documents such as birth certificates and driver's licenses no longer require GRS to be completed for a gender marker to be changed. This is an important win for the rights of trans persons. However, changing gender markers on identification can be a confusing process, and some people may need help or advice to do so.

Presently, the **same-sex partner of a Canadian citizen can immigrate** to Canada as a married spouse, common-law partner, or conjugal partner. These three possibilities differ depending on the facts of the applicant's (non-Canadian citizen's) situation. For same-sex couples who were legally married in Canada, immigration officials will recognize their relationship for the purposes of immigrating. Same-sex couples married in places like the Netherlands or Belgium, where same-sex marriage is legally recognized, may also immigrate if their marriage is valid. However, same-sex couples who live where same-sex marriage is not legally recognized would have to apply as common-law or conjugal partners.

After the *Ward* decision, it was generally accepted that gays and lesbians could make a claim for **refugee status** under section 96 of the *Immigration and Refugee Protection Act*. Immigration Boards have now accepted that intersex and trans persons can qualify as Convention Refugees as well. However, bisexual claimants are less likely than gay and lesbian claimants to be granted asylum. This is due to bisexuals being the most likely to have their sexual orientation disbelieved.

Sean Rehaag notes that the following assumptions can create difficulties for LGBQ2S+ asylum claimants:

- using a westernized understanding of what gays and lesbians act like to determine if a claimant is a refugee based on sexual orientation;
- assuming that a lesbian woman will look masculine and a gay man will look feminine;
- assuming that violence against gay men happens mainly in public (for example, outside of bars and clubs) due to "inappropriate" displays of sexuality;
- assuming that violence against lesbian women happens mostly in private (for example, in homes or with family);
- using the lack of attendance to a gay bar to undermine a gay/lesbian claimant's credibility; and
- doubting a claimant's case if they have dated the opposite sex (i.e., are bisexual).

However, Rehaag's 2017 study shows that the large majority of refugee claims by LGBQ2S+ persons are successful.

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LGBTQI2S+ youth are a vulnerable population because of their lack of legal status to make decisions for themselves. The issues affecting LGBQ2S+ youth in schools include: lack of representation of same-sex headed families; poor discussion of sexual orientation and sex; assumption that all youth are heterosexual; bullying; difficulty finding a teacher/mentor who is LGBQ2S+ friendly; living in hiding as heterosexual; coming out; and more.

Some issues facing **trans youth** are: lack of discussion about trans issues; difficulty finding a mentor, parent, family member to speak with about issues; finding a bathroom that is safe to use based on one's gender identity and expression; understanding one's gender identity and expression; exercising one's gender expression; getting information about desired treatments or surgeries, and getting parental approval for them in some cases; having one's correct gender identifier on documents for travel or school; and experiencing other issues including lack of inclusion in curriculum, social circles or gender-related activities.

Conversion therapy continues to be an issue facing LGBTQI2S+ youth, but there is ongoing talk of a federal-level ban on the harmful practice. As well, it is being banned at the municipal level in many areas.

Intersex people face the unique human rights issue of "normalizing" surgeries. These surgeries are often done at a young age, without the patient's consent, and can have longterm negative effects on a person's physical and mental health. International law calls for this practice to be banned, but it is legal in Canada.

Overall, although Alberta has taken steps to protect LGBTQI2S+ rights, there are still issues facing the community that must be addressed.

LGBTQI2S+ Rights: Climbing the judicial steps to equality

INTRODUCTION

Language

The acronym we have chosen to use in this paper is LGBTQI2S+. There are many acronyms that represent this community, and different groups prefer different acronyms. We hope to be as inclusive as possible while highlighting often ignored groups such as intersex and two-spirit persons. At the same time, we understand that no single acronym can possibly capture everyone's experience of gender and sexual diversity, and by adding "+" we hope to convey that these discussions may also apply to those who do not identify with a term within "LGBTQI2S".

We have included the gender non-conforming or gender variant community, including the transsexual, transgendered, and two-spirit communities, with one T representing "trans". This is intended as an umbrella term inclusive of all individuals who do not identify as cisgender.

There will be times that we will drop the "T" and "I" in LGBTQI2S+ and just use the acronym "LGBQ2S+". This will be in cases when the discussion focuses on sexual orientation/attraction and not gender identity or anatomical sex. Note that the term two-spirit encompasses diverse sexual attraction and gender identities and is therefore included in both our umbrella term of 'trans' and our shortened acronym of LGBQ2S+.

Intersex people are identified using the "I" and face unique issues due to their anatomical and chromosomal sex.

Fifty years after Pierre Trudeau decriminalized homosexuality,[1] twenty years after "sexual orientation" was read into the *Alberta Human Rights Act* (*AHRA*),[2,3] and fifteen years after same-sex marriage was affirmed by the Supreme Court of Canada,[4] heterosexism and cissexism still exist in Canadian law and society. Laws are now more

[1] *Criminal Law Amendment Act, 1968-69* (SC 1968-69, c 38). Pierre Trudeau made sweeping changes to the *Criminal Code of Canada* in the late 1960's. He said, "the State has no place in the bedrooms of the nation." With that he changed the *Criminal Code of Canada* so that private anal sex was permitted between consenting adults, 18 years and older [Trudeau].
[2] *Alberta Human Rights Act,* RSA 2000, c A-25.5 [*AHRA*].
[3] *Vriend v Alberta,* [1998] 1 SCR 493.
[4] *Reference re Same-Sex Marriage,* [2004] 3 SCR 698, 2004 SCC 79 [*Reference re Same-Sex Marriage*].

inclusive of LGBTQI2S+ individuals, relationships and families. However, full legal equality of LGBTQI2S+ people still does not exist.

After same-sex marriage rights became a reality in early 2000, many people thought that human rights and equality for LGBTQI2S+ people and same-sex couples had been achieved. However, this perception is not always reflected in law, policies and access to legal resolutions. In addition, the legalization of same-sex marriage did not change the fact that the laws protecting trans people still lag far behind those for LGBQ2S+ individuals. Intersex people can face unique challenges related to their bodily autonomy.

All provincial and territorial human rights legislation prohibits discrimination based on sexual orientation and gender identity. All jurisdictions also prohibit discrimination based on sex, except for Alberta, which includes the term sex within the meaning of gender. All provinces and territories, except for Manitoba and Saskatchewan, prohibit discrimination on the basis of gender expression. A Supreme Court of Canada Decision[5] in 1998 read "sexual orientation" into the *AHRA* and, in 2010, the Alberta government formally amended the *AHRA* to include "sexual orientation".[6]

This paper outlines the areas where the law has not been amended to protect LGBTQI2S+ people and where its application results in differential treatment of LGBTQI2S+ individuals. The paper will begin with a history of LGBTQI2S+ rights in Alberta. It will then review legal areas that have the potential for continued change, interpretation and legislative review:

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

Finally, this paper will examine some of the potential *Charter*[7] and other legal challenges that LGBTQI2S+ people may bring to the courts in the near future. The

[5] *Vriend*.
[6] Bill 44, *The Human Rights, Citizenship and Multiculturalism Amendment Act,* Second Session, 27th Leg, Alberta, 2009 [Bill 44].
[7] *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

history of LGBTQI2S+ rights demonstrates a patchwork quilt of laws and social acceptance that has slowly evolved. Over time there has been increased equality in the laws affecting LGBTQI2S+ populations. However, while this progression appears to be moving forward, there are still gaps in equality. In this paper, the Alberta Civil Liberties Research Centre hopes to shine some light on the gaps to equality for LGBTQI2S+ communities and to open a conversation about how these gaps can be eliminated.

HISTORY

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

1. decriminalization, followed or sometimes accompanied by…
2. the setting of an equal age of consent, after which…
3. anti-discrimination legislation can be introduced, before the process is finished with…
4. legislation recognizing same-sex partnership and parenting.[8]

Sexual relationships between same-sex partners were decriminalized for the most part in 1969.[9] In Alberta, anti-discrimination legislation (with respect to sexual orientation) was introduced after the *Vriend* decision in 1998.[10] After this time, the Alberta government began to contemplate how equal human rights for same-sex couples would affect the definition of spouse and the rights regarding children. On March 23, 1999, the Report of the Ministerial Task Force was released. Its purpose was to:

> [R]eview the need for protection within various provincial Acts to alleviate concerns the ruling could have wider implications (for example, definitional changes within legislation to clarify the meaning of 'spouse' or possible future use of the notwithstanding clause where appropriate).[11]

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

It focused on foster parenting, adoption, employee benefits, education, marriage and benefits for common-law couples. The Report, along with a review of a 1998 survey on how Albertans felt about LGBQ2S+ people gaining rights, was a snapshot of where Alberta stood on same-sex rights in 1999. Many Albertans really did not have a concern about how the law was changing and were supportive of more rights for LGBQ2S+ populations.

A 1998 Alberta Justice study[12] attempted to take the temperature of Albertans and their "tolerance" of LGBQ2S+ relationships. The results showed that, for the most part, over half of participants agreed with most gay rights or did not really care (were neutral) one way or the other.

Half of participants in the Alberta Justice study were aware of the SCC *Vriend* decision that added "sexual orientation" to the protected grounds of the *AHRA*. Seventy-seven percent (77%) were either neutral, agreed somewhat or agreed strongly that the Government should not use the notwithstanding clause to block the SCC *Vriend* decision. The survey asked if participants would agree with a government decision that would allow gays and lesbians to marry, adopt and foster. Fifty-sex percent (56%) said that they were either neutral, agreed somewhat, or agreed strongly that the Government should not fight a court decision such as this. These statistics demonstrate some strong support by participants for LGBQ2S+ rights in some cases (for instance, in most questions about 1/3 of participants strongly agreed with LGBQ2S+ equality). Even in the case of adoption, 42% agreed somewhat or agreed strongly that gays and lesbians should be allowed to adopt. There were no equivalent studies done on trans people or the issue of gender identity.

Human Rights & Sexual Orientation

In 1991, 25-year-old Delwin Vriend was fired from his teaching position at King's College because he had been open about being in a same-sex relationship. He turned to the Alberta Human Rights legislation[13] to file a complaint that he had been

[12] Alberta, Alberta Justice and Attorney General, *Alberta Justice Issues Research: Final Report*, (Edmonton: Alberta Justice and Attorney General, 1998) online: <http://justice.alberta.ca/publications/Documents/alberta_justice_issues_research/index.html> Accessed September 23, 2011 [*Alberta Justice Study*].
[13] As it was then, *Individual's Rights Protection Act*, RSA 1980, c I-2 [*Individual's Rights Protection Act*].

discriminated against based on "sexual orientation". However, he soon found out that "sexual orientation" was not covered under the Human Rights legislation, and that to have his rights upheld he would have to take his claim through the courts up to the Supreme Court of Canada. Mr. Vriend took the challenge and fought for seven years to have "sexual orientation" included under the Human Rights legislation. In 1998, the SCC said:

> In excluding sexual orientation from ...[human rights] protection, the Government has, in effect, stated that 'all persons are equal in dignity and rights', except gay men and lesbians. Such a message, even if it is only implicit, must offend s. 15(1), the 'section of the *Charter*, more than any other, which recognizes and cherishes the innate human dignity of every individual' (*Egan,*[14] at para 128).[15]

The case opened the doors for LGBQ2S+ people to make complaints of discrimination under Alberta's human rights law.[16] After a seven-year battle, Mr. Vriend decided not to pursue a case of discrimination at the Human Rights Commission. Therefore, he never did file a complaint against King's College for firing him because he was gay. However, more importantly, he had succeeded in getting "sexual orientation" as a protected ground under Alberta's human rights law so that future claimants could put their case forward.

Thereafter, the Human Rights Commission accepted complaints based on sexual orientation, but it was not actually written into the Act until an amendment in 2010.[17] The Alberta Human Rights Commission, however, did amend its Information Sheets to include "sexual orientation" as a protected ground. They also wrote an Information Sheet entitled "Sexual Orientation".[18] So, while the words were not in the legislation, they were in the informational materials that the public could access online.

In that 2010 amendment, the words "sexual orientation" were written into the *AHRA* under Bill 44. Bill 44[19] also proposed an amendment to the Act that would allow parents to make a human rights complaint if their children are taught "subject-matter that

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

deals primarily and explicitly with religion, sexuality or sexual orientation" without the parent's permission.[20] The media and public gave the Bill mixed reviews. LGBQ2S+ communities and allies were happy to have "sexual orientation" actually in the legislation, however, many felt that the limiting of discussion regarding religion, sexuality and sexual orientation reduced the quality of education and, nevertheless, had been already allowed under the *School Act.*[21]

Bill 44 can be traced back to a private member's bill proposed in 2006. Bill 208[22] proposed changes to three Alberta statutes: the *Alberta Human Rights, Citizenship and Multiculturalism Act*,[23] the *School Act*,[24] and the *Marriage Act*.[25] It provided three amendments:

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

Bill 208 was defeated, but Bill 44, which passed in 2010, had a similar, if not broader, section on teaching about sexual orientation and gender identity in schools. Parental notice was needed when courses contained subject matter that dealt with religion, sexuality or sexual orientation (s 11.1). However, this section was repealed entirely in 2015. This history of attempting to limit material about LGBTQI2S+ people in the classroom must be seen against the backdrop of major support for LGBTQI2S+ human rights by the Alberta Teachers' Association (ATA). In 1999, one year after the *Vriend* decision, the ATA amended its *Code of Professional Conduct* to include "sexual orientation" and in 2003 it amended its *Code* to include "gender identity". Since then,

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

much work has been done by the ATA and specifically its Sexual Orientation and Gender Identity Sub-committee[26] to improve the lives of LGBTQI2S+ students and teachers.[27]

Some of the human rights issues that affect LGBTQI2S+ people are discussed throughout this paper. There will be a focus however on legislation and the application of law and policies that have an inequitable effect because of a person's sexual orientation and gender identity.

Human Rights and Gender Identity

While human rights for people with diverse sexual orientations are included in the *AHRA* and have been for over twenty years, gender identity and gender expression were not specifically written in until 2015. Ontario was the first province to have a case[28] that said transsexuality is covered under the ground of 'sex' in the *Ontario Human Rights Code*.[29] As of 2017, all provinces include gender identity, gender expression, or both in their human rights codes.

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

Cases have addressed some of these issues, but there is still much misunderstanding by employers and unions as to their human rights responsibilities regarding trans employees. While some employers are aware of the rights of trans people, others still need more education on the issues facing this community. This is changing over time as employers gain more human rights knowledge and trans legal rights become more known

[26] SOGI Committee, Alberta Teaching Association website: www.teachers.ab.ca and follow the links: Professional Development - Diversity, Equity and Human Rights – Sexual Orientation and Gender Identity.
[27] For more information on the history of these kind of amendments see the Alberta Teaching Association website: www.teachers.ab.ca and follow the links: Professional Development - Diversity, Equity and Human Rights – Sexual Orientation and Gender Identity – Publications - History of ATA Sexual Orientation and Gender Identity (SOGI) Initiative, online: http://www.teachers.ab.ca/For%20Members/Professional%20Development/Diversity%20and%20Human%20Rights/Sexual%20Orientation/Publications/Pages/A%20History%20of%20ATA%20SOGI%20Initiatives.aspx.
[28] *Forrester v Peel (Regional Municipality) Police Services Board (No. 2),* 2006 HRTO 13.
[29] *Ontario Human Rights Code,* RSO 1990 c H.19.

in society. However, many of the legal issues regarding gender identity and expression have not been tested by higher courts, so there are issues still outstanding.

While there seems to be an opening of rights in the last decade for trans people, there are still many hurdles to face. Some Commissions have addressed this inequity by publishing information sheets on the issues facing trans people.[30] Still more awareness and education of this issue would help to protect these rights more fully.

Rights Regarding Children

The Alberta Justice Study showed support, by about half of the population, for LGBQ2S+ equality. This should dispel the stereotype that all Albertans were against LGBQ2S+ equality. Closer examination demonstrates that Albertans were just beginning to gain an understanding of LGBQ2S+ families and they were still struggling with these families having completely equal rights. For instance, while 42% of participants thought that gays and lesbians should be able to act as adoptive parents in any circumstances, these same participants agreed with adoption only if it was: with one of the natural parents (73%), with permission of the natural parents (63%), or regarding a Ward of the Government where no one else would adopt (57%). In the late 90's there was a sense that equality should have some strings attached to limit the ways in which these rights would be used. These numbers show that a gay couple adopting a child who was the natural child of one of them was more palatable to the public than a gay couple adopting an unrelated child. There were no equivalent studies done on trans people and public opinion regarding adoption and children.

Parental Status

Adopting Your Partner's Child

The question of adoption of children by the partner of a natural parent was resolved in the courts the year after the Alberta Justice study was released. In response to an upcoming case,[31] the Government of Alberta had changed its adoption legislation so

[30] Ontario, Ontario Human Rights Commission, *Policy on discrimination and harassment because of gender identity* (Toronto: Ontario Human Rights Commission, 2000, updated 2009) online: http://www.ohrc.on.ca/en/resources/Policies/PolicyGenderIdent/pdf .
[31] *A (Re),* 1999 ABQB 879 [*Re A*].

that it used the term 'step-parent adoption' rather than 'spousal adoption' to describe adoption of a partner's natural child by their spouse. The case of *Re: A* noted that the government had said that changing the term 'spouse' to 'step-parent' would:

1. recognize other types of relationships, such as same-sex couples;
2. ensure that a judge does not define 'spouse' in the legislation as including same-sex partners and thereby change the definition of spouse from applying only to heterosexual couples.[32]

However, the legislation failed to define "step-parent" as such and therefore it was case law that later used the above comments to define "step-parent". In one case, two lesbian couples, who had conceived children through artificial insemination, each wanted to adopt their respective partner's natural child.[33] One of the questions the Court of Queen's Bench had to answer was whether the definition of "step-parent" under the *Child Welfare Act*[34] included same-sex partners. The Court examined Hansard debates such as the one above and answered "yes", thereby allowing same-sex partners to apply for private adoption of their partner's natural child.[35]

Government and Agency Adoption

Same-sex couples did not, however, have access to government adoptions until 2006. Newspaper clippings during that time period show that Lance Anderson and Blair Croft were the first open same-sex couple to adopt a child from a government agency.[36] Note that it is unclear whether earlier some gay couples applied to adopt as single people to avoid homophobic stereotypes. Mr. Anderson and Mr. Croft were two gay men who had applied for government adoption and been approved in 2004. Very quickly after their approval, news reports say that Children's Services put up extra protocols for gay

[32] *Re A,* at para 23.
[33] *Re A.*
[34] The *Child Welfare Act*, SA 1984, c C-8.1, was subsequently amended and renamed the *Child, Youth and Family Enhancement Act*, RSA 2000, c C-12 [*Child, Youth and Family Enhancement Act*].
[35] I have used the phrase 'partner's natural child', but in reality these children were wanted, planned and cared for by both partners making both partners social mothers of the child. However, in legal terms only one partner was seen as a birth or 'natural' mother. Later I will discuss caselaw that recognizes both mothers as legal parents from the moment of birth.
[36] *Gay Couple leaps 'walls' to adopt son,* Feb 19, 2007.online: Canada.com http://www.canada.com/edmontonjournal/news/story.html?id=643c0d39-9ccb-43d8-a7f1-9a034e83b06e (accessed Oct 20/11) [Gay Couple].

adoptions such as looking to see if the child would have contact with people of the opposite sex. There are, however, no records of these protocols other than in newspaper reports.[37]

Adoption by same-sex couples through private agencies has been permitted for many years, and at least since 1999 with the *Re: A* decision[38]. At private adoption agencies, the birth mother, for the most part, looks through a series of couples and chooses for herself who will adopt the baby. If she chooses a gay or lesbian couple, then that couple gets to adopt. Recently there have been a number of gay male couples that have adopted children through private agencies. Anecdotal reports say that these experiences have been very positive, and couples feel accepted and welcome in the adoption experience.[39]

Foster Parents

In Alberta, foster parenting has somewhat of a different history than adoption. In 1997, there was a high profile foster parent, Ms. T, who had fostered 70 children over 18 years.[40] When it was discovered that she was a lesbian, the Minister of Children's Services instituted a policy whereby gays and lesbians could no longer become foster parents.[41] The new policy was upheld after a change in Ministers. However, after the *Vriend* case was decided it was denied that there was a policy against gays and lesbians, but instead decisions were made according to the best interests of the child. Ms. T's rights to foster were reinstated.

Between the 1998 *Vriend* decision and 2006, the requirements about who could be a parent dramatically changed. Alberta went from being a province that did not protect sexual orientation in its human rights legislation and did not allow gay parents to foster children, to a province that includes same-sex parents in the definition of 'step-parent'

[37] Gay Couple.
[38] *A (Re),* 1999 ABQB 879 (CanLII), 253 AR 74.
[39] Discussions with Same-sex Parents Group of Calgary Outlink: Centre for Gender and Sexual Diversity from April to August 2010.
[40] David M. Rayside, *Queer Inclusions, continental divisions: public recognition of sexual diversity in Canada and the United States*, (Toronto: University of Toronto Press, 2008) at 176 [Rayside].
[41] Rayside.

and allows adoption by same-sex parents, and finally graduated to a province that allows lesbian parents to directly and immediately register a baby as both of theirs upon birth.[42]

Trans Parents

Trans parents have been in a more precarious place. Stereotypes abound on how having a trans parent will affect children. Courts examine in each case what is in the best interest of the child, and therefore trans parents do sometimes face the difficulty of explaining whether there will be a negative effect on their children. However, most of these cases are not published, with negotiations between former spouses happening in mediation or behind closed doors. This is still a developing area of law, and a topic of concern to trans parents and their supporters.

Marriage and Spousal Relationships

In Ontario, in July 2002, the first Canadian court ruled in favour of legalizing same-sex marriage.[43] Subsequently, between 2002 and 2004, all but New Brunswick, the Northwest Territories, Nunavut, Prince Edward Island and Alberta had recognized same-sex marriages. Finally, the issue was put to rest in 2004, with the Supreme Court of Canada reference case[44] and a subsequent Federal Bill that made marriage across Canada a "union of two persons".

Meanwhile, in Alberta in 2000 the *Marriage Act*[45] passed into legislation. This Act addressed the solemnization of marriages, but also invoked the notwithstanding clause to say:

'marriage' means a marriage between a man and a woman;

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

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[42] *Fraess v Alberta (Minister of Justice and Attorney General)* (2005), 56 Alta LR (4th) 201 (ABQB) [*Fraess*].
[43] *Halpern et al v Canada* (2002), 95 CRR (2d) 1 (Ont Sup Court).
[44] *Reference re Same-Sex Marriage.*
[45] *Marriage Act*, ss 1-2.

Later, when marriage was officially available to same-sex couples across Canada, Alberta found that its provincial powers did not include the ability to define marriage as excluding same-sex couples. Therefore, that section of the *Marriage Act* was outside of Alberta's legislative powers and of no force or effect. The *Marriage Act* is still in force today and deals with the solemnization of marriage, something that is within the province's powers. The words defining marriage between a man and a woman were included in the preamble until 2014:

> **WHEREAS marriage between a man and a woman** has from time immemorial been firmly grounded in our legal tradition, one that is itself a reflection of long standing philosophical and religious traditions; [emphasis mine]

Subsection 1(c) of the Act which defined "marriage" as "between a man and a woman", and section 2, where it said: "This Act operates notwithstanding the …Charter"… were both repealed in 2014. In summary, the Act has incorporated the new definition of marriage as between two persons and has taken out the reference to using the notwithstanding clause to impose this definition on Albertans.

The *Marriage Act* came into being shortly after a decision in Ontario[46] found that the definition of 'spouse' included a same-sex partner. In 2000, the Federal government enacted Bill C-23, the *Modernization of Benefits and Obligations Act.*[47] This Act was in response to the court case[48] where two women (known as "M" and "H") split up after a ten-year relationship. M wanted financial support from H, but their same-sex relationship was not covered under the definition of "spouse" in Ontario's *Family Law Act.*[49] The Supreme Court of Canada[50] found that denying same-sex couples access to support was discriminatory. After this decision, many other jurisdictions in Canada amended their definitions of 'spouse' in various pieces of legislation.

Alberta responded by enacting the *Adult Interdependent Relationships Act* (*AIRA*).[51] This Act amended 69 other statutes such as, Alberta's *Family Relief Act*[52] and

[46] *M v H,* [1999] 2 SCR 3, 171 DLR (4th) 577 [*M v H*].
[47] *Modernization of Benefits Act,* SC 2000, c 12.
[48] *M v H.*
[49] *Family Law Act*, RSO 1990 c F3 s 29.
[50] *M v H*, at 73-74.
[51] *Adult Interdependent Relationships Act* SA 2002, c A-4.5 [*AIRA*].
[52] *Family Relief Act*, RSA 2000, c F-5.

Wills Act.[53] The *AIRA* granted rights to couples who were unmarried but lived together for more than 3 years, had a child together, or signed an adult interdependent relationship agreement. The Act could also apply to family members who lived together, such as a senior and their adult child. However, in order for people who are related by blood or adoption to be in an adult interdependent relationship, they had to sign an agreement. In 2005, as the rest of the country celebrated same-sex marriage, Alberta continued to threaten the use of the notwithstanding clause to prevent same-sex couples from marrying in Alberta.[54] Two gay men applied at the registry office for a marriage license but were refused.[55] They filed a complaint with the Human Rights Commission, which eventually was dropped when the Alberta Government admitted that they had no legal recourse against same-sex marriage.[56]

Despite the reticence to recognize same-sex couples, there were still many Albertan supporters of same-sex marriage. For instance, MP Jim Prentice voted in favour of the federal government's marriage bill[57] after hearing from his constituents. Also, an EKOS/CBC poll in 2002 found that 40% of Albertans would answer 'yes' to the question of whether the federal government should change the definition of marriage to include same-sex couples. In the poll, this turned out to be more support for same-sex marriage than in Manitoba or Saskatchewan.

Later, when the debate heated up about whether the Federal government could use the notwithstanding clause to deny marriage to same-sex couples, law professors from across Canada signed an open letter[58] to Stephen Harper, in support of same-sex marriage. University of Calgary Law professors were among the many professors who signed this open letter.

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[53] *Wills Act*, RSA 2000, c W-12.
[54] *Alberta may invoke notwithstanding clause over same-sex marriage,* CBC News, July 27, 2005 Accessed July 15, 2010, online: <http://www.cbc.ca/canada/story/2005/07/27/Alberta-same-sex-050727.html>.
[55]Keith Purdy and Rick Kennedy's complaint was accepted by the Human Rights Commission, but same-sex marriage became accepted law in Alberta before their complaint was heard.
[56] CTV News, *Alberta backs down on gay marriage*, CTV News, July 13, 2005.online: <http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/1121195450282_34/?hub=Canada>
[57] Bill C-38*, The Civil Marriage Act,* 1st Sess, 38th Parl, 2005.
[58] "Open letter to The Hon. Stephen Harper from Law Professors Regarding Re-opening Same Sex Marriage" online: Equality for Gays And Lesbians Everywhere (EGALE), online: <https://egale.ca/egale-in-action/open-letter-to-the-hon-stephen-harper-from-law-professors-regarding-re-opening-same-sex-marriage/> Accessed July 15, 2020.

LGBTQI2S+ Rights: Climbing the judicial steps to equality

While the progression of same-sex rights in Alberta has been blocked, litigated and denied, the above examples of commitment to LGBQ2S+ human rights demonstrate that there is still support on all sides for LGBQ2S+ rights in Alberta. Now, several years after same-sex marriage has come to Alberta, there is little debate on the issue and not much controversy.

The following sections review present day laws and policies. In these sections, we examine what the law is, how it is applied, and whether there are upcoming legal challenges in particular areas. The legal areas discussed have been split into: Human Rights, Family, Hate Crimes, Benefits, Refugees, and Schools and Youth. While the preceding section examined how these laws came to be, these sections will specifically focus on the present and the future. The history demonstrates how much has changed in the past ten years, while the present shows how some of the same political ideology that affected past homophobia is now playing out in how laws are being applied.

HUMAN RIGHTS

The *AHRA* protects Albertans against discrimination and harassment in areas such as schools, restaurants, bars, tenancy, unions, work, and volunteer activities. There are five areas covered by the *AHRA*[59]:

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

There are 15 grounds covered under the *AHRA*: race, religious beliefs, colour, gender, gender identity, gender expression, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status and sexual orientation[60].

"Sexual orientation" was read into the *AHRA* after the *Vriend* decision in 1998 as discussed earlier. After the 1998 *Vriend* ruling, it was not actually written into the *AHRA*

[59] *AHRA.*
[60] *AHRA,* ss 3(1)-4.

until 2010. The amendment also added a section to indicate that parents could make a complaint under the *AHRA* if their child was taught curriculum that focused on 'sexuality, sexual orientation or religion' that they did not give permission for[61]. This section was repealed in 2015.

Trans people are covered under the grounds of gender, gender identity, and expression. Previously, trans people were considered to be covered under the ground of gender only.

A note on bisexual human rights in Alberta and Canada: there are few cases that ever mention bisexual rights as being separate and apart from lesbian and gay rights. Bisexuality is protected in the abstract by protecting individual's rights when they are in a same-sex relationship. There are legal and social issues that arise for bisexual people; however, when judges address many of these issues they do so in a lesbian/gay dichotomy not acknowledging that complainants are bisexual. The issue with handling cases this way is that bisexual complainants become hidden. Another issue for bisexual claimants is that sometimes their bisexuality is used against them. This happens in the refugee context where adjudicators may presume a claimant is not eligible because they have had opposite-sex partners.

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

- firing an LGBTQI2S+ person from their work because of their sexual orientation or gender identity or refusing to hire them in the first place;
- posting a sign that promotes hatred against an LGBTQI2S+ person or community;
- refusing to accommodate a trans person at work as they transition;
- refusing to rent to a LGBTQI2S+ person; and
- harassment or denial of rights of an LGBTQI2S+ person by a union.

Complaints filed with the Human Rights Commission based on sexual orientation and gender identity made up 2% of the 810 complaints filed in 2018/19.[62] However, many

[61] Bill 44.
[62] Alberta Human Rights and Citizenship Commission, "Grounds of discrimination cited in complaint files opened April 1, 2018 to March 31, 2019" in *Alberta Human Rights and Citizenship Commission Annual Review, April 1, 2018 – March 31, 2019, (*Edmonton: Alberta Human Rights and Citizenship Commission, 2010) at 11, online: https://www.albertahumanrights.ab.ca/about/Documents/25473%20HR%20Annual%20Report%2018_19%20online.pdf.

complaints are settled before they make it to a tribunal. Complaints that get settled before making it to a tribunal do not set any legal precedent.

Trans Human Rights

Previous issues in the field of trans human rights seemed to center around what stage a trans person was at in their actual physical transition. Legislation and policy[63] often recognized rights for trans people who had some form of gender reassignment surgery (GRS) or hormone treatment but ceased to acknowledge a trans person who had not. Many trans people have not had GRS or hormone treatment. This stems from a variety of reasons: they are too early in the process and still doing the real-life test[64], operations are expensive and there are few facilities that perform them,[65] or they are happy living as their identified gender without having treatments or surgeries. Fortunately, GRS is no longer required for trans people to exercise the rights discussed in this paper, as is discussed in the Identification section below.

A key issue for trans people is whether they are permitted to use bathrooms and change-rooms as per their identified gender. In *Ferris*[66], a trans woman was employed for 20 years by the same company. A co-worker complained that she was using the women's washroom. The Union did not investigate the situation properly and did not fight against the company's treatment of Ms. Ferris. Expert evidence in front of the Tribunal noted that trans people are particularly vulnerable to discrimination[67]. This kind of disrespectful treatment takes an emotional toll on trans people. Refusing the use of the women's washroom had a detrimental effect on Ms. Ferris and challenged her identity as a woman[68]. The Union was found to have discriminated against Ms. Ferris.

Another case that addressed the issue of using gendered washrooms happened in a nightclub[69] when a trans woman was refused use of the women's washroom. The British Columbia Human Rights Commission found that this was discriminatory treatment. A

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[63] See for instance, policies pertaining to identification and changing one's gender on driver's licenses, birth certificates, etc.
[64] Under the Benjamin Standard a trans person is required to go through a real-life test before they can undergo certain surgeries. This involves living in the gender they identify with at work, with family and/or with friends, for a period of 3 to 12 months. These standards have been recently updated and can be found online: GID Reform Weblog by Kelly Winters at idreform.wordpress.com/2011/09/25/new-standards-of-care-for-the-health-of-transsexual-transgender-and-gender-nonconforming-people/ .
[65] No facilities for genital surgery exist within Alberta and so patients must fly out of province for these.
[66] *Ferris v Office and Technical Employees Union, Local 15* [1999] BCHRTD No 55 [*Ferris*].
[67] *Ferris* at para 16.
[68] *Ferris* at para 105.
[69] *Sheridan v Sanctuary Investments Ltd*, [1999] BCHRTD No 43, 33 CHRR D/467 (BC Trib) [*Sheridan*].

doctor speaking about trans rights said that using the appropriate washroom was significant in the identity of a trans person[70].

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

Unfortunately, almost 20 years after the cases discussed above, trans people are still fighting to use the washroom of their choice. In 2016, Cesar Lewis, a transgender man, was forcibly removed from the men's bathroom at a nightclub by a security guard. He was physically assaulted and subjected to homophobic and transphobic slurs.[71] The respondent nightclub was found to have discriminated against Mr. Lewis and was ordered to pay him $15,000.[72] As seen from the above cases, courts are readily accepting of this kind of treatment as discrimination, but societal stereotypes and negative views of trans people mean that the discrimination is continuing to occur.

For youth who are in secondary school, the bathroom issue can be even greater. This issue is further discussed in the section on Youth and Schools.

Gender Reassignment Surgery

Gender reassignment surgery (GRS) is a medical procedure often used to treat gender dysphoria experienced by trans people. GRS was delisted from health coverage in Alberta in the 2009/2010 budget.[73] When GRS was delisted, news reports said that 23

[70] *Sheridan* at para 36.
[71] Lewis v Sugar Daddys Nightclub, 2016 HRTO 347 at paras 55-56 [*Lewis*].
[72] *Lewis* at para 60.
[73] Government of Alberta Budget 2010 Online:< http://budget2010.alberta.ca/index.html> Accessed July 27/10.

Albertans filed human rights complaints.[74] The delisting was done to reduce the health and wellness budget of $15 billion by $700,000. The Health Minister said that he would allow those who were waiting for GRS to still have their surgeries covered. In April 2010, the Government agreed to cover up to 20 surgeries per year, phasing out the funding in 2015. However, in order to be included in these last GRS procedures the individual had to have been signed up with a recognized physician by April 2009 and had to have met a list of qualifying criteria.[75] Interestingly, in 1998, Ontario had also decided to delist GRS, before having any consultation with the trans community or medical professionals. A 2006 case[76] found that it was discriminatory to de-list GRS and prevent those people who were already in process from continuing on with their surgery. However, it took until May 2008, after much lobbying by trans groups, for Ontario to relist GRS coverage.

The Alberta government reinstated funding for GRS effective June 15, 2012.[77] This funding now covers surgeries associated with vaginoplasty, metoidioplasty, or phalloplasty.[78] However, breast augmentation and mastectomy require prior approval from a surgery or primary care provider. Augmentation requires that the patient have little to no breast growth, and in most instances, is considered cosmetic in nature and therefore does not qualify for coverage. Other procedures that may be desired by the patient, such as voice pitch surgery, facial feminizing, or tracheal shave are also not covered.[79] As well, requirements such as approval from a psychiatrist may be a barrier to individuals who want to have GRS.

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[74] *Transgendered Albertan File Human Rights Complaint,* April 15, 2009. Online: CBC News <http://www.cbc.ca/news/canada/calgary/story/2009/04/15/cgy-alberta-transgendered-sex-change-human-rights.html> (accessed May 25, 2011).
[75] Dr. Warneke, MD, Open letter to transgendered individuals April 27, 2010 re: GRS. Online: Facebook http://www.facebook.com/topic.php?uid=85048933488&topic=14486 (Accessed September 30/11).
[76] *Hogan, Stonehouse, AB and McDonald v Her Majesty the Queen in Right of Ontario As represented by the Minister of Health and Long-term Care,* 2006 HRTO 32.
[77] Mercedes Allen *Alberta reinstates funding for sex reassignment surgery (plus, why it's necessary)* rabble.ca online: http://rabble.ca/blogs/bloggers/mercedes-allen/2012/06/alberta-reinstates-funding-sex-reassignment-surgery-plus-why-i.
[78] Alberta Health Services, "Alberta's Gender Reaffirming Program" (2019). Retrieved from: https://www.albertahealthservices.ca/info/Page15676.aspx [*AHS*].
[79] *AHS.*

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

Trans Prisoner's Rights

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

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

1. An inmate who had already started hormones, monitored through a recognized gender program, could continue to do so.
2. Unless an inmate had already completed GRS, the inmate's birth gender would be used to determine whether the inmate would be incarcerated in a male or female facility (i.e., If the inmate was born male and hadn't had surgery, they would be placed in a male facility, even if their identity was female).
3. GRS was not allowed while an inmate was incarcerated.

The Court also discussed whether GRS was an "essential service" and therefore covered under CSC medical treatment. In the past, CSC doctors had said that it was an elective procedure even though the Harry Benjamin Standard[80] stated, "Sex reassignment is not 'experimental', 'investigational', 'elective', 'cosmetic', or optional in any meaningful sense. It constitutes very effective and appropriate treatment for transsexualism or profound GID."[81]

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

> Part of the rehabilitation process for female offenders involves placing them in a safe environment, where they can begin to address the problems that got them into trouble in the first place. This includes teaching them how to deal with men in a more positive fashion. These are disadvantaged women, counsel says, who are dealing with their own issues, and we have to be realistic about their ability to cope. Forcing such women to deal with a pre-operative male to female transsexual in their midst, and the risks that such individuals could pose, is not a realistic expectation, nor is it an appropriate priority.[82]

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

The Tribunal found that while the CSC had not justified their strict policy, it did take the 'special vulnerability' of trans people into consideration on an *ad hoc* basis.[83] The Canadian Human Rights Tribunal found that a policy should:[84]

1. …recognize the differential effect that housing inmates in accordance with their anatomy has on transsexual inmates.

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[80] World Professional Association for Transgendered Heath, "*The Harry Benjamin International Gender Dysphoria Association's Standards Of Care For Gender Identity Disorders, Sixth Version"* online: World Professional Association for Transgendered Heath www.wpath.org/documents2/socv6.pdf.
[81] *Kavanagh v Canada,* [2001] CHRD No 21, [2001] DCDP No 21, para 38 [*Kavanagh*].
[82] *Kavanagh* at para 151.
[83] *Kavanagh,* at para 166.
[84] *Kavanagh,* at para 166.

2. …acknowledge their susceptibility to victimization within the prison system.
3. …require individualized assessment of each transsexual inmate…in consultation with qualified medical professionals…

Therefore, the Tribunal found that a blanket policy that prohibited inmates from sex-reassignment surgery was not justified. This case was affirmed by the Federal Court of Canada.[85] The case demonstrates a balancing of the inmates' rights to a safe rehabilitation process, and the rights of trans inmates to safety in their living space. It does not give an answer to prison officials as to how to handle this balancing but suggests that a case-by-case analysis of each trans inmate is necessary to determine their needs. In addition, it notes that prison physicians are not equipped to assess gender identity needs of trans inmates. This should be left to a recognized gender dysphoria clinic.[86]

In 2017, CSC came out with an interim policy that impacts trans inmates.[87] This new policy allows inmates to be placed according to their gender identity, if that is their preference, unless there are "any overriding health or safety concerns which cannot be resolved". Inmates can also choose which gender of officer conducts their strip and frisk searches. Information regarding an inmate's gender identity must be kept private between the inmate and those directly involved with their care. Trans inmates have access to GRS if a qualified health professional in the area of gender dysphoria indicates that the surgery is medically essential. CSC pays the cost of these surgeries. This is a positive change, however, what constitutes an "overriding health or safety concern" is not explicitly defined. If this component is interpreted broadly, there is potential for trans inmates to be imprisoned in a facility that is not their preference. As well, the "medically essential" requirement may be a barrier to inmates receiving this care.

[85] *Canada (Attorney General) v Canada (Canadian Human Rights Commission)* [2003] FCJ No 117; [2003] ACF No 117 [*Canada v Canada*].
[86] *Canada v Canada,* at para 45.
[87] Correctional Service Canada, "Interim Policy Bulletin 584 Bill C-16 (Gender Identity or Expression)" (2017). Retrieved from: https://www.csc-scc.gc.ca/acts-and-regulations/584-pb-en.shtml

FAMILY

Same-sex couples can form families, in the eyes of the law, by becoming Adult Interdependent Partners (AIPs),[88] by getting married, or by being defined as common-law partners under other pieces of legislation. Each piece of legislation has a different requirement for when couples (heterosexual or same-sex couples) are determined to be spouses or common-law partners. For instance, under the *AIRA,* any two people will become AIPs once they live together in an interdependent relationship for three years, if they have a child (by birth or adoption) together, or if they sign an agreement stating that they are AIPs[89]. However, under Canada's *Income Tax Act,* two people are considered to be common-law partners once they have cohabited in a conjugal relationship for more than 12 months, or if they have a child together[90]. Therefore, inclusive definitions of "spouse" and "common-law partner" outline when a same-sex couple can access the rights and responsibilities under a particular piece of legislation and when they cannot.

Marriage

One of the more controversial topics in family law was granting same-sex couples relationship and family rights. Politically, it was a hot button topic that caused the Alberta government to attempt to legislate that marriage was "between a man and a woman".[91] Voices against legalizing same-sex unions ranged from promoting a separate sphere for same-sex couples whereby couples could become legal partners, to outrage that a same-sex couple could be seen on equal footing to a heterosexual married couple. And yet, an EKOS/CBC poll in 2002 found that 40% of Albertans would answer "yes" to the question of whether the federal government should change the definition of marriage to include same-sex couples. While this is less than half the population, it was higher than some other provinces and did represent a considerable amount of support in the population. A survey by Alberta Justice[92] asked participants: "What is the definition of a family?" Two options were given for answers: "Heterosexual pair, including a single

[88] *Adult Interdependent Relationships Act,* SA 2002 A-4.5.
[89] *AIRA,* s 3(1).
[90] *Income Tax Act,* RSC 1985, c-1.
[91] *Marriage Act*, ss 1-2.
[92] Alberta Justice Study.

parent and his/her children" OR "Any pair or group". Forty-two percent (42%) agreed that family was "any pair or group". Therefore, the support for same-sex marriage was split in Alberta. However, being federal law, same-sex marriage was permitted in every province and territory once the *Reference re Same-Sex Marriage* case was decided.

It is unlikely that this law would be revoked in a similar fashion to what has happened in California, where same-sex marriage was banned from 2008-2013 after a ballot proposition was passed.[93] Here in Canada, the federal government would have to invoke the notwithstanding clause under section 33 of the *Charter* to take away same-sex marriage rights.

While the law supports the dissolution of same-sex couple marriages, couples can sometimes find it difficult to find a lawyer who is accepting and knowledgeable about same-sex couples and marriage. Each partner must determine the lawyer they will feel most comfortable with. Lawyers that specialize in the area of same-sex couples are few and far between and cannot represent both parties. This is especially true in rural areas where there may only be one or two lawyers serving an area. Also, some polls have indicated that acceptance of same-sex marriage in rural areas is lower than in urban areas.[94]

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

[93] On November 5, 2008 a ballot on Proposition 8 was successful in changing the Californian Constitution to define marriage as between a man and a woman. In Canada, our *Charter* is a federal document and cannot be changed by an individual province.

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

lawyer might presume that a child was conceived though alternative insemination rather than a birth child of one of the parties.

Lawyers will need to have a good understanding of the rights of trans parents in divorce cases to suitably represent a trans client. Discriminatory ideas about the gender of their client, for example that a trans man is not a "real man", could bias the process. These ideas are based on stereotypes and create awkwardness and unfairness in the legal process that makes trans people feel misunderstood and misrepresented.

Registration of birth

The 2005 *Fraess v Alberta* case allowed same-sex couples who had planned a baby together to register the baby as belonging to both parents at the time of birth, thus avoiding the adoption process[95]. Until October 2005, babies born through artificial insemination were technically supposed to go through an adoption process whereby the birth mother would give permission for her partner to adopt the child. Heterosexual couples could side-step this requirement by keeping the fact that there was no genetic link to the father a secret. Lesbian couples could not do the same because it was obvious that the baby could not be born to both women.[96] In October 2005, the *Family Law Act*[97] was proclaimed. It said under section 13:

> Assisted conception
> 13(1) In this section, "assisted conception" means the fertilization by a male person's sperm of a female person's egg by means other than sexual intercourse and includes fertilization of a female person's egg outside of her uterus and subsequent implantation of the fertilized egg into her uterus.
>
> (2) A male person is the father of the resulting child if at the time of an assisted conception he was the spouse of or in a relationship of interdependence of some permanence with the female person and
>
> (a) his sperm was used in the assisted conception, even if it was mixed with the sperm of another male person, or

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

> (b) his sperm was not used in the assisted conception, but he consented in advance of the conception to being a parent of the resulting child.

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

1. an inclusive definition would alter the historical and universal definition of 'mother' and 'parent'; and that this would extend parental rights to lesbian women based on the intention to be a parent rather than biology; and
2. defining the language of 'mother' and 'parent' involves policy implications that should be left to the legislature. [98]

Justice Clarke noted that the reason the legislation existed was to extend parental responsibilities to those who had *intended* to be a parent from birth.[99] Excluding lesbian couples from this definition was discrimination under the *Charter.* Since this ruling in 2005, lesbian couples have been able to add both of their names to the birth registry and receive a valid birth certificate with both of their names on it.

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

In 2010, *Family Law Act* section 13 was repealed.[100] The situation of assisted reproduction was addressed in a new section 7, which states (in part):

> **Rules of parentage**
>
> 7(1) For all purposes of the law of Alberta, a person is the child of his or her parents.
>
> (2) The following persons are the parents of a child:
>
> ….
>
> (b) if the child was born as a result of assisted reproduction, a person identified under section 8.1 to be a parent of the child;
>
> …

[98] *Fraess,* at para 10 – 11.
[99] *Fraess* at para 16.
[100] SA 2010, c 16, s 1.

> (4) A person who donates human reproductive material or an embryo for use in assisted reproduction without the intention of using the material or embryo for his or her own reproductive use is not, by reason only of the donation, a parent of a child born as a result.
> …..
> 8.1(6) Unless the contrary is proven, a person is presumed to have consented to be a parent of a child born as a result of assisted reproduction if the person was married to or in a conjugal relationship of interdependence of some permanence with,
> (a) in the case of a child born in the circumstances referred to in subsection (2), the male person referred to in that subsection,
> (b) in the case of a child born in the circumstances referred to in subsection (3), the female person referred to in that subsection
> ….

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

HATE CRIMES

Canada has various laws to address issues of discrimination in the form of hatred aimed at LGBTQI2S+ individuals. In Alberta, there are currently three pieces of legislation that inform the discussion of hate laws: The *AHRA*, the *Canadian Charter of Rights and Freedoms,* and the *Criminal Code of Canada.*[101] There are a number of parallels and similarities between federal and provincial human rights statutes; however, each law sets out its own protections, the areas in which discrimination is prohibited and the procedures and remedies;[102] that is, the means by which a right is enforced or the violation of a right is prevented, redressed or compensated.[103] Each law has anti-discrimination provisions and each law indicates the forum a complaint or criminal charge is to be heard. For example, cases falling under the *AHRA* are pursued through a

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

human rights tribunal, whereas *Charter* and *Criminal Code* cases are typically pursued through the courts.[104]

Anti-discrimination and anti-hate laws in Canada aim to balance freedom of expression with the eradication of discrimination. Hatred is detrimental to any society for numerous psychological and social reasons. The group who is targeted by hate propaganda, such as gays and lesbians, may be stripped of their sense of personal dignity and self-worth or even respond aggressively, while those whom the hatemonger seeks to influence are harmed.[105]

Under the *AHRA*, the prohibition against hate messages includes statements, publications, notices, signs, symbols, emblems or other representations and it protects on the grounds of sexual orientation and gender, gender identity, and gender expression.[106]

Moreover, the law enforced in a given legal matter depends on the particular situation, the allegations, and the parties involved. Someone who commits a crime and is found to violate the prohibitions against hate propaganda under the *Criminal Code* will be prosecuted under criminal law, whereas a newspaper that publishes discriminatory and hateful comments about the LGBTQI2S+ community, may be investigated under s 3 of the *AHRA* and may need to pay damages. Finally, there have been numerous cases in the past twenty years of individuals who argue that the federal government has limited their freedom of expression and these cases develop into *Charter* cases.

The Charter

The Charter reads at s 2 (b):

> Everyone has the following fundamental freedoms:
> …
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.[107]

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[104] Ray-Ellis, Soma *Halsbury's Laws of Canada* - Discrimination and Human Rights, III. DISCRIMINATION 4. Hate Communications (1) Introduction, HDH-227 *Jurisdictions prohibiting hate messages* [*Jurisdictions prohibiting hate messages*].
[105] *R v Keegstra* (1984), 19 SCC (3d) 254 [*Keegstra*].
[106] *Jurisdictions prohibiting hate messages*. Under federal human rights legislation, until 2012, hate messages were prohibited in the area of "telephonic communications". In 2012, in response to concerns that this section violated the *Charter*, it was repealed.
[107] *Charter.*

Under Canadian law, all activities conveying or attempting to convey meaning are 'expression' for the purposes of s 2(b).[108] However, no rights or freedoms are unlimited, and so, for instance, when people express their thoughts through physical violence, they may find that this type of expression is limited.[109] The Supreme Court of Canada has a two-step process to determine whether an individual's freedom of expression has been infringed.[110] The court must determine:

1. whether the individual's activity falls within the freedom of expression;[111] and
2. whether the purpose or the effect of the government action is to restrict the freedom.[112]

The Supreme Court of Canada has given broad interpretation to freedom of expression. However, the Court has also made it clear that freedom of expression may be restricted under s 1 of the *Charter* which indicates that the rights and freedoms guaranteed in the Charter are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".[113] For example, public expression that is deemed to incite hatred and deliberately attack the basic human dignity of a woman because she belongs to, or is perceived to belong to, the gay and lesbian community (an identifiable target group) is known as "hate expression", "hate propaganda", or "hate speech".[114]

The right conferred by s 2(b) of the *Charter* embraces a broad continuum of intellectual and expressive freedom—"freedom of thought, belief, opinion and expression".[115] Above all, the purpose of s 2(b) is to permit free expression with the goal of promoting truth, political or social participation and self-fulfillment. That purpose

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[108] *Irwin Toy v Quebec (Attorney General)*, [1989] 1 SCR 927 at 968.
[109] *R v Khawaja,* [2012] 3 SCR 555 at para 70.
[110]Canadian Charter of Rights Decision Digest, Section 2(b), June 2004 online: http://www.canlii.org/en/ca/charter_digest/s-2-b.html#_Toc68429547 [Canadian Charter of Rights Decision Digest].
[111]Canadian Charter of Rights Decision Digest.
[112] *Ross v New Brunswick School District No. 15*, [1996] 1 SCR 825 [*Ross*].
[113] *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 at s 1 :
> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[114] Alberta Civil Liberties Research Centre, *Freedom of Expression and Its Limitations in Canada: Background Materials and Learning Activities* (2004), at 69 [ACLRC 2004].
[115] *R v Sharpe*, [2001] 1 SCR 45, para 25.

extends to the protection of minority beliefs that the majority regards as wrong or false.[116] While expression taking the form of violence, terror, or directed towards violence or terror is unlikely to find shelter in *Charter* guarantees, most freedom of expression arguments most often involve a tension between the majoritarian view of what is true or right and an unpopular minority view.[117] To this end, the tension between individual freedom of expression and the right to be free from discrimination has been seen in court cases involving LGBTQI2S+ legal issues.

Criminal Code of Canada

In Alberta and in other provinces, where the provincial human rights codes prohibit publication of material that promotes hatred, a wider range of minority groups, including LGBTQI2S+ people, are protected, and different remedies may be sought, from monetary remedies to an apology.[118] In addition, Canadian Parliament and provincial legislatures have implemented controls on hate expression under criminal law using the Criminal Code's hate propaganda provisions at s 318 to s 320.[119] The Court in *Keegstra,* discussed below, held that while section 319(2) of *Criminal Code* infringes freedom of expression provisions of the *Charter* by prohibiting willful promotion of hatred, it is a justified limitation.

The Supreme Court of Canada laid out the legal definition of "hatred" in 1990 in the case *R v Keegstra.*[120] James Keegstra was a teacher in Alberta who was charged with unlawfully promoting hatred against an identifiable group by communicating anti-Semitic statements to his students. If the students did not reproduce Keegstra's views on exams, their marks suffered. The definition of hatred as laid out in *Keegstra* indicates that hate expression has a common set of basic messages and purposes.[121] Therefore, looking at hatred against the LGBTQI2S+ communities, the core message of hate expression is that the targeted group, or LGBTQI2S+ people, is seen as different and inferior (this may be rooted in perceived historical, genetic, cultural, moral, ethical, behavioral or religious

[116] Canadian Charter of Rights Decision Digest.
[117] Canadian Charter of Rights Decision Digest.
[118] ACLRC 2004.
[119] ACLRC 2004, at 74.
[120] *R v Keegstra,* [1990] 3 SCR 697.
[121] ACLRC 2004, at 70.

inferiority).[122] A second message generally follows, that the LGBTQI2S+ people have either harmed or threatened to harm the speaker's group. These two messages combined result in the target group, in this example LGBTQI2S+ people, being perceived as not worthy of the same rights, dignity and respect as the rest of society.[123] Sometimes hate expression goes further to conclude that LGBTQI2S+ people should be physically eliminated from society, or that the groups' political, civil and human rights should be eliminated.[124] In *Keegstra,* the Court analyzed the guiding philosophy behind the freedom of expression provisions in the *Charter:*

> The question is always one of balance. Freedom of expression protects certain values, which we consider fundamental -- democracy, a vital, vibrant and creative culture, and the dignity of the individual. At the same time, free expression may put other values at risk. It may harm reputations, incite acts of violence. It may be abused to undermine our fundamental governmental institutions and undercut racial and social harmony. The law may legitimately trench on freedom of expression where the value of free expression is outweighed by the risks engendered by allowing freedom of expression.[125]

A school board has a duty to maintain a positive school environment for all persons served by it. The Court in *Ross v New Brunswick School District No. 15*[126] said that "a school is a communication centre for a whole range of values and aspirations of a society …[and] an arena for the exchange of ideas and must, therefore, be premised upon principles of tolerance and impartiality so that all persons within the school environment feel equally free to participate."[127] It follows that LGBTQI2S+ students also have the right to equally participate, however this is not always the case in a heterosexist or cissexist environment.

To charge someone under the hate propaganda provisions of the *Criminal Code*, a very high threshold must be met. According to s 319(1) of the *Criminal Code*, a person can be sentenced to up to two years in prison for making statements in a public space that incite hatred against any identifiable group, provided those statements are likely to lead to a breach of the public peace and order. "Identifiable group" includes "any section of the

[122] ACLRC 2004, at 70.
[123] ACLRC 2004, at 71.
[124] ACLRC 2004, at 71.
[125] *Keegstra* at 807.
[126] *Ross v New Brunswick School District No. 15*, [1996] 1 SCR 82 at para 42 [*Ross*].
[127] *Ross,* at para 42.

public distinguished by colour, race, religion, national or ethnic origin, age, sex, sexual orientation, gender identity or expression, or mental or physical disability".[128] Also, a person can be sentenced to up to two years in prison for making statements that willfully promote hatred against any identifiable group, other than in private conversation. The statements covered by the prohibition against hate expression are not limited to language alone, and may include spoken, written or recorded words, as well as gestures signs or other visual representations.[129] Also, "public place" can include any place where allowing expression is supported by the historical or actual function of the place, and whether allowing expression in the place would undermine the values of free expression.[130] The 'values' of free expression include self-fulfillment, political discourse, and truth-seeking.[131]

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

- the accused establishes that the statements communicated were true;
- the accused in good faith expressed an opinion on a religious subject or an opinion based on a belief in a religious text;
- the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds the accused believed them to be true; or
- the accused in good faith intended to point out, for the purpose of removal, matters producing feelings of hatred toward an identifiable group in Canada.[132]

The *Criminal Code* may seem to be in conflict with freedom of expression guarantees in the *Charter*, however, the Supreme Court of Canada has said that the infringement of individual freedom of expression can serve an important anti-discrimination objective.[133] The Court further found that the limitation of individual freedom of expression is to be

[128] *Criminal Code,* at s 318(4).
[129] *Criminal Code,* at s 319(7).
[130] *Montreal (City) v 2952-1366 Quebec Inc,* [2005] 3 SCR 141 at para 74 [*Montreal*].
[131] *Montreal* at para 68.
[132] *Criminal Code,* at s 319(3).
[133] *Keegstra.*

balanced with the objective of anti-discrimination, so the limitation of hate expression was not excessive.[134] This is still a highly debated area of law.

Alberta Human Rights Act

The *AHRA* prohibits denial of or discrimination based on sexual orientation, gender, gender identity, and gender expression, as well as other grounds, in the following specific areas: (1) goods, services, accommodation or facilities that are customarily available to the public; (2) tenancy; (3) employment practices, applications and advertisements; and (4) membership in trade unions, employers' organizations or occupational associations.

Section 3 of the *AHRA* describes the grounds of protection in relation to published statements. Section 3 is balanced with provisions speaking to freedom of expression, exceptions where a contravention of the Act may be reasonable and justifiable. Section 3 reads:

> No person shall publish…or cause to be published… before the public any statement…that…is likely to expose a person or a class of persons to hatred or contempt because of the race, religious beliefs, colour, gender, gender identity, gender expression, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation of that person or class of persons.[135]

The section also reads that: "Nothing in this section shall be deemed to interfere with the free expression of opinion on any subject".[136] When someone makes statements that somebody else finds to be insulting, upsetting, in bad taste, or contrary to their own beliefs, the *Human Rights Act* is not engaged. In order to engage the *Act*, statements must be connected to the grounds protected under the *Act* and must meet certain tests for determining whether a statement indicates discrimination, an intention to discriminate or is likely to expose a person or class of persons to hatred or contempt.[137] The Supreme Court of Canada provided clarification on the limits of hate expression stating

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[134] *Keegstra.*
[135] *Alberta Human Rights Act,* s 3.
[136] *Alberta Human Rights Act,* s 3.
[137] Alberta, Alberta Human Rights Commission, *Detailed Discussion of Section 3 of the Alberta Human Rights Act,(2010), online:* Alberta Human Rights Commission http://www.albertahumanrights.ab.ca/other/statements/what_to_know/section_3_discussion.asp [Detailed Discussion of Section 3].

that 'hatred or contempt' "must be interpreted as being restricted to those extreme manifestations of the emotion described by the words 'detestation' and 'vilification', and that the words that ridicule, belittle or otherwise affront the dignity of persons 'do not rise to the level of ardent and extreme feelings constituting hatred required to uphold the constitutionality of a prohibition of expression in human rights legislation…'"[138]

Complaints of hate expression covered by provincial human rights legislation, may end up going to a human rights tribunal.[139] These tribunals have jurisdiction over the claim and are provided with broad powers, as specified by legislation to determine appropriate remedies and awards under their respective governing legislation.[140] Moreover, the *AHRA* provides defenses and justifications for some statements. For example, section 11 of the Act reads that a complaint cannot be made out under the Act so long as it is shown that the alleged contravention was reasonable and justifiable in the circumstances.[141] Some cases are summarized in Appendix A that provide insight into the current legal climate surrounding hate expression laws in Canada.

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

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[138] *Saskatchewan (Human Rights Commission) v Whatcott,* [2013] 1 SCR 467 at para 109.
[139] Ray-Ellis.
[140] Ray-Ellis.
[141] Detailed Discussion of Section 3.

IDENTIFICATION DOCUMENTS FOR TRANS PEOPLE

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

Federal Identification

Passports

According to Passport Canada, passport applicants may adjust their information, including gender identification. According to the *Canadian Passport Order*,[142] Passport Canada may request an applicant to provide further information, material, or declarations respecting any matter relating to the issue of the passport or the delivery of passport services. It follows that Passport Canada is authorized to convert the information into digital biometric information, as it does to any information submitted by any applicant.

The *Canadian Passport Order* contains a schedule entitled "Sex".[143] This section indicates that a passport applicant may be requested to "provide an explanation", if the sex indicated in an application for a passport is not the same as that set out in that applicant's birth certificate. The schedule further states that in the event an application indicates that "a change of sex of the applicant has taken place", Passport Canada may request the applicant to submit a certificate from a medical practitioner to substantiate the statement. Nowhere in the *Canadian Passport Order* or its schedules, does it make

[142] *Canadian Passport Order SI/81-86* Online: Department of Justice http://laws.justice.gc.ca/eng/regulations/SI-81-86/FullText.html (accessed October 31, 2011).
[143] A schedule is an attachment to a legislative or legal document containing supplementary details.

explicit that GRS must be completed as a condition of changing the gender on a passport. Therefore, it is not made clear at what stage of transition a "change of sex" would be recognized by Passport Canada (i.e., psychotherapy, hormone treatment or full-fledged GRS.) Considering the abandonment of the requirement of GRS for other identification documents, it seems unlikely that Passport Canada would require GRS or treatment in order to change a passport.

Citizenship Documentation

A Citizenship Policy Manual published in June 2010 by Citizenship and Immigration Canada entitled *CP3 Establishing Applicant's Identity*[144] contained instruction on how to establish identity of the applicant after GRS. Should someone require replacement documents, all replacement certificates would be the same as the previous citizenship certificate, unless the applicant provided a statement from a surgeon confirming the surgical procedure, as well as a statement from another person to the effect that he or she knew the applicant prior to the surgery and that this person is one and the same.

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

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

[144] *Citizenship Policy Manual CP3 – Establishing Applicant's Identity* Online: Citizenship and Immigration Canada www.cic.gc.ca/english/resources/manuals/cp/cp03-eng.pdf (accessed October 31, 2011).

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

As of June 4, 2019, there were three gender marker options available for people to use: "F", "M", and "X". The application no longer requires any proof of GRS or any reason for the change. If the individual requesting the change is under 18, a parent/guardian signature is required.[145]

Certificate of Indian Status (aka Indian Status Card)

The Registrar of the Indian and Northern Affairs Canada, Southern Alberta Field Services Office, indicated in a telephone communication[146] that the Indian Registry System is informed by an applicant's birth certificate. Therefore, if the birth certificate is changed to adjust the gender information, the Indian Registry System will be updated. Furthermore, this means a Status Card can be changed without the completion of GRS (see below).

Provincial Identification

Birth Certificate

Up until 2014, s 30 (1) of the *Vital Statistics Act*,[147] stated that a person may adjust his/her gender information to another gender other than what appears on the birth certificate only after his/her anatomical sex structure had been changed. Then, the person may apply to the Director of Vital Statistics to have the gender designation changed on the birth certificate. Section 30 (1) of the *Vital Statistics Act* indicates that the person had to submit to the Director, two affidavits of two physicians, and each affidavit had to give evidence that the anatomical sex of the person was changed. The Director also had to be satisfied through the production of evidence by the person as to the identity of the person.

[145] Government of Canada, "How do I change the sex or gender identifier on my application or document?" (2020). Retrieved from: https://www.cic.gc.ca/english/helpcentre/answer.asp?qnum=1253&top=32
[146] Private Conversation, Friday, June 10, 2011, INAC Southern Alberta Field Services Office, Phone: (403) 292-5901.
[147] RSA 2000, c V-4.

Section 30(2) indicated that if the procedure set out in s 30(1) was completed, then the Registrar may amend the sex on the person's record of birth and may, with the consent of the other party to the marriage, amend the sex on the record of a subsisting marriage, if any", if the sex of the person was registered in Alberta. If the sex of the person was registered outside Alberta, the Director had to transmit to the officer in charge of the registration of births and marriages in the jurisdiction in which the person was registered, a copy of the proof of the identified sex. Finally, section 30 (3) indicates that "Every birth or marriage certificate of the person referred to in subsection (1) or (1.1) issued after amending the sex on the record under this section must be issued as if the registration had been made with the sex as changed." Therefore, GRS was a required step in transition, in order to have a birth certificate reflect a gender other than the original registered gender. This was a problem for non-operative trans individuals who chose not to get surgery, could not afford it, or where the surgery was still in an experimental stage.

In 2014, a case came to the AB Queen's Bench which challenged these requirements of the *Vital Statistics Act.* CF, a trans woman, wanted to change the gender marker on her birth certificate. However, the Act required that her anatomical sex structure be changed from 'male' to 'female' before such a change could be made. CF was entirely happy with her body as it was and had no desire to undertake surgery to change.[148]

The Court held that the requirement of the Act violated CF's s 15 *Charter* right to equal protection and benefit of the law.[149] They recognized the distinction created by the Act between transgender people and cisgender people, as well as between transgender people who have undergone GRS and those who have not. This distinction was based on a ground listed in the *Charter*, namely "sex". The Court went on to say that if "sex" was to be so narrowly interpreted as to exclude characteristics of trans people, the distinction could be considered to be analogous to sex.[150]

The requirements of the Act were held to create disadvantage by perpetuating prejudice and stereotyping against trans people by forcing them to live with an

[148] *CF v Alberta (Vital Statistics),* 2014 ABQB 237 (CanLII), [2014] AJ No 420 (QL) at para 8 [*CF*].
[149] *CF* at para 60.
[150] *CF* at paras 38-39.

inconsistent gender marker on their identification and making them discuss the extremely personal details of their body with strangers.[151] The remedy for this was to hold the sections of the Act that required GRS of no force or effect.[152]

The Vital Statistics Information Regulation no longer has the requirement of GRS to change the gender marker on birth records.[153]

Driver's License or Alberta Identification Card

Previously, the Service Alberta website [154] indicated that people could adjust their gender information before or after GRS had been completed. However, there were a few steps that had to be completed and the gender could be readjusted if timelines of GRS were not met. An applicant had to submit two letters: one requesting the gender change with the applicant's information and another letter from a psychologist or psychiatrist stating that changing the sex designation was appropriate. After GRS had been completed, the applicant had to submit two affidavits: one from the surgeon or clinic that completed the procedure and one from the attending psychologist or psychiatrist, within 90 days of completion of the GRS. If the applicant decided not to complete the GRS, they had to notify the Motor Vehicles office within 90 days.

Currently, Alberta.ca states that you can change the sex marker on your driver's license or identification card to "F", "M", or "X". To do so, you must present an amended birth certificate. Minors must also have the consent of both parents/guardians, be married or an AIP, or have a court order dispensing with the parents/guardians' consent. No affidavits from medical professionals are required.[155]

Therefore, GRS is no longer needed to update these forms of identification. As well, the "X" marker is an option for individuals who do not conform to the binary "M" or "F".

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[151] *CF* at paras 47-49.
[152] *CF* at para 64.
[153] *Vital Statistics Information Regulation.* Alta Reg 108/2018, s 17.
[154] Service Alberta Online: http://www.servicealberta.ca/1692.cfm
[155] Alberta.ca, "Update Driving Documents" (2020). Retrieved from: https://www.alberta.ca/update-driving-documents.aspx#:~:text=a%20birth%20certificate-,Amend%20sex%20information,%22%2C%20or%20%22X.%22&text=To%20apply%20for%20a%20change,agent%20and%20request%20the%20change

Prerequisites to changing identification

Overall, Canada and Alberta have taken positive steps to alleviate the barriers for trans people who want to change their IDs. The requirement that anatomical sex structure be surgically changed was a discriminatory policy that perpetuated stereotypes of what makes someone a "real" man or woman. By removing these requirements, trans people are able to have identification that is consistent with who they are.

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

REFUGEES/IMMIGRANTS

Refugees and immigrants to Canada are regulated by the *Immigration and Refugee Protection Act* (*IRPA*).[156]

Immigration Rules

Until the *IRPA*[157] amendments in 2002, the same-sex partner of a Canadian person had difficulty entering Canada. The legislation required that couples had to have lived together to prove that they were in a committed relationship. This was often impossible for same-sex partners. It was also difficult for many same-sex couples where one partner lived in a country that had laws or societal values that frowned on same-sex relationships. To get around this, some same-sex partners were admitted to Canada under a provision that allowed for the Immigration process to take into account 'humanitarian and compassionate' reasons.[158]

Presently, the same-sex partner of a Canadian citizen can immigrate to Canada (1) as a married spouse, (2) as a common-law partner, or (3) as a conjugal partner. These

[156] Immigration and Refugee Protection Act, SC 2001, c 27 [*IRPA*].
[157] *IRPA.*
[158] *IRPA* s 67(1)(c).

three possibilities differ depending on the facts of the applicant's (non-Canadian citizen) situation. For same-sex couples who were legally married in Canada, immigration officials will recognize their relationship for the purposes of immigrating. Same-sex couples married in places like the Netherlands or Belgium, where same-sex marriage is legally recognized, may also immigrate if their marriage is valid.[159]

If your same-sex marriage is legal in your partner's home country, you can sponsor your partner as your spouse. If same-sex marriage is not legally recognized in your partner's home country, you can sponsor them as your common-law partner or conjugal partner, depending on how long you have been living together.

The Overseas Processing Manual #2 stated that trans people who "…change their sex legally, retain the sex they had at birth for the purposes of marriage" and that "A marriage to someone who has had a sex change is recognized for immigration purposes only where the parties are of the opposite birth sex".[160] This manual is no longer in the list of Active Manuals on the Government of Canada's Operational instructions and guidelines page for Immigration and therefore it is likely that this policy is no longer in force.[161] The next two sections discuss the difference between common-law partners and conjugal partners and how these differences affect immigration.

Common-law Partners

The applicant may also apply under the section for common-law partners (not to be confused with conjugal relationships). This can be used in circumstances where the couple were able to live together for some time. This is not always the case as same-sex couples may be persecuted if they openly live together. The Government of Canada website states that "your common-law partner":

- **isn't** legally married to you
- can be either sex
- is at least 18 years old

[159] Canada, Citizenship and Immigration Canada, *Sponsoring your family: Spouses and dependent children-who can apply,* online:<http://www.cic.gc.ca/english/immigrate/sponsor/spouse-apply-who.asp> (accessed June 16, 2011).
[160] *OP-2,* at s 5.31.
[161] Government of Canada, *Operational instructions and guidelines.* (2020). Retrieved from: https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals.html.

- has been living with you for at least 12 consecutive months, meaning you've been living together continuously for 1 year in a conjugal relationship, without any long periods apart
    - Any time spent away from each other should have been
        - short
        - temporary.[162]

Couples have to prove their relationship of at least 12 months by providing things like proof of shared property ownership, joint leases, shared utility bills, and more.[163] The above elements must be present for heterosexual and same-sex couples. Couples must show that they have a conjugal relationship and have been cohabiting for at least a period of one year or have done so in the recent past. However, because of stigma, stereotypes and anti-gay laws these rules are sometimes more difficult for same-sex couples. Therefore, the most recent amendments of the provisions affecting same-sex couples allows for two other methods of application. First, the partners may attempt to demonstrate that they were in a conjugal relationship but were unable to cohabit because of penal control (laws prohibiting same-sex relationships) or because of a fear of persecution or actual persecution. In this case the immigration process is open to proof that the relationship is a conjugal relationship but that it has been held back from cohabitation because of laws, traditions or persecution in the country of origin of the applicant.

Conjugal Relationships

Canadians can sponsor members from the family class to come to Canada. This includes a person with whom the Canadian is in a 'conjugal relationship'. In order for to qualify as a conjugal partner, your partner:

- isn't legally married to you or in a common-law relationship with you
- can be either sex
- is at least 18 years old
- has been in a relationship with you for at least 1 year
- lives outside Canada
- can't live with you in their country of residence or marry you because of significant legal **and** immigration reasons such as

[162] *Sponsor.*
[163] Government of Canada, *How can my common-law partner and I prove we have been together for 12 months?* (2020) Retrieved from: https://www.cic.gc.ca/english/helpcentre/answer.asp?qnum=347&top=14.

- their marital status (for example, they're still married to someone else in a country where divorce isn't possible)
- their sexual orientation (for example, you are in a same-sex relationship, and same-sex relationships are not accepted, or same-sex marriage is illegal where they live),
- persecution (for example, your relationship is between different religious groups which is not accepted and they may be punished legally or socially).[164]

Some factors that must be considered to determine if a couple is in a conjugal relationship are:

- shared shelter (e.g. sleeping arrangements)
- sexual and personal behaviour (e.g. fidelity, commitment, feelings towards each other)
- services (e.g. conduct and habit with respect to the sharing of household chores)
- social activities (e.g. their attitude and conduct as a couple in the community and with their families)
- economic support (e.g. financial arrangements, ownership of property)
- children (e.g. attitude and conduct concerning children)
- societal perception of the two as a couple.[165]

These categories give same-sex couples flexibility depending on their circumstances and the societal restrictions in the countries they are from.

Refugees

A person may apply for refugee status if they fit the following definition:

> A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,
>
> > (*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or

[164] Government of Canada *Sponsor your spouse, partner, or child: who you can sponsor.* (2020). Retrieved from: https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/family-sponsorship/spouse-partner-children/who-you-can-sponsor.html [*Sponsor*].
[165] Government of Canada, *Assessing conjugal relationships.* (2019). Retrieved from: https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/permanent-residence/non-economic-classes/family-class-determining-spouse/assessing-conjugal.html#requirements.

> (*b*) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.[166]

This definition means that in order to be defined as a refugee, a person must show a connection between a fear of harm and one of the listed grounds of persecution, namely: "…race, religion, nationality, membership in a particular social group or political opinion". LGBTQI2S+ individuals who need to apply as refugees will argue that they fall within the definition of 'refugee' and that their persecution stems from "political opinion", or "membership in a particular social group."

Initial decisions on sexual orientation demonstrated that the Immigration Refugee Board did not agree that gays and lesbians could make an argument for refugee protection based on being persecuted because of their sexual orientation.[167] However, by 1993 the Supreme Court of Canada in *Ward*[168] defined the term "particular social group" and included "sexual orientation" in the examples of types of groups covered. After the *Ward* decision it was generally accepted that gays and lesbians could make a claim for refugee status under section 96. In 2013, a transgender man was deemed to be a Convention Refugee after showing that the stringent requirements for a change of gender in his home country of South Korea established the serious possibility that he would face persecution on return to South Korea.[169] In 2015, two intersex girls were accepted as Convention Refugees as they would face a serious possibility of persecution in their home country of Jordan as a result of being incorrectly perceived as transgender or homosexual.[170] The case cited is actually that of the girl's family members, who were also found to be Convention Refugees as they had a well-founded fear of persecution in Jordan partially due to their familial connection to the intersex girls.[171] Therefore, immigration boards seem to be accepting of the claims of trans and intersex persons as well as LGBQ2S+ persons. However, bisexual claimants are less likely than gay and lesbian claimants to be

[166] *IRPA, at* s 96.
[167] Sean Rehaag, "Patrolling the Borders of Sexual Orientation: Bisexual Refugee Claims in Canada" (2008) 53 McGill L.J. 59-102 at para. 13 – 17 [Rehaag 1].
[168] *Canada (AG) v Ward,* [1993] 2 SCR 689, (1993), 103 DLR (4th) 1 [*Ward*].
[169] *X (Re),* 2013 CanLII 73865 (CA IRB) at paras 16, 26.
[170] *X (Re),* 2017 CanLII 52317 (CA IRB) at para 5 [*X (Re)*].
[171] *X (Re)* at para 77.

granted asylum. This is due to bisexuals being the most likely to have their sexual orientation disbelieved, especially in the case of bisexual women.[172]

A study[173] from 2013 to 2015 showed that 2,371 claims were made to the IRB based on sexual orientation. Of these, 30% involved female claimants, with the vast majority being male claimants. Of the total 2,371 claimants, 70.5% were granted refugee status. This compared with a granting rate of 62.5% of the overall 18,221 claims. Therefore, the granting rates in 2013-2015 for refugee status based on sexual orientation was higher than the overall rate of granting refugee status. However, studies of the actual refugee decisions demonstrate how stereotypes and bias can show up in other areas of the decision-making.

Rehaag[174] reviewed cases and an earlier finding by Millbank[175] to show how stereotypical images of gays and lesbians have affected IRB members' review of refugee applications. Rehaag notes the following assumptions applied to the facts of gay and lesbian refugee cases:

- using a westernized understanding of what gays and lesbians act like to determine if a claimant is a refugee based on sexual orientation;
- assuming that a lesbian woman will look masculine and a gay man will look feminine;
- assuming that violence against gay men happens mainly in public (for example, outside of bars and clubs) due to "inappropriate" displays of sexuality;
- assuming that violence against lesbian women happens mostly in private (for example, in homes or with family);
- using the lack of attendance to a gay bar to undermine a gay/lesbian claimant's credibility; and
- doubting a claimant's case if they have dated the opposite sex (i.e., are bisexual).

These assumptions can make it difficult for gay and lesbian claimants to make a case demonstrating that they were in fear of persecution based on their sexual orientation. For instance, a woman who looks traditionally heterosexual may have a more difficult time demonstrating that she is in fact a lesbian, if lesbians are seen as mostly "masculine"

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[172] Sean Rehaag, "Sexual Orientation in Canada's Revised Refugee Determination System: An Empirical Snapshot" (2017) 29:2 Can J Women Law, at 286-289 [Rehaag 2].
[173] Rehaag 2 at 277.
[174] Rehaag 1, at para 32-43.
[175] J. Millbank, "Imagining Otherness: Refugee Claims on the Basis of Sexuality in Canada and Australia" (2002) 26 Melbourne U.L. Rev 144 [Millbank].

women. Also, some gay and lesbian claimants will not attend gay bars, just as some heterosexual people will not go out to bars in general. Bisexual claimants also have a difficult time proving their refugee status because dating the opposite gender is seen as casting doubt on their sexual orientation.

Gay, lesbian and bisexual refugees still have problems today with proving their fear of persecution based on sexual orientation. Younger claimants who have not had sexual relationships, attended gay bars or participated in gay life in their home country sometimes have difficulty demonstrating that they left because of a fear of persecution.[176]

LGBTQI2S+ YOUTH

School

LGBTQI2S+ youth are a vulnerable population because of their lack of ability to make legal decisions for themselves. Social issues affecting LGBTQI2S+ youth include:

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

These issues are exacerbated in rural areas where the resources and support that LGBTQI2S+ youth need may only be available in the nearest city. Some smaller centres, such as Medicine Hat, do offer support services through their HIV/AIDS organization.[177] Many of the issues affecting LGBTQI2S+ youth are discussed in detail in the Alberta Civil Liberties Research Centre publication, *Freedom to Be: Human Rights, Sexual Orientation and Gender Identity*.[178] This paper focuses on specific legal issues that impact youth in their coming out process or in learning about the LGBTQI2S+ communities.

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[176] For instance, see the case of Alvaro O. Online: Slap upside the head http://www.slapupsidethehead.com/tag/refugees/ (accessed July 4, 2011).
[177] See Youthsafe.net for more information on resources and support services available across Alberta.
[178] Alberta Civil Liberties Research Centre, *Freedom to Be: A Teacher's Guide to Sexual Orientation, Gender Identity and Human Rights* (Calgary: Alberta Civil Liberties Research Centre, 2020) Online http://www.aclrc.com/new-page-40).

Youth who grow up having romantic feelings for a person of the same sex may feel confused if they have had no exposure or education on same-sex couples. Schools do not typically provide these resources, although some schools have begun Gay/Straight Alliances[179] to support youth. Setting up a Gay/Straight Alliance is sometimes limited by the principal of the school and, therefore, is not always an option that is open to students. Youth who need information may look on the internet or access services within the city they live. However, in elementary school and junior high youth are often sheltered from the outside world and trust those closest to them to provide information on personal topics.

Some youth come out so young that parents, family and school are the main places they receive most of their information. For instance, a trans boy who comes out at ten years of age will very likely need parental support to talk to the school about issues of what bathrooms he can use and what gender is noted on his record. Without a parent or family advocate it will be difficult for the youth to navigate these issues and the opinions/stereotypes of teachers and classmates. Many youths know at a very young age that they are LGBTQI2S+ and are still fairly vulnerable in terms of their dependence on the adults in their life. Therefore, enforcing their legal rights is often directly related to what supportive adults are in the youth's life, and how 'out' the youth is to those adults.

The issues affecting LGBQ2S+ youth in schools include: lack of representation of same-sex headed families, poor discussion of sexual orientation or sex and sexual orientation, assumption that all youth are heterosexual, bullying, difficulty finding a teacher/mentor who is LGBQ2S+ friendly,[180] living in hiding as heterosexual, coming out, and accessing correct information on being LGBQ2S+.

Some issues facing trans youth are: lack of discussion about trans youth and therefore lack of information; coming out to oneself but difficulty finding a mentor, parent, family member or representative for school issues; finding a bathroom that is safe to use based on one's gender identity and gender expression; understanding one's gender identity and expression; exercising their gender expression in general; wanting to take hormones or

[179] A group of gay and straight students who come together to educate, celebrate and learn more about the challenges facing LGBT students.
[180] There are of course many teachers who are LGBT friendly but it still takes some thought and consideration to find out who is a safe teacher with whom to discuss issues.

have surgery; having proper identification for travel or school information that matches the gender the youth expresses; and experiencing other issues including lack of inclusion in curriculum, social circles or gender-related activities.

One of the more pertinent issues for trans youth is figuring out what bathroom they are permitted to use. Trans youth who have supportive parents can still face the steep learning curve of the school and administrators in addressing the youth's concerns. Many teachers and principals are very interested in supporting LGBTQI2S+ youth and have taken on this learning actively trying to find resources by attending conferences, joining the Alberta Teachers' Association (ATA) Sub-committee on Sexual Orientation and Gender Identity (SOGI), or taking on individual cases within their schools and ensuring teachers understand their rights and responsibilities to LGBTQI2S+ youth. However, there are issues for trans students that have yet to be decided in a legal venue. For instance, courts and tribunals have supported the right of a trans adult's use of the bathroom that matches with their gender identity. However, this issue has not yet been tested for youth.[181] In 2016, the Alberta Government released "Guidelines for Best Practices: Creating Learning Environments that Respect Diverse Sexual Orientations, Gender Identities and Gender Expressions".[182] These guidelines set out best practices regarding trans students and their use of washrooms. It states that "Students with diverse sexual orientations, gender identities and gender expressions have a right to accommodation when it comes to the use of washroom and change-room facilities that are congruent with their gender identity." It goes on to mention that this not only applies to the school, but at any location during school-related activities. Examples of this best practice in action were listed, including that every school provide a non-gendered, single-stall washroom, that students are allowed to use the washroom that best fits their gender identity, and more.

[181] See for instance: *Sheridan*, at para 111: "…if any inquiries by an employee of the Respondent need to be made to verify that an individual is a transsexual in transition, such inquiries must be made in a dignified, private, and non-confrontational manner, keeping in mind the immediate nature of the service required."
[182] Alberta Government, "Guidelines for Best Practices: Creating Learning Environments that Respect Diverse Sexual Orientations, Gender Identities and Gender Expressions" (2016). Retrieved from: https://education.alberta.ca/media/1626737/91383-attachment-1-guidelines-final.pdf.

Another issue for trans youth who have made significant transition to the gender they identify with is the disclosure of their gender identity. Often, staff at the school will know the student's birth gender and given name, but the student may not want this shared with students. The Best Practices Guide instructs staff to ensure confidentiality when a student's legal name (when different than their preferred name) must be reported, to use a student's preferred name consistently on school issued documents, and to ensure that gender designations are never included beside students' names or as a composite number for the group. In 2016, a case came before the Alberta Office of the Information and Privacy Commissioner (AB OIPC).[183] This case involved a transgender girl who attended an Edmonton public school. The student and her parents met with school officials to ensure that teachers understood the student's gender identity and kept the information private. At the time, the student's legal name had not been changed and reflected a typically male gender. Unfortunately, the student's legal name was entered into the software used to take attendance in class. On more than one occasion, the teacher read aloud the student's legal name during attendance while the legal name was displayed on a screen visible to the entire class. The student submitted a complaint to the AB OIPC alleging that the school had breached the *Freedom of Information and Protection of Privacy Act* (FOIPPA)[184] by releasing this information. The disclosure of the student's legal name was found to be a breach of FOIPPA, and the school district was ordered to stop disclosing said information and make reasonable security arrangements to protect against any further disclosures. The Commissioner found that a draft policy brought forward by the district after this incident showed that the district was on its way to creating a policy that would adequately protect students' information.

There is a movement for supporting not only trans students, but other forms of diversity, in schools. The ATA supported trans students by amending the *Code of Professional Conduct* in 2003 to include 'gender identity' as a protected ground of discrimination.[185] It also amended its *Declaration of Rights and Responsibilities* *For*

[183] *Edmonton Public School District No 7 (Re),* 2016 CanLII 82100 (AB OIPC).
[184] *Freedom of Information and Protection of Privacy Acy,* RSA 2000, c-F-25.
[185] The Alberta Teachers' Association, "Code of Professional Conduct" (2018). Retrieved from: https://www.teachers.ab.ca/SiteCollectionDocuments/ATA/Publications/Teachers-as-Professionals/IM-4E%20Code%20of%20Professional%20Conduct.pdf.

Teachers in 2004 to include gender identity.[186] Both documents now also include gender expression.

The Calgary Board of Education released "Guidelines for Attending to Gender Identity, Gender Expression and Sexual Orientation in our Schools" in 2019.[187] Some guidelines of note are that teachers must hold any disclosures of gender identity/expression and sexual orientation in confidence, call students by their preferred name and pronouns, and ensure the safe use of the washroom of the student's choice (including the availability of a gender neutral or universal washroom). In 2018, the Edmonton Public Schools Board implemented a Sexual Orientation and Gender Identity Policy,[188] which also implemented rules around restroom accessibility, names and pronouns, and more.

These policy changes create an opportunity for school staff and the public to learn about the challenges facing LGBTQI2S+ students in school. Having administrative regulations protecting these students will be a huge leap in equality and safety for all students.

Trans Youth

In a BC Court of Appeal case, a 14-year old transgender boy was deemed to be a mature minor and therefore had the capacity to choose to pursue hormone treatment without the consent of his parents[189]. The boy, AB, had identified as male since the age of 11, began to socially transition at age 12, and at 13, began to pursue steps to appear more masculine.[190]

[186] The Alberta Teachers' Association, "Declaration of Rights and Responsibilities for Teachers" (2018). Retrieved from: https://www.teachers.ab.ca/SiteCollectionDocuments/ATA/Publications/Teachers-as-Professionals/IM-5E%20Declaration%20of%20Rights.pdf.
[187] Calgary Board of Education, "Guidelines for Attending to Gender Identity, Gender Expression and Sexual Orientation in our Schools" (2019). Retrieved from: https://www.cbe.ab.ca/about-us/school-culture-and-environment/Documents/Guidelines-Attending-Gender-Identity-Gender-Expression-Sexual-Orientation-Schools.pdf.
[188] Edmonton Public School Board, "Sexual Orientation and Gender Identity" (2018). Retrieved from: https://epsb.ca/ourdistrict/policy/h/hfa-ar/.
[189] *AB v CD,* 2020 BCCA 11 (CanLII) at para 174 [*AB*].
[190] *AB* at paras 11-12.

AB's father outwardly opposed the treatment, misgendered AB, and addressed AB by his birth name instead of his chosen name. At the trial level, this behaviour was deemed to be family violence, and was the basis for a protection order that restrained the father from attempting to persuade AB to abandon the treatment, addressing AB by his birth name, and referring to AB as a girl or with female pronouns, either to AB or to others.[191] The father was also restrained from sharing information including AB's sex, gender identity, sexual orientation, and physical/mental health, with anyone other than legal counsel, the Court, medical professionals, or anyone authorized by the Court or AB.[192]

The BC Court of Appeal held that, although the father's behaviour was hurtful to AB, it did not constitute family violence. This was partially due to the fact that as a mature minor, AB had the capacity to hear opposing opinions, and because the father generally allowed AB to disengage from the conversations when he was uncomfortable.[193] The Court of Appeal decided that a conduct order, under s 227(c) of the Family Law Act of BC (Family Law Act, SBC 2011, c 25), was more appropriate than the protection order that was made by the trial court.[194]

The Court of Appeal concluded that AB's consent to treatment was valid without consent from his parents.[195] They substituted a conduct order for the protection order of the Trial Court, and ordered that the father:

> i. acknowledge and refer to AB as male and employ male pronouns, both generally and with respect to any matters arising in these proceedings; and
> ii. identify AB by the name he has chosen, both generally and with respect to matters arising in these proceedings.[196]

The father was also prohibited from "[publishing] information or providing documentation relating to AB's gender identity, physical and mental health, medical status or treatments, other than with":

> i. his retained legal counsel;
> ii. retained legal counsel for AB or EF;

[191] *AB* at para 165.
[192] *AB* at para 166.
[193] *AB* at para 174.
[194] *AB* at para 188.
[195] *AB* at para 219.
[196] *AB* at para 220.

iii. medical professionals engaged in AB's care or CD's care;
iv. any other person authorized by AB's written consent; and
v. any other person authorized by court order.[197]

The father was not prohibited from expressing his opinion on AB's treatment in private conversations with family, close friends, and close advisors, as long as these people assured him they would not share such information and they were not part of the media or any public forum.[198]

This case is a step forward for trans minors who have parents that oppose their gender identity or expression and desire to seek treatment. Although the Court of Appeal concluded that the father's behaviour was not family violence, their conduct order recognized the harm of his actions and prohibited them. This decision also recognizes the ability of trans minors to make informed decisions and provide consent regarding their transition and its related treatments. As a BC Court of Appeal case, this does not set a precedent across Canada, and provincial capability and consent laws may still bar trans youth from obtaining treatment without parental consent.

Conversion Therapy

Conversion therapy, one form of the variety of harmful practices known as sexual orientation and gender identity and expression change efforts (SOGIECE), is a therapeutic attempt to change the sexual orientation, gender identity, or gender expression of LGBTQ2S+ individuals to heterosexual or cisgender.[199]

Conversion therapy is opposed by many organizations, including the Canadian Psychological Association and the World Health Organization.[200] Conversion therapy

[197] *AB* at para 222.
[198] *AB* at para 223.
[199] American Academy of Pediatrics, "Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescents" (2018) 142:4 Pediatrics at 4; Shidlo, Ariel, and Schroder, Michael, "Changing Sexual Orientation: A Consumer's Report" (2002) 33:3 Professional Psychology at 249 [*Shidlo*].
[200] Canadian Psychological Association, "CPA Policy Statement on Conversion/Reparative Therapy for Sexual Orientation". Retrieved from: https://cpa.ca/docs/File/Position/SOGII%20Policy%20Statement%20-%20LGB%20Conversion%20Therapy%20FINALAPPROVED2015.pdf ; Pan American Health Organization: Regional Office of the World Health Organization, "Cures for an Illness that does not Exist: Purported therapies aimed at changing sexual orientation lack medical justification and are ethically unacceptable". Retrieved from: https://www.paho.org/hq/dmdocuments/2012/Conversion-Therapies-EN.pdf at 2.

treatments may include prayer or religious rites, modification of behaviours, and individual or group counselling.[201]

The Community-Based Research Centre reported in 2020 that 1 in 5 BGTQ2S+ men had experienced SOGIECE and proportionally, younger men experience SOGIECE more than older men. The highest exposure to SOGIECE was men aged 15-19. Of all respondents, 48% reported their gender identity as transgender.[202] Conversion therapy is ineffective, and can have serious negative effects on the individual, including depression, suicidality, internalized homophobia, and interference with intimate relationships.[203]

Conversion therapy is slowly being banned in certain municipalities. For example, Calgary banned the practice in 2020 under the *Prohibited Businesses Bylaw* (bylaw number 20M2020). However, the practice is still legal at the federal level. On December 19, 2019, Prime Minister Justin Trudeau expressed his intent to amend the *Criminal Code* to ban conversion therapy throughout Canada.[204] Therefore, although a federal ban will hopefully be instituted soon, the practice is currently legal in many municipalities in Canada, and LGBTQ2S+ individuals can still be harmed by it.

Intersex Youth Bodily Autonomy

"Intersex" is an umbrella term used to describe persons whose reproductive or sexual anatomy does not conform to the typical definitions of "male" or "female".[205] Like gender, the shape and size of anatomical sex structures are spectrums onto which humans have placed social constructions of what it means to look "male" and "female". There are many conditions that can make a person intersex, and many are not noticeable at birth. Some people will never even know that they have an intersex condition. Intersex people may have atypical genitalia, hormone levels, internal reproductive systems, or 46th

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[201] Bright, Chuck, "Deconstructing Reparative Therapy: An Examination of the Processes Involved when Attempting to Change Sexual Orientation" (2004) 32:4 Clin Soc Work J at 473.
[202] Community-Based Research Centre, "The Latest: Conversion Therapy & SOGIECE in Canada" (2020). Retrieved from: https://www.cbrc.net/sex_now_survey_results_reveal_prevalence_of_change_efforts
[203] *Shidlo* at 257.
[204] Rt Hon Justin Trudeau, PC, MP, "Minister of Justice and Attorney General of Canada Mandate Letter" (2019). Retrieved from: https://pm.gc.ca/en/mandate-letters/2019/12/13/minister-justice-and-attorney-general-canada-mandate-letter
[205] InterACT, "FAQ: What is intersex?" (2020). Retrieved from: https://interactadvocates.org/faq/ [*InterACT*]

chromosome combinations[206]. For example, androgen insensitivity syndrome (AIS) is when a person is genetically male (one X, one Y chromosome), but is resistant to male hormones called androgens. This causes the person to have physical traits that are typically female. It is also possible to have male external genitalia while having two 46X chromosomes and internal ovaries. It is estimated that about 1.7% of people are born intersex.[207]

This discussion will focus on the cases when a person's genitalia falls somewhere outside of what is typically considered "male" or "female", or when internal reproductive systems do not match external genitalia. This is because ambiguous genitalia or incongruent reproductive organs are legally allowed to be surgically "corrected" by doctors with parental, but not patient, consent. Section 268(3) of the *Criminal Code* is intended to prohibit female genital mutilation, but 268(3)(a) allows for qualified medical practitioners to perform surgery of this kind "for the benefit of the physical health of the person or for the purpose of that person having normal reproductive function or normal sexual appearance or function".[208] These surgeries can be medically necessary or cosmetic. An example of a medically necessary surgery would be the case of a child with cancerous gonads that must be removed. However, many surgeries are to "normalize" the appearance of the genitalia and are therefore cosmetic.

"Normalizing" surgeries are inherently problematic as the wording itself suggests that intersex persons are not normal, even though they are common in the population and only considered to be different due to a social construction of "normal" anatomical sex. These surgeries can include a reduction of the size of the clitoris or removal of incongruent reproductive structures.[209] Another problematic aspect of these "normalizing" surgeries is that a main goal of them is to enable heterosexual penetrative intercourse.[210] When these surgeries are done on children, doctors and parents cannot know if heterosexual intercourse will ever even be desired by the child. This assumption

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[206] *InterACT.*
[207] *InterACT.*
[208] *Criminal Code,* RSC, 1985, c C-46, s 268(3)(a).
[209] *InterACT.*
[210] Human Rights Watch and InterACT. "'I Want To Be Like Nature Made Me', Medically Unnecessary Surgeries on Intersex Children in the USA". (2017). Retrieved from: https://www.hrw.org/report/2017/07/25/i-want-be-nature-made-me/medically-unnecessary-surgeries-intersex-children-us#_ftn34 . [*HRW*]

perpetuates heteronormativity – the often-unconscious bias that assumes all people are heterosexual, ignoring diversity in sexual attraction.[211]

In a 2019 Human Rights Watch (HRW) and InterACT report, three former US Surgeons General stated that "there is insufficient evidence that growing up with atypical genitalia leads to psychosocial distress"[212]. They go on to say that "while there is little evidence that cosmetic infant genitoplasty is necessary to reduce psychosocial damage, evidence does show that the surgery itself can cause severe and irreversible physical harm and emotional distress"[213]. The report lists possible negative effects of infant/childhood intersex surgeries:

- Scarring,
- Incontinence,
- Loss of sexual sensation and function,
- Psychological trauma including depression and post-traumatic stress disorder,
- The risk of anesthetic attendant to surgical procedures on young children,
- Sterilization,
- The need for lifelong hormone therapy, and
- Irreversible surgical imposition of a sex assignment that the individual later rejects.[214]

The HRW report finally recommends that the US Congress "Pass legislation to ban all surgical procedures that seek to alter the gonads or genitals of children with atypical sex characteristics too young to participate in the decision, when those procedures both carry a meaningful risk of harm and can be safely deferred."[215] A similar demand has been put forward by Egale Canada, who asked Parliament to update the *Criminal Code* to make it unlawful to perform these surgeries on a minor in cases where the surgery can be safely deferred until the patient can provide informed consent.[216]

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[211] Egale Canada Human Rights Trust, "Glossary of Terms" at page 12. Retrieved from: https://egale.ca/wp-content/uploads/2017/03/Egales-Glossary-of-Terms.pdf.
[212] *HRW*.
[213] *HRW*.
[214] *HRW*.
[215] *HRW*.
[216] Kennedy, Helen, Holmes, Morgan, and Egale Canada Human Rights Trust, "'65 Reasons': The Rights of Intersex People in Canada". (2019). Retrieved from: https://egale.ca/wp-content/uploads/2019/10/2-Intersex-Final-65-Reasons.pdf

SUMMARY

The above discussion outlines the challenges that still face LGBTQI2S+ individuals and communities. These issues can be grouped into the following areas:

1. Discrimination and harassment based on stereotypes or hatred cause LGBTQI2S+ people to become involved in the legal system to resolve these issues.
2. New laws that are implemented and potentially discriminatory against the LGBTQI2S+ communities come with a cost (time and money), to LGBTQI2S+ litigants, as they challenge them in court.
3. There is little case law addressing bisexual people. They are protected when they pass as lesbian or gay, but sometimes their legal case suffers when it is shown that they have been in a heterosexual relationship (for instance, in immigration applications).
4. There is still a need to update many Albertan laws to reflect the equality that Courts have already ruled upon.
5. Legal services and caselaw that are based on stereotypical assumptions of gender and sexual orientation cause for substandard service to LGBTQI2S+ people, and misleading decisions.
6. There is a lack of information and resources available on legal rights of LGBTQI2S+ people and legal responsibilities toward them. This is especially true in rural areas and also for youth in Alberta.

The foregoing material summarizes the legal issues facing LGBTQI2S+ claimants today. The law is quickly changing, and this presents another challenge for LGBTQI2S+ people to keep apprised of what rights have been supported in the courts or amended in legislation. Upon closer examination, the main legal issues facing the lesbian and gay communities are about how the law is applied and interpreted, amending incorrect laws, getting legal information, and general discrimination and harassment. The issues for bisexual people are the same as lesbians and gays, when they are in a same-sex relationship. However, the presumption that a person is heterosexual when in an opposite-sex relationship and other stereotypes about bisexuality create the main legal issues for those who identify as bisexual. When these stereotypes are used to determine

legal rights, bisexual people are at a disadvantage. Trans people also suffer from stereotypes, discrimination and harassment, as education on the trans experience is only beginning to receive wider attention. Intersex people face challenges to their bodily autonomy and capacity to refuse surgery as youths. This is also an issue that has not gained wide public attention yet.

Some of these areas will change over time with more education and knowledge about the challenges facing LGBTQI2S+ populations. However, some issues still need legislative amendments or recognition. The final section of this paper explores some of the legal issues that may be seen in front of courts and tribunals in the near future.

POTENTIAL LEGAL ISSUES

There are a myriad of potential human rights issues that could arise in front of courts and tribunals in the future. Issues such as same-sex marriage appear to be in the past, but still hold such strong views in some populations that even this right may not be taken for granted.

Many legal battles have been won, and this paper shows that, for gays and lesbians, rights are generally the accepted practice within most legal contexts. The gaps for gays, lesbians and bisexuals are in the potential for bias or stereotypes in applying laws and in some gays and lesbians not knowing their rights. Trans people are still fighting to safely use washrooms of their choice, but courts are accepting of this as discrimination and have compensated victims accordingly. As well, rules around ID have made it much easier for trans people to have their ID markers congruent with their gender identity. However, trans youth may face issues with changing gender markers or gaining access to treatments if their parents are not in agreement. The biggest gaps in actual law are arguably seen in issues affecting the intersex community.

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

Definition of 'Parent' and number of legal parents

With changing families and sharing of parenting responsibilities it is getting more difficult to say that it is always in the best interests of the child that s/he have only two legal parents. A key case,[217] which changed the ability of the court to declare a third parent, involved a lesbian couple who had conceived a child with a male friend. The legal parents of the child were the birth mother and the male friend. However, the child lived with and was primarily cared for by the lesbian couple. There was a gap in the law protecting the rights and responsibilities of the child's non-birth mother ("CC"). CC was unable to get the child airline tickets, a passport or a social insurance card. In addition, if the birth mother died, CC would have no legal rights or ability to care for their child. The Court of Appeal used its *parens patriae* jurisdiction to find that CC was a parent of the child and in this case three parents were legally acknowledged.

Other cases have addressed this issue of becoming a parent. *Fraess* acknowledged that lesbian parents who used artificial insemination could put their names on the registration of birth and legally become parents without a formalized adoption. Another case[218] from Alberta involved two gay men who had a child with the help of a surrogate mother. All of these cases examine the definition of parent, how one is defined as a parent, and how many legal parents a child may have. The caselaw in this area is still developing.

Can medical treatment be refused to trans Albertans?

Re-listing GRS has been one step toward providing health and medical services for trans Albertans. However, funding for GRS often does not include all forms of surgery that a trans person may require or desire. Many surgeries are considered to be cosmetic, and therefore are not covered. We could see litigation in the area of health services and what is available to the trans community.

In addition, anecdotal stories from trans community members have indicated that doctors will sometimes treat them as trans first and ignore or forget to check obvious signs of illness that do not have to do with their trans status. Also, trans people have

[217] *AA v BB and CC* (2007), 83 OR (3d) 561 (ONCA).
[218] *DWH v DJR,* 2011 ABQB 608; additional reasons 2011 ABQB 791.

related stories of doctors refusing to treat them or offer regular physicals because of their trans status. A claim such as this could be brought under the *AHRA* as a refusal of services based on a person's trans status.

Clean up the legislation

An issue that has a lesser legal effect, but greatly affects the rights of LGBQ2S+ communities is the fact that many pieces of legislation and the policies behind it have not been updated to include same-sex couples. Some legislation still uses the terms "husband" and "wife" and offers no inclusion of same-sex couples.[219] In order to change this legislation, each statute must be challenged separately or the Government of Alberta must make amendments similar to how other provinces have changed the definition of spouse in their legislation.[220]

Refugees proving their status in a homophobic home country

Assumptions about LGBTQI2S+ communities make it difficult for claimants to demonstrate that they are in fear of persecution based on their sexual orientation or gender identity. As discussed above, Rehaag reviewed cases and found that certain assumptions applied to the facts of gay and lesbian refugee cases. Where these stereotypes do exist, gay and lesbian claimants will have an additional hurdle to overcome in proving their refugee status. Bisexual claimants who have dated people of the opposite sex are one group who will have to overcome the stereotype that there is a choice in who they date and therefore no persecution.

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

The debate on whether prosecuting hate expression is too large a limitation on freedom of expression is highly applicable to the LGBTQI2S+ communities. These communities are sometimes at great risk of being hurt by hateful expression in environments where little or no other groups will stand up for their rights. LGBTQI2S+

[219] For example, *Law of Property Act,* RSA 2000, c L-7, s 4-6., *Family Law Act,* SA 2003, c F-4.5, s 105-106, *Trustee Act,* RSA 2000, c T-8, s 20.
[220] See for instance, *Definition of Spouse Amendment Act*, SBC 2000: 4th Session, 36th Parl.

people who experience hatred, even in the form of expression, can feel quite alone in their fight for equality. The debate rages on whether as a society we should limit hateful expression even though it violates full freedom of expression.

Civil libertarian organizations generally advocate for freedom of expression and are generally opposed to numerous forms of discrimination. While most civil libertarians would agree that Canadian society should be extremely concerned about prejudiced or discriminatory statements, civil liberties organizations in Canada have varying philosophies on how, when and if freedom of expression should be restricted. Some civil libertarians view hate expression laws as a way to censor unpopular forms of expression, and see the potential for these laws to be misapplied.[221] In general, the Canadian Civil Liberties Association (CCLA) is of this view, stating:

> When government actors are allowed to decide which opinions can be expressed and which cannot, an open, vibrant and diverse society quickly breaks down. Similarly, when our court system is used to silence those with unpopular views or those who oppose powerful actors, we all lose the opportunity to hear all sides of an issue and come to our own conclusions. Freedom of expression is the right to speak, but also the right to hear. Informed political debate requires that this right be strongly protected, and it is only through free expression that individuals can take action to ensure that our governing institutions are held accountable.[222]

The British Columbia Civil Liberties Association (BCCLA) has taken a traditional civil libertarian approach, which supports freedom of expression, despite the message being offensive. In 2019 they stated, "The BCCLA strongly believes that a broad range of perspectives must be welcome in our public sphere. We support the rights of people in Canada to celebrate or condemn the actions of foreign or domestic governments, without being vulnerable to state action. We continue to hold that the best remedy for bad speech is not censorship, but better speech and more compelling arguments."[223]

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[221] ACLRC 2004, at 91.
[222] CCLA, "Freedom of Expression". Retrieved from: https://ccla.org/freedom-of-expression/
[223] BCCLA, "The BCCLA opposes the international campaign to adopt the International Holocaust Remembrance Association (IHRA) definition of antisemitism", (2019). Retrieved from: https://bccla.org/our_work/the-bccla-opposes-the-international-campaign-to-adopt-the-international-holocaust-remembrance-association-ihra-definition-of-antisemitism/.

On the other hand, supporters of stricter hate speech laws say the *Criminal Code* sections dealing with hate expression are too outdated and limited in the protection available to minority groups.[224] As a result, these critics have called for reform of hate speech law through a further expansion of the term "identifiable group" to include more criteria, or through the abolishment of the concept of identifiable group so that all expressions of hatred could be prosecuted.[225]

American civil libertarian groups tend to lean towards permitting the expression of all ideas and beliefs, no matter how offensive, guided by the philosophy that in a free marketplace of ideas the absurdity of hate speech will be exposed and ultimately rejected.[226]

Some cases that examine how the courts and tribunals determine what constitutes "hate expression" and how it should be limited under human rights legislation are discussed in Appendix A. These cases expand upon the debate on whether hate expression laws should have the power to limit freedom of expression in limited circumstances. While this debate rages on in the courts and society-at-large, LGBTQI2S+ populations will continue to be affected on a personal and daily basis. The answer to this debate is a matter of law and the development of policy and human rights. Only the future will tell how the courts handle this critical issue.

Protecting the rights of trans people

It is difficult to pinpoint which legal issues will be isolated for a human rights challenge in the future based on trans human rights, but easy to know that there will be a number of them. Issues that arise from the process of coming out as a trans person, to the treatment of trans people as youth, to discrimination at work and harassment in general are all potential causes of court action.

Coming out and transitioning can be a difficult time for a trans person. Often, medical standards require that they live in their identified gender for a period of time before surgery. This is often the first time a trans person will be out at work, to family, or to some friends. Strong protection against discrimination is needed during this time, but

[224] ACLRC, 2004.
[225] ACLRC, 2004.
[226] ACLRC, 2004.

not all employers are aware of trans rights. The process of transitioning can take two to eight years, and during this time many people may discover the trans person's birth gender. This could lead to harassment or discrimination.

Trans youth are in a particularly precarious position. Medical professionals and parents may refuse to do any surgery until the youth is 18 years old, and yet the time between when the trans youth asks for surgery and the time he or she is able to have the surgery, is not protected by solid policies as of yet.

Obviously, education would go a long way to assist these youth but often teachers do not have enough information or proper education on this matter, or parents complain about kids learning about trans issues at such an early age. Teaching about trans issues is difficult unless the educator has a solid knowledge base. Nevertheless, anecdotal information has shown that some schools are addressing the issues for trans youth and finding ways to accommodate their needs. As policies develop, such as the Edmonton Public School Policy as mentioned earlier, it will be much easier for these schools to address trans youth thoughtfully. The Alberta government's "Guidelines for Best Practices: Creating Learning Environments that Respect Diverse Sexual Orientations, Gender Identities and Gender Expressions", released in 2016, is a great resource for schools and teachers to learn about LGBTQI2S+ student issues.

Trans incarcerated individuals also face some important legal issues. The small percentage of inmates who are openly trans can pose an issue for changing policies, as fewer voices are calling for change. For instance, in the *Kavanagh* case[227] the Judge noted that at the time of the hearing there were 12,500 incarcerated persons. Out of those only ten were trans and four of the ten were seeking gender reassignment surgery. This amounts to 0.03% of the inmate population that the decision would affect. Unfortunately, this small population can often be overlooked in calls for reform.

[227] *Kavanagh*, at para 45.

Appendix A

Kane (Re)

The Alberta freedom of expression case, *Kane (Re)*,[228] illustrates how provincial human rights bodies can balance the two competing interests at play in freedom of expression cases. This balance is achieved through the examination of the nature of the contentious statement in a full, contextual manner which recognizes the objectives and goals of the human rights legislation, in a manner that is sensitive to the *Charter*. The case involved Harvey Kane, the Executive Director of Jewish Defence League of Canada, and an article published in the *Alberta Report* (no longer in publication).[229] The article made several references to negative stereotypes about Jewish people in its discussion of a dispute relating to a failed property development project in Canmore. Kane made a formal complaint to the then-named Alberta Human Rights and Citizenship Commission stating that the article violated s 2 of the *Alberta Human Rights, Citizenship and Multiculturalism Act* (now, the *AHRA),* which related to discriminatory publications. The Court in *Kane* ultimately found that a person does not need to be involved in the publication, issuance or display of the discriminatory material in a "hands on" sense in order to be liable under the provincial human rights law. [230]

The Court said that a person's liability will be determined by the degree of indirect involvement in the discriminatory publication, and this involvement will have to be determined on a case by case basis as part of a full contextual review.[231] The judge in *Kane (Re)* made his decision based on the principle that human rights legislation should have a broad and liberal interpretation. The case was very important for cases involving freedom of expression in Alberta and hate expression. The Court found that it is essential that the Alberta Human Rights Panel consider the:

1. nature and context of the expression,
2. degree of protection that the type of expression is afforded,

[228] 2001 ABQB 570 [*Re Kane*].
[229] *Re Kane.*
[230] *Re Kane,* at para 32
[231] *Re Kane,* at para 32.

3. other provisions of the Charter which may come into play including equality rights, aboriginal rights, multicultural rights, sexual equality, and freedom of religion.[232]

Lund v Boissoin[233]

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

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

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

Shortly after, the *Red Deer Advocate* apologized to Dr. Lund, published a statement to that effect, and changed its policy regarding letters to the editor. As a result of these actions, the newspaper was not compelled to appear before the Human Rights Tribunal, and a complaint proceeded against Mr. Boissoin and the Concerned Christian Coalition. Mr. Boissoin argued that he did not believe the letter was discriminatory, nor did he intend to discriminate against anyone based on their sexual orientation, but that he was hoping to generate some spirited debate in the community. Mr. Boissoin further argued that the war metaphor used was referring to a war of ideologies. The Panel did not hear evidence from the Concerned Christian Coalition.

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[232] *Re Kane at* para 32.
[233] ABHRT 2007 [*Lund v Boissoin* ABHRT], overruled 2010 ABQB 123 [*Lund v Boissoin* ABQB], appeal dismissed 2012 ABCA 300.

The panel found that the Coalition had contravened s 3(1)(b) of the *Alberta Human Rights, Citizenship and Multiculturalism Act* (now the *AHRA*) in the same manner as Mr. Boissoin had contravened the Act.[234] Dr. Lund argued that the letter met the legal test for exposure to hatred, as set out in the case *Canadian Jewish Congress v North Shore Free Press Ltd.*,[235] and argued that the letter dehumanizes people based on sexual orientation, had a militaristic tone, and is degrading, insulting and offensive.[236] Dr. Lund compared these statements to those made by James Keegstra in the 1980s.[237] Dr. Lund argued that Keegstra and Boissoin similarly exposed an identifiable group to hatred, said the groups threatened children, and both evoked fears that the groups posed a dangerous threat to Christian institutions. Dr. Lund relied on a number of legal arguments in starting an action against Mr. Boissoin, including a news item published two weeks after the letter to the editor, in the July 4, 2002, edition of the Red Deer Advocate. The news story became integral to the complaint and the Panel's decision on Boissoin's letter.[238] That news item reported that a gay teenager had been seriously assaulted in downtown Red Deer solely because he was gay, and also reported of the teen: "He doesn't feel safe reading the anti-gay statements like the ones in the Red Deer Advocate's June 17 letter to the editor from Stephen Boissoin of the Concerned Christian Coalition. 'I feel the letter was just encouragement for people to go out and stop the gay rights movement.'"[239] Lund testified that the reported assault and the teen victim's reference to Boissoin's letter triggered his complaint the Commission.[240] Constable Doug Jones gave evidence at the hearing which confirmed that LBGT youth are more vulnerable in rural areas.

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

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[234] *Lund v Boissoin* ABHRT at para 15.
[235] *Canadian Jewish Congress v North Shore Free Press Ltd.,* [1997] BCHRTD No 23 para 139-140.
[236] *Lund v Boissoin* ABHRT.
[237] *Keegstra*.
[238] *Lund v Boissoin* ABHRT at para 15.
[239] *Lund v Boissoin* ABHRT at para 15.
[240] *Lund v Boissoin* ABHRT at para 15.

On appeal to the Alberta Court of Queen's Bench, Boissoin was successful in arguing that his letter was not a violation of s 3(2) of the *AHRA*.[241] Mr. Lund appealed this decision to the Alberta Court of Appeal, and his appeal was dismissed in 2012.

This case, and the following case out of Saskatchewan illustrate the challenges in proving hate expression.

Whatcott v Saskatchewan[242]

In 2001 and 2002 Bill Whatcott distributed flyers that advocated for the re-criminalization of sodomy and attempted to convince readers that gays and lesbians posed a threat to Saskatchewan's children and educational system. The flyers were created under the name of the Christian Truth Activists and were distributed to homes in Regina and Saskatoon bearing headings such as "Keep Homosexuality out of Saskatoon's Public Schools" and "Sodomites in our Public Schools."[243]

Four individuals complained to the Saskatchewan Human Rights Tribunal, which held that the materials promoted hatred against individuals based on their sexual orientation and that the material intended to expose gay and lesbian people to hatred and ridicule, and to belittle and otherwise affront their dignity. The Tribunal noted that the *Saskatchewan Human Rights Code*[244] was a reasonable limit on Whatcott's freedoms of religion and expression.[245] The Tribunal awarded each complainant money for "the loss of their dignity and self-respect and their hurt feelings".[246]

Whatcott appealed the Tribunal decision and the Court of Queen's Bench[247] found that the Tribunal erred in failing to identify the portion of the Code the flyers contravened. The case eventually went to the Saskatchewan Court of Appeal,[248] which

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[241] 2010 ABQB 123 [*Lund v Boissoin* ABQB].
[242] *Whatcott v Saskatchewan (Human Rights Tribunal),* 52 CHRR D/264 (SHRT) [*Whatcott* SHRT], overturned 2007 SKQB 450 [*Whatcott* SKQB], which was overturned 2010 SKCA 26 [*Whatcott* SKCA], appeal to SCC allowed in part, 2013 SCC 11 [*Whatcott, SCC*].
[243] Karen Selick. *Top court gets second chance to do right thing on free speech; Saskatchewan appeal could allow justices to rein in power of rights bodies*. *The Gazette*. Montreal, Que.: November 12, 2010, pg. A.21
Online:
<A.21http://ezproxy.lib.ucalgary.ca:2048/login?url=http://proquest.umi.com.ezproxy.lib.ucalgary.ca/pqdweb?did= 2188440 761&sid =2&Fmt=2&clientId=12303&RQT=309&VName=PQD>
[244] *Whatcott* SHRT.
[245] *Whatcott* SHRT.
[246] *Whatcott* SHRT.
[247] *Whatcott* SKQB.
[248] *Whatcott* SKCA.

overturned the lower court's findings and held that, taken in isolation, Whatcott's words were demeaning, but did not constitute hate expression.[249] However, the Judge held that the flyers did contravene section 14(1)(b), which prohibits hateful publications, because the flyers erroneously implied that gay people were likely pedophiles.

In the Court of Appeal, Whatcott argued that he was exercising his right to freedom of expression and freedom of religion and that the flyers did not violate the Code.[250] Alternatively, he argued that if the materials exhibited hate, it was directed toward sexual behaviour, which is not a prohibited ground.[251] If sexual behaviour is a prohibited ground within the meaning of sexual orientation, Whatcott argued that this is "overbroad and should be inoperative to the extent that it conflicts with s 4 and 5 of the *Saskatchewan Human Rights Code* and s 2 of the *Canadian Charter of Rights and Freedoms*."[252]

The Saskatchewan Court of Appeal held that the Tribunal and Queen's Bench judge should have considered the situations and conditions in which the message was delivered. Furthermore, the court held that Whatcott acted in the context of a debate about the actions of the school board to include LGBT issues in the curriculum. In this context, the court said, "the flyers did not communicate the level of emotion required to expose persons on the basis of their sexual orientation to a sufficient level of hatred".[253] Furthermore, the court said that each inappropriate statement within each flyer did not constitute hate expression, therefore it was improper to impose limits on Whatcott's freedom of expression. Thus, while s 14(1)(b) was constitutional (as amended), Whatcott did not intervene the *Code.*

The SCC allowed Saskatchewan's appeal in part, holding that the Tribunal's decision regarding two of the flyers was reasonable. [254]

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[249] *Whatcott* SKCA.
[250] *Whatcott* SKCA.
[251] *Saskatchewan Human Rights Commission v William Whatcott*, online: http://www.scc-csc.gc.ca/case-dossier/cms-sgd/sum-som-eng.aspx?cas=33676.
[252] *Whatcott* SKCA.
[253] *Whatcott* SKCA.
[254] *Whatcott,* SCC.