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Ontario's *Human Rights Code* Amendments: Deconstructing "Gender Identity" and "Gender Expression"

*Ryan Edmonds**

On June 19, 2012, the Ontario legislature amended the *Human Rights Code* (the "*Code*") to add new protected grounds of "gender identity" and "gender expression" (amendments collectively known as "*Toby's Act*").

While the transcript of legislature debates make it clear that Toby's Act was intended to offer explicit protection for transgendered people, it's notable that both "gender identity" and "gender expression" were never defined, and as of writing, remain undefined by Ontario case law.

Although other jurisdictions' case law may provide clues as to the scope of protection that "gender identity" will offer, the same cannot be said for "gender expression", as Ontario is the only jurisdiction in Canada to include it as a protected ground.

As a result, depending on how the Human Rights Tribunal of Ontario ("the Tribunal") interprets the new grounds, they may, either individually or in tandem, end up providing broader gender-based human rights protection to statuses and groups other than just transgendered people.

Purpose of the Amendments

According to debate transcripts, "[t]he purpose of *Toby's Act* is to explicitly state that transgendered people are entitled to the same human rights protection offered to all Ontarians, regardless of their race, creed, religion, color, sexual orientation or sexual identity" [Emphasis added]. Indeed, the debate quoted statistics that emphasized the socio-economic vulnerability of transgendered people.

Accordingly, *Toby's Act* now provides protection from discrimination in services, accommodation, contracting, employment, and vocational association on the basis of "gender identity" and "gender expression".

Notably, however, the debate transcripts showed no differentiation between the terms "gender identity" and "gender expression", despite possibly meaning very different things. Rather, MPPs and special interest groups consistently referred to both "gender

identity" and "gender expression" (in tandem) when speaking to the benefits the amendments would bring to transgendered people.

Given that other jurisdictions have relied on "gender identity" (only) as the basis for protecting transgendered people, one must ask what the purpose was of adding additional protection under "gender expression", and what additional protection to which groups, if any, this may provide.

Deconstructing "Gender Identity"

In its "Policy on Discrimination and Harassment Because of Gender Identity", the Ontario Human Rights Commission describes "gender identity" in broader terms than the *Toby's Act* debate suggests:[i]

> "Gender identity is linked to an individual's intrinsic sense of self and, particularly the sense of being male or female. Gender identity may or may not conform to a person's birth assigned sex. The personal characteristics that are associated with gender identity include self-image, physical and biological parent, expression, behavior and conduct, as they relate to gender.
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> At birth, a child is assigned a gender by a healthcare professional based on observation of the child's genitalia. Society makes the assumption that based on this medical assessment a child will grow up to exhibit correspondingly masculine or feminine behaviors and appearance. However, this is not always the case. A person's felt identity or core identity may differ in part or in whole form from their birth-assigned sex. Individuals whose birth assigned sex does not conform to their gender identity include transsexuals, transgenderists, intersexed persons, and cross-dressers." [Emphasis added]

Other jurisdictions such as Manitoba, Saskatchewan, and the Northwest Territories have express provisions for "gender identity" in their human rights legislation. Although also undefined by case law to date (as of writing), policy documents from those jurisdictions endorse a similarly broad interpretation as that provided by Ontario's Human Rights Commission. Note, however, that these policy documents have no legal force, strictly speaking.

On the other hand, as one of the first Tribunals to rule on such matters, in 1999 the BC Human Rights Tribunal adopted a narrow view of "gender identity", which it read into the province's human rights legislation under the ground of "sex".[ii]

The BC Human Rights Tribunal rejected the broad interpretation of "gender identity" noted above in favour of a narrow definition that relied on the DSM-IV medical diagnosis of "transsexualism" (noted as the "most distressed of gender dysphoric individuals").

The Canadian Human Rights Tribunal also recently adopted a similarly restrictive, medically-influenced definition.[iii]

Although pre-dating the *Toby's Act* amendments, a recent decision from the Ontario Human Rights Tribunal suggests that the Tribunal may adopt a less restrictive view of "gender identity". Specifically, the Tribunal found that legislation which required persons to qualify and have "transsexual surgery" before they could change the sex designation on their birth registration was discriminatory on the basis of "sex" and/or "disability",[iv] as it "perpetuat[ed] stereotypes about transgendered persons and their need to have surgery in order to live in accordance with their gender identity, among other things."

Deconstructing "Gender Expression"

If a proper definition of "gender identity" remains elusive, there is no precedent in Canadian law for Ontario's new ground of "gender expression".

In fact, as stated above, even the *Toby's Act* debate did not differentiate the terms, with the exception of one submission from the Registered Nurses Association of Ontario:

> "'Gender identity' is a person's innate feeling of being male, female, both genders, neither or in between. … 'Gender expression' is the expression of that inner identity. It is the freedom to be, plain and simple, one's self."

Put another way, an expert witness in a past Tribunal case described gender expression as a "social issue", while the spectrums of transgenderism are a "medical condition".[v]

Taken at its literal meaning, "gender expression" could protect how one informs the world of their gender. For example, this could occur by wearing clothing or having a hair style not commonly associated with a particular gender (e.g. an anatomical male wearing a woman's pant-suit, or vice versa). It could also occur more subtly, by wearing (or not wearing) certain gender-associated accessories, such as ties, necklaces, and so forth.

Given the wealth of academic literature on society's deeply-held binary understanding of gender (that is, male or female with nothing in between), the new ground of "gender expression" could, depending on the Tribunal's approach, provide a legally protected shock to these traditional views.

That said, the Tribunal is still an administrative body, and as such its jurisdiction to advance expansive changes is limited. Further, as its caseload is already saturated with claims based on more traditional grounds of discrimination, without a clearer legislative mandate it may be hesitant to "open the floodgates" to claims that society may not yet be ready to understand.

Implication for Employers

Even in the absence of case law definitions of “gender identity” and “gender expression” from the Tribunal, employers should still review their policies as they relate to appearance, dress code, uniforms, and even pronoun usage in official company documents.

Policies or practices that mandate washroom or change room use according to anatomical gender should certainly receive careful attention, with consideration given to devising an accommodation plan should the need arise. Employees should be made aware of this accommodation plan as well, so as not to cause alarm or concern in the event it is implemented.

When considering the flexibility of a certain policy or practice, employers should also be careful not to jump to conclusions about what is or is not undue hardship.

Although these new grounds are undefined, the *Toby’s Act* debates are clear that the legislature is quite concerned about socio-economic vulnerability of transgendered people specifically. Simply put, any undue hardship argument about customer or employee discomfort will likely be met by harsh skepticism from the Tribunal in light of wealth of social science literature detailing the systemic misunderstanding and stereotyping transgendered people suffer from.

As a result, proactive employers should consider taking it upon themselves to train management and employees on gender identity generally, and in particular the hardships associated with an individual’s gender transition (especially at work).

Closing Thoughts

While the *Toby's Act* amendments are laudable in theory and puts Ontario on the cutting edge of protecting gender-related discrimination, it is ultimately up to the Tribunal to craft definitions of the new grounds that are both simultaneously workable to society at large and to the individuals, however broad, the amendments seek to protect.

In closing, the British Columbia Court of Appeal’s view of this dilemma, while originating from a case in 2005 about a transgendered woman’s purported right to volunteer at a rape relief shelter,[vi] is an even more thoughtful consideration now, in light of the onus now placed on the Tribunal in respect of the new grounds:

> “Sex reassignment has only been medically possible for the last 35 years or so. The earliest work – it was first published in 1974 – I know of on the emotional implications is Conundum by Jan Morris, and author of great distinction. Indeed, as James Morris, it was he who first sent forth to the world of 1953 the news that Hillary and Tensing had conquered Mt. Everest.

> But it takes many years for society in general to adjust itself to radical developments in the human condition."

While the British Columbia Court of Appeal rejected the right of that transgendered woman to volunteer at a rape relief shelter, Ontario's Code amendments may be seen as the legislative response to the views that resulted in such decisions.

** Ryan Edmonds is an Employment and Labour Lawyer in Heenan Blaikie's Toronto office, where his practice encompasses all aspects of workplace law. He is the current Newsletter Editor for SOGIC. Ryan can be reached at REdmonds@heenan.ca or 416.777.4189*

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[i] Ontario Human Rights Commission, "Policy on Discrimination and Harassment Because of Gender Identity", online: http://www.ohrc.on.ca/en/policy-discrimination-and-harassment-because-gender-identity

[ii] *Sheridan v. Sasnctuary Investments (c.o.b. B.J.'s Lounge)*, [1999] B.C.H.R.T.D. No. 43.at paras. 93-97.

[iii] *Micheline Montreuil v. Canadian Human Rights Commission and Canadian Forces*, 2009 CHRT 28.

[iv] *XY v. Ontario (Government and Consumer Services)*, 2012 HRTO 726 at para. 14.

[v] *Forrester v. Peel (Regional Municipality) Police Services Board et . al*, 2006 HRTO 13 at para. 113. Specifically, the expert described six key variations: transvestites, cross-dressers, drag queens, intersexed persons, pre/post-op transgendered persons, and Two-Spirited persons from the Native community.

[vi] *Vancouver Rape Relief Society v. Nixon*, 2005 BCCA 601 at paras. 81-82.