LOCATING THE TRANS LEGAL SUBJECT IN CANADIAN LAW: *XY V ONTARIO*

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The 2012 decision of the Ontario Human Rights Tribunal in XY v Ontario is the most recent in a rising tide of legal decisions relevant to the lives of trans Canadians. In XY, the Tribunal concluded that the Vital Statistics Act requirement that an individual seeking to change the sex designation on his or her birth registration supply medical certificates confirming that he or she has undergone "transsexual surgery" was discriminatory. This article identifies and critically analyzes the representation of the trans legal subject in the XY decision. The paper begins by situating the decision in its broader context, tracing the emergence of the trans subject in Canadian antidiscrimination law over the past fifteen years. We examine the decision in XY, connecting it to previous jurisprudence to establish a model of how legal discourse functions to create a particular trans subjectivity. We point to three fundamental shortcomings of the dominant construction of trans subjectivity in law, arguing that legal discourse: 1) understands the trans subject as predominately determined by trans status, ignoring other aspects of identity or experience; 2) establishes trans subjectivity as an immutable identity category defined by a disconnect between sex and gender that the trans subject seeks to 'remedy'; and 3) assumes the trans subject lacks the autonomy to self-define his or her gender identity and thus requires expert corroboration. The paper considers how the dominant trans legal subject constrains trans engagements with law by demarcating the lines of inclusion so that only certain trans subjects are visible in law, and by conditioning the kinds of arguments that are intelligible in legal forums. We conclude by calling for increased problematization of the dominant trans subject in legal discourse and in strategies designed to improve the lives of trans Canadians.

I. Introduction

From the troubling change to the *Aeronautics Act* stipulating "[a]n air carrier shall not transport a passenger if the passenger does not appear to be of the gender indicated on the identification he or she presents,"[1] to the formal inclusion of 'gender identity and gender expression' as prohibited grounds of

[1] *Aeronautics Act*, RSC 1985, c A-2. *Regulations Amending the Designated Provisions Regulations and the Identity Screening Regulation*, SOR/2011-156 amending *Identity Screening Regulations*, SOR/2007-82, s 5.2(1)(c). The changes to the *Aeronautics Act* did not proceed through the regular Parliamentary process but instead were passed via ministerial fiat. Many have argued that this provision presents potential challenges for trans individuals and others who do not conform to societal standards of gender presentation. See e.g. Mercedes Allen, "Trans People Believe in Security, Too" *Montreal Gazette* (6 February 2012) online: Montreal Gazette <http://blogs.montrealgazette.com/2012/02/06/guest-post-trans-people-believe-in-security-too/>; Lana Cuthbertson, "Aeronautics Act Grounds Transgender Canadians", *Capital News* (10 February 2012) online: Capital News <http://www.capitalnews.ca/index.php/news/aeronautics-act-grounds-transgender-canadians>.

discrimination in the Ontario and Manitoba human rights codes,[2] there has been a great deal of legal activity relevant to the lives of trans Canadians in the past year.[3] One of the most significant developments was the April 2012 decision of the Ontario Human Rights Tribunal (the Tribunal) in *XY v Ontario*

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[2] *Toby's Act (Right to be Free From Discrimination and Harassment because of Gender Identity or Gender Expression)*, SO 2012, c C-7. See also Robert Benzie, "Human rights code to be amended to include the transgendered", *Toronto Star* (12 June 2012) online: The Star <http://www.thestar.com/news/canada/politics/article/1210337--human-rights-code-to-be-amended-to-include-the-transgendered>. Manitoba quickly followed Ontario's lead, passing a similar amendment to its provincial human rights code on June 14, 2012: *The Human Rights Code*, CCSM, c H175, s 9. See Bruce Owen, "Rights code beefed up to include transgender, poor folks", *Winnipeg Free Press* (24 May 2012) online: Winnipeg Free Press <http://www.winnipegfreepress.com/local/rights-code-beefed-up-to-include-transgender-poor-folks-153492955.html>. The question of including 'gender identity' in the *Canadian Human Rights Act*, *infra*, is also being debated at the federal level with Bill C-279, *An Act to Amend the Canadian Human Rights Act and the Criminal Code (Gender Identity and Gender Expression)*, 1st Sess, 41st Parl, 2011 (second reading 6 June 2012). See Christin Scarlett Milloy, "UPDATE: Federal gender identity bill passes second reading", *Xtra!* (7 June 2012) online: Xtra! <http://www.xtra.ca/public/National/MPs_to_vote_on_federal_trans_rights_bill-12099.aspx>.

[3] Borrowing from the work of Krista Scott-Dixon, "Introduction" in Krista Scott-Dixon, *Trans/Forming Feminisms: Trans Feminist Voices Speak Out* (Toronto: Sumach Press, 2006) 11 at 12-13, we use the word 'trans' as a broad term that "suggests many forms of crossing gender boundaries, whether in terms of behavior, self-presentation or identity, or in terms of how such crossings are experienced and understood." The term includes, but is not limited to, more specific categories of gender diversity including transsexual and transgender but importantly, according to Scott-Dixon at 13, avoids "the associations that these terms have with clinical classifications of medical and psychotherapeutic practice and with perceived psychological authenticity (in other words, who is seen as a 'true transsexual')." The word trans makes no assumptions about individual anatomy or pre or post-operative status, nor does it assume that trans individuals necessarily seek to 'align' their sex and gender identities through gender-affirming surgery and/or hormone therapy. On the medical classification of trans people, see e.g. Franklin H Romeo, "Beyond a Medical Model: Advocating for a new Conception of Gender Identity in the Law" (2005) 36 Colum HRL Rev 713. We further include within the category 'trans': cross-dressers, Two-Spirited individuals, genderqueers, intersex persons and those who identify as 'masculine women' or 'feminine men.' See also "Policy on discrimination and harassment because of gender identity" *Ontario Human Rights Commission* (30 March 2000), online: OHRC <http://www.ohrc.on.ca/sites/default/files/attachments/Policy_on_discrimination_and_harassment_because_of_gender_identity.pdf> at 14-15 [*OHRC Policy*].

(Government and Consumer Services).[4] "XY" is the pseudonym of the individual who filed an application with the Tribunal alleging that section 36 of the *Vital Statistics Act* (*VSA*),[5] requiring that a person seeking to change the sex designation on his or her birth registration produce two medical certificates independently confirming that he or she has undergone "transsexual surgery," amounted to discrimination with respect to services, contrary to section 1 of the Ontario *Human Rights Code* (the *Code*).[6] The Tribunal agreed that the *VSA* provision discriminated against trans people, and Ontario was given 180 days to revise the criteria for changing sex designation on birth registration documents in order to remove the discriminatory effect of the existing requirements and come into compliance with the *Code*.[7] The *XY* decision makes Ontario the first Canadian province[8] to permit a change in sex designation on birth registration without proof of gender-confirming surgery.[9]

The result in *XY* has been enthusiastically received: the Toronto-based Trans Lobby Group was "thrilled" with the decision;[10] the national lesbian, gay, bisexual and trans (LGBT) human rights organization Egale described the Tribunal's ruling as a "landmark" and a "victory," marking "a significant step toward recognizing the discrimination faced daily by trans people in Canadian society and respecting the inherent dignity and equality of trans people";[11] and

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[4] *XY v Ontario (Government and Consumer Services)*, 2012 HRTO 726 [*XY*].

[5] *Vital Statistics Act*, RSO 1990, c V-4, s 36 [*VSA*].

[6] *XY*, *supra* note 4 at paras 14-18; *Human Rights Code,* RSO 1990, c H-19, s 1 [*Code*] guarantees: Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or disability.

[7] *XY*, *ibid* at para 300.

[8] Andrea Houston, "Ontario trans rights decision makes Canadian history" *Xtra!* (16 April 2012) online: Xtra! <http://www.xtra.ca/public/National/Ontario_trans_rights_decision_makes_Canadian_history-11845.aspx>.

[9] While the Tribunal in *XY* uses the phrase "transsexual surgery" throughout its decision, we prefer the term "gender-confirming" treatment to refer to the healthcare treatments and procedures that some trans people need to live healthy, happy lives. Gender-confirming procedures may include sex reassignment surgery, hormone treatments, and counseling: Dean Spade, "Medicaid Policy and Gender-Confirming Healthcare for Trans People: An Interview with Advocates" (2010) 8:2 Seattle J Soc Just 497.

[10] "Trans Lobby Group Applauds Ontario Human Rights Decision" (17 April 2012), online: Trans Lobby Group <http://translobbygroup.ca/?q=content/surgical-requirement-record-birth-discriminatory-trans-people>.

[11] "Egale Canada Hails Landmark Tribunal Ruling Recognizing Discrimination Against Trans Community" (17 April 2012), online: Egale Canada

Chief Commissioner of the Ontario Human Rights Commission Barbara Hall declared *XY* "a welcome step forward in recognizing and promoting the dignity and equality of trans people."[12] Indeed, we join in applauding the *XY* decision and its recognition of the multiple ways that conditioning a change in sex designation on having and providing proof of having had "transsexual surgery" "perpetuates stereotypes about transgendered persons and their need to have surgery in order to live in accordance with their gender identity"[13] and worsens the already precarious situation of trans people in Canadian society.[14]

<http://archive.egale.ca/index.asp?lang=&menu=1&item=1567>. See also Houston, *supra* note 8. Some have suggested that the *XY* may spark division within the trans community: see e.g. Tristan Hopper, "Transgender person with penis can legally be a woman", *Montreal Gazette* (20 April 2012) online: Montreal Gazette.<http://www.montrealgazette.com/health/Transgender+person+with+penis+legally+woman/6488683/story.html> (quoting Mercedes Allen, a writer on trans issues, who states those trans individuals who have undergone sex reassignment surgery may "have trouble sometimes understanding how a person could transition and not require (surgery)").

[12] "Important Victory for Transgender Persons in Ontario", *Canada Newswire* (20 April 2012), online: Canada Newswire <http://www.newswire.ca/en/story/958893/important-victory-for-transgender-persons-in-ontario>.

[13] *XY, supra* note 4 at para 15. Elaine Craig, "Trans-Phobia and the Relational Production of Gender" (2007) 18 Hastings Women's LJ 137 [Craig, "Trans-Phobia"] at note 4 provides the following helpful explanations of relevant terminology, which we rely upon in this paper:

> By the term gender identity I refer to one's internal sense of being a man or woman or some variation thereof. By the term gender expression I refer to the expressive manifestation of one's gender identity – the outwardly observable activities, gestures, behaviors and attitudes culturally associated with gender signifiers. By the term gender I refer to the social-psychological construct that designates how persons are categorized by others and how they categorize themselves in terms of masculine and/or feminine and/or some derivation or combination thereof...The meanings of the terms feminine and masculine and man and woman are themselves socially constructed, contested and often contextually variable.

[14] Trans Canadians continue to experience overwhelming rates of discrimination, unemployment and underemployment, poverty, harassment and violence, and are less able to access health care and social services than non-trans citizens. See e.g. the Tribunal in *XY, supra* note 4 at paras 174-176 (noting that trans individuals seeking to change their sex designation do so to "avoid the negative consequences that flow from having a birth certificate which says that, officially, they are not the gender they feel themselves to be and present to the world" including "harassment, discrimination and abuse, which is all-too-commonly experienced by transgendered persons in our society"). The 2000 *OHRC Policy, supra* note 3 at 4, concluded, "[t]here are, arguably, few groups in our society today who are as disadvantaged and disenfranchised as transgenderists and transsexuals. Fear and hatred of transgenderists and transsexuals combined with the hostility of society toward their very existence are fundamental human rights issues."

In the same moment that we endorse the *XY* decision, this article explores the limits of the case – and other legal decisions like it – for improving the lived realities, or what Professor Dean Spade aptly calls the "life chances," of trans people in Canada.[15] In the past fifteen years, trans individuals have been increasingly visible in Canadian legal forums, engaging the law as a tool to combat discrimination and violence and fight for access to services and benefits. As Professor Wendy Brown observes, because "much of the struggle against male dominance, homophobic [and transphobic] practices and racism now dwells irretrievably in the field of [legal] rights claims and counterclaims," we must ask, "what are the perils and possibilities of this dwelling?"[16] What work are legal framings, rhetoric and results doing for the

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To date, Statistics Canada has not collected any comprehensive data on trans individuals: "Gay Pride... by the numbers" (2010), online: Statistics Canada <http://www42.statcan.gc.ca/smr08/2011/smr08_158_2011-eng.htm>. However, a 2010 survey of 443 trans Ontarians conducted by TransPULSE, a community-based research project focused on trans access to health and social services in Ontario, found that "while a high percentage [71%] of Ontario trans people have post-secondary education, their income levels do not reflect this. The majority are living below the poverty line, and only 7% report personal annual incomes over $80,000." The study further concluded that 43% of respondents had attempted suicide, 20% had been targets of physical or sexual assaults and 34% had been verbally harassed or threatened: Greta Bauer et al, "Who are Trans People in Ontario?" (26 July 2010) 1:1 Trans PULSE e-Bulletin, online: TransPULSE <http://www.ohtn.on.ca/Documents/Publications/didyouknow/july28_10/E-Bulletin.pdf>. A 2011 report by the same organization concluded, "[t]wenty-five percent of trans Ontarians felt they passed as cisgender (meaning they appear to be a non-trans person) less than half the time, leaving them vulnerable to harassment and discrimination...", Greta Bauer et al, "We've Got Work to Do: Workplace Discrimination and Employment Challenges for Trans People in Ontario" (30 May 2011) 2:1 Trans PULSE e-Bulletin, online: TransPULSE <http://www.transpride.ca/assets/trans-discrimination.pdf>. See also Douglas Victor Janoff, *Pink Blood: Homophobic Violence in Canada* (Toronto: University of Toronto Press, 2005) at 95-97 (recounting harassment, discrimination and violence experienced by incarcerated trans persons in Canada).

[15] Professor Dean Spade describes his term "life chances" as "captur[ing] the many, many vectors of harm and well-being" that dictate a person's levels of security and vulnerability in society: Meaghan Winter, "Trans-Formative Change: Meaghan Winter interviews Dean Spade", *Guernica / a magazine of art & politics* (1 March 2011) online: Guernica <http://www.guernicamag.com/interviews/spade_3_1_11/>. See also Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law* (Brooklyn: South End Press, 2011) at 11-13 [Spade, *Normal Life*].

[16] Wendy Brown, "Suffering the Paradoxes of Rights" in Wendy Brown & Janet Halley, eds, *Left Legalism/Left Critique* (North Carolina: Duke University Press, 2002) 420 at 420 (asking this question in the context of assessing the "value of rights language for women"). See also Susan B Boyd, "The Perils of Rights Discourse: A Response to Kitzinger and Wilkinson"

trans community in Canada? Given that the law relies upon, and is regularly invoked to re-inscribe dominant, binary conceptions of sex and gender, can the law respond meaningfully to the realities of trans experiences?[17] What role could or should the law play in strategies to improve the "life chances" of trans Canadians?

Our purpose in this paper is to identify and raise critical questions about the discursive construction of the trans legal subject in Canadian law, using the *XY* decision as a case study. The matter of how the law understands and describes a certain group or community of people is an important one; as a site of "productive discourse," it is well-established that law has the power to construct and give meaning to social realities, to "regulate the borders of (in)visibility, and play an active part in shaping identities, governing conduct and producing subjectivity."[18] Legal discourse, embodied in jurisprudence, legislation and legal rhetoric, produces the subjects it names, creating the categories of individuals about which it speaks through the act of speaking of them. Feminist legal scholars have revealed the multiple ways that legal discourse creates a limited, particular vision of women[19] and queer theorists have mapped the discursive construction of the sexual subject in law.[20] In this

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(2004) 4:1 Analyses of Social Issues and Public Policy 211 (problematizing the use of legal and human rights discourses in arguments for same-sex marriage).

[17] Craig, "Trans-Phobia", *supra* note 13 at 137 (arguing that law is "a critical location of re-conceptualization" of the binary understanding of gender). See also Sarah Lamble, "Unknowable bodies, unthinkable sexualities: lesbian and transgender legal invisibility in the Toronto women's bathhouse raid" (2009) 18:1 Social & Legal Studies 111 at 114 (describing the human rights framework as relying "on universal humanity claims that often erase lesbian and transgender specificities.").

[18] Lamble, *ibid* at 113. See also Michel Foucault, *The History of Sexuality: Volume 1: An Introduction* (New York: Vintage Books, 1990) at 36-49.

[19] See e.g. Carol Smart, *Feminism and the Power of Law* (London: Routledge, 1989) ch 1 at 4; Lise Gotell, "Rethinking Affirmative Consent in Canadian Sexual Assault Law: Neoliberal Sexual Subjects and Risky Women" (2008) 41:4 Akron L Rev 865.

[20] Queer theory refers broadly to approaches, strategies and methodologies that challenge dominant norms and understandings about sex, sexuality and gender. See e.g. Eve Kosofsky Sedgwick, *Epistemology of the Closet* (Berkeley: University of California Press, 1990); Judith Butler, *Gender Trouble*, 2d ed (New York: Routledge, 1999); and Laurie Rose Kepros, "Queer Theory: Weed or Seed in the Garden of Legal Theory?" (1999-2000) 9 Law & Sexuality 279 at 280-284 (tracking the history of queer theory and concluding that queer theory, "like other postmodern movements, is hard to link to a narrow definition. It resists classification at every turn..."). In attempting to destabilize hegemonic accounts of gender and sexuality in the law, queer theory resists the forces of normalization and assimilation and works to expose the ways

paper we extend and build upon these insights to investigate how legal discourse functions to create and constrain trans subjectivity.[21] We begin from an understanding of law as a site of struggle over gender identity,[22] a struggle which, through legal discourse, creates a particular model of trans subjectivity.[23]

The paper begins in Part II with a brief overview of the history of the emergence of the trans legal subject, tracking the increasing frequency with which trans people have been engaging antidiscrimination law over the past

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that homophobic, heterosexist and gender oppressive modes of thinking continue to dominate juridical reasoning: see e.g. Carl F Stychin, *Law's Desire: Sexuality and the Limits of Justice* (New York: Routledge, 1995) at 140; Ruthann Robson, *Sappho Goes to Law School* (New York: Columbia University Press, 1998); and Francisco Valdes, "Queers, Sissies, Dykes and Tomboys: Deconstructing the Conflation of 'Sex,' 'Gender,' and 'Sexual Orientation' in Euro-American Law and Society" (1995) 83:1 Cal L Rev 1.

[21] This project accords with the aims of critical trans theory, a stream of theorizing and strategizing related to, but distinct from, queer theory that focuses specifically on the lived realities of trans people, revealing and analyzing the multiple, interlocking systems of oppression that continue to shape their lives. See e.g. Vivian Namaste, *Sex Change, Social Change: Reflections on Identity, Institutions and Imperialism* (Toronto: Women's Press 2005); Scott-Dixon, *supra* note 3; Spade, *Normal Life, supra* note 15; Dean Spade, "Documenting Gender" (2008) 59 Hastings LJ 731; Joey L Mogul, Andrea J Ritchie & Kay Whitlock, *Queer (In)Justice: The Criminalization of LGBT People in the United States* (Boston: Beacon Press, 2011); Craig, "Trans-Phobia" *supra* note 13; Julia C Oparah, "Feminism and the (Trans)gender Entrapment of Gender Nonconforming Prisoners" (2012) 18 UCLA Women's LJ 239; and Val Napoleon, "Raven's Garden: A Discussion about Aboriginal Sexual Orientation and Transgender Issues" (2002) 17:2 CJLS 149.

[22] barbara findlay et al, *Finding Our Place: Transgendered Law Reform Project* (Vancouver: High Risk Project Society, 1996) at 15 online: <http://www.hawaii.edu/hivandaids/Tg/Finding_Our_Place__Transgendered_Law_Reform_Project.pdf> (explaining that because the law "can only 'see' two genders, male and female," legislation, law enforcement and judicial reasoning is always based on this singular assumption, often in ways that oppress trans people).

[23] Lise Gotell, "The Discursive Disappearance of Sexualized Violence: Feminist Law Reform, Judicial Resistance and Neo-Liberal Sexual Citizenship" in Dorothy E Chunn, Susan B Boyd & Hester Lessard, eds, *Reaction and Resistance: Feminism, Law, and Social Change* (Vancouver: UBC Press, 2007) 127 at 128 (describing "law as a site of struggle over sexual subjectivity," and focusing on the role of legal discourse in creating a certain kind of sexual citizen). See also Brenda Cossman, "Disciplining the Unruly: Sexual Outlaws, Little Sisters and the Legacy of Butler" (2003) 36 UBC L Rev 77; and Wendy Brown, *supra* note 16 at 422-423 (explaining, "[t]he regulatory dimension of identity-based rights emerges to the extent that rights are never deployed 'freely,' but always within a discursive, hence normative context, precisely the context in which 'woman' (and any other identity category) is iterated and reiterated.")

fifteen years to pursue various goals. Part III then narrows in on the *XY* case, recounting the facts, reasoning and conclusions of the Tribunal. In Part IV we identify the specific construction of trans subjectivity in *XY*. We connect this vision of the trans subject to previous jurisprudence and highlight three fundamental shortcomings of the dominant understanding of trans subjectivity in law. We then consider how the trans legal subject might constrain trans engagements with law by rendering only certain trans individuals (transsexuals) making certain kinds of legal claims (inclusion/recognition) cognizable in antidiscrimination law. We call for increased problematization of the dominant model of the trans legal subject in antidiscrimination law, and conclude that the *XY* decision is properly understood as a partial victory, one that benefits some trans people and relegates others to the outskirts of legal intelligibility.

II. The Emergence of the Trans Legal Subject in Canadian Law

Over the past fifteen years, trans individuals have increasingly engaged the Canadian legal system in new and productive ways intended to improve their lived realities.[24] Out from the shadow of the 'LGBT rights,' agenda,[25] trans people with unique sets of experiences, interests and goals are harnessing legal mechanisms to combat discrimination and to access benefits and

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[24] Prior to this time, there were, of course, trans engagements with law, see e.g. *Québec (Commission des droits de la personne)v Anglsberger*, (1982), 3 CHRR D/892, 1982 CarswellQue 358 (CP), (the Court of Québec finding that a restaurant owner had discriminated against a trans person by refusing to serve her and by throwing her out of the restaurant). Courts have often considered trans lives in the context of marriage cases where an individual's anatomical status was key to the legal recognition of a self-defined gender identity: see e.g. *C(L) v C(C)* (1992), 10 OR (3d) 254, 1992 CarswellOnt 691 (Ct J (Gen Div)), (denying a trans person recognition as a male because he had not had surgery to fully transition); *B v A*, (1990), 1 OR (3d) 569, 29 RFL (3d) 258 (SC) (refusal to grant spousal support to a female-to-male spouse who had not had surgery to irreversibly change his genitals). See also Andrew N Sharpe, "Endless Sex: The Gender Recognition Act 2004 and the Persistence of a Legal Category" (2007) 15 Fem Legal Stud 57.

[25] Historically, trans issues have often been subsumed within the 'LGBT' rights agenda, one that has tended to focus almost exclusively on gay rights in general, and, in recent years, on marriage equality in particular: see e.g. Shannon Price Minter, "Do Transsexuals Dream of Gay Rights? Getting Real about Transgender Inclusion" in Paisley Currah, Richard M Juang & Shannon Price Minter, eds, *Transgender Rights* (Minneapolis: University of Minnesota Press, 2006) 141 at 142 (asking, "the question that calls for an explanation is not whether transgender people can justify their claims to gay rights, but rather how did a movement launched by bull daggers, drag queens, and transsexuals in 1969 end up viewing transgender people as outsiders less than thirty years later?").

services.[26] Although a full mapping of the history of trans engagements with the law is beyond our scope here, it is important to situate the *XY* case in its appropriate context: first, by providing some background to antidiscrimination law, the particular legal framework through which trans arguments have most frequently been made; and, second, by briefly reviewing the broad evolution of Canadian trans jurisprudence to date.

A. Antidiscrimination Law

Antidiscrimination law has been an important tool for combating harassment and discrimination against trans people in both the public and private sectors. Professor Sujit Choudhry describes the established formula of antidiscrimination law as, "to identify groups which are the subject of irrational, arbitrary, or systemic discrimination, to locate the defining characteristics of those groups, and to frame those characteristics as prohibited criteria (e.g. race, sex, religion and national origin) upon which to base decisions regarding employment, the provision of services, and the like."[27] Antidiscrimination law is the foundation of Canada's human rights regime, which includes the equality provision in section 15 the *Canadian Charter of Rights and Freedoms*, guaranteeing equal protection and benefit of the law "without discrimination based on race, national or ethnic origin, colour,

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[26] This is not to imply that trans people have not been engaged with the legal system in past, as, for example, when they come into conflict with the criminal justice system: see e.g. Janoff *supra* note 14 at 95-97 (recounting the experiences of trans prisoners in Canada); Rebecca Mann, "The Treatment of Transgender Prisoners, Not Just an American Problem—A Comparative Analysis of American, Australian, and Canadian Prison Policies Concerning the Treatment of Transgender Prisoners and a 'Universal' Recommendation to Improve Treatment" (2006) 15 Law & Sexuality 91; Joey L Mogul, Andrea J Ritchie & Kay Whitlock, *supra* note 21; Eric A Stanley & Nat Smith, eds, *Captive Genders: Trans Embodiment and the Prison Industrial Complex* (Baltimore: AK Press, 2011); barbara findlay, "Transsexuals in Canadian Prisons: An Equality Analysis" (1999) online: <http://www.hawaii.edu/hivandaids/Transsexuals_in_Canadian_Prisons__An_Equality_Analysis.pdf>.

[27] Sujit Choudhry, "Distribution vs. Recognition: The Case of Anti-Discrimination Laws" (2000) Geo Mason L Rev 145 at 148. See also *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at para 23, 56 DLR (4th) 1 [*Andrews*] (describing the nature of discrimination under section 15 of the *Charter*); Nitya Iyer, "Categorical Denials: Equality Rights and the Shaping of Social Identity" (1993) 19 Queen's LJ 179 at 191-192 (helpfully describing the operation of the antidiscrimination model in Canadian law).

religion, sex, age or mental or physical disability,"[28] as well as federal and provincial[29] human rights codes.[30]

Antidiscrimination law is integral to the liberal ideal of equality. According to the Supreme Court of Canada, equality in law is "aimed at preventing discriminatory distinctions that impact adversely on members of groups identified by the grounds enumerated in s. 15 and analogous grounds"[31] in order to prevent the "violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political and social prejudices, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society,

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[28] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c11,s 15(1) [*Charter*] provides:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[29] See e.g. the Ontario *Code, supra* note 6 at s 1. The federal and other provincial human rights documents include antidiscrimination provisions couched in similar language; see e.g. the *Canadian Human Rights Act*, RSC 1985, c H-6, s 2 (describing the purpose of the *Act* as extending the laws of Canada to "give effect... to the principle that all individuals should have an opportunity...to make for themselves the lives that they are able and wish to have" free from "...discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered").

[30] Although they share similar basic formulations of antidiscrimination, there are important differences between the mechanics of human rights instruments and *Charter* guarantees, not least the fact that the human rights regime does not involve the balancing exercise that occurs under section 1 of the *Charter* following a finding that section 15 has been violated. On the relationship between the constitutional guarantee of equality and quasi-constitutional provincial human rights regimes, see e.g. Nancy Holmes, *Human Rights Legislation and the Charter: A Comparative Guide* (Ottawa: Parliamentary Research Branch, 1997), online: Government of Canada <http://publications.gc.ca/Collection-R/LoPBdP/MR/mr102-e.htm>; Leslie A Reaume, "Postcards from *O'Malley*: Reinvigorating Statutory Human Rights Jurisprudence in the Age of the *Charter*" in Fay Faraday, Margaret Denike & M Kate Stephenson, *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Toronto: Irwin Law, 2006) 373.

[31] *R v Kapp*, 2008 SCC 41 at para 16, [2008] 2 SCR 483. In adopting an approach to section 15 of the *Charter* based on enumerated and analogous grounds, the Supreme Court in *Andrews, supra* note 27 at para 20 described grounds as "reflect[ing] the most common and probably the most socially destructive and historically practiced bases of discrimination."

equally capable and equally deserving of concern, respect and consideration."[32] In *Egan v Canada,* Justice L'Heureux-Dubé considered the connection between antidiscrimination and equality in the following terms:

> Equality means that our society cannot tolerate legislative distinctions that treat certain people as second class citizens, that demean them, that treat them as less capable for no good reason, or that otherwise offend fundamental human dignity.....[I]f the fundamental purpose of s. 15 is to guarantee equality "without discrimination," then it follows that the pivotal question is, "How do we define 'discrimination'"?[33]

More recently in *R v Kapp*, the Supreme Court adopted the definition of discrimination established in the first section 15 case, *Andrews v Law Society of British Columbia*, stating:

> ...[D]iscrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.[34]

Accordingly, we can understand antidiscrimination law as having a symbolic purpose, marking the formal legal and social recognition of the dignity of individuals belonging to one or more of the enumerated groups,[35] and an instrumental purpose, aiming to remedy individual instances of

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[32] *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para 51, 170 DLR (4th) 1 [*Law*].

[33] *Egan v Canada*, [1995] 2 SCR 513 at 542-554, 124 DLR (4th) 609 [*Egan*] (Justice L'Heureux-Dubé made these comments in the context of the minority opinion in *Egan*; however, her approach was at least partially incorporated by the majority of the SCC in subsequent section 15 cases including *Law, supra* note 32.).

[34] *Kapp, supra* note 31 at para 18, citing *Andrews, supra* note 27 at p 174.

[35] In the context of trans human rights claims, Spade, *Normal Life, supra* note 15 at 81, explains, "the processes of advocating the passage of such laws, including media advocacy representing the lives and concerns of trans people and meetings with legislators to tell them about trans people's experiences, increases positive trans visibility..."

exclusion based on prohibited grounds and "provide relief for the victims of discrimination."[36] The ultimate goal of these laws is to ensure the equality of all persons by preventing and ameliorating discriminatory treatment.[37]

There is much to appreciate about antidiscrimination law and its goal of achieving equality by ending discrimination. By relying upon apparently 'universal' claims to humanity, however, human rights frameworks reify binary notions of sex and gender[38] and, in the process, tend to "erase...transgender specificities."[39] Nevertheless, trans people in Canada have harnessed antidiscrimination law with increasing regularity in recent years.

B. Trans Jurisprudence

The majority of cases in the past fifteen years involving trans rights in Canada have proceeded through the federal and provincial human rights regimes.[40] In early cases, a key issue was the legal definition of trans status; that is, whether trans identity could be grafted on to one or more of the existing prohibited grounds of discrimination, and if so, which one. In 1998, the Québec Commission des droits de la personne & des droits de la jeunesse was among the first bodies to conclude that discrimination based on the enumerated ground of "sex" included discrimination against trans people.[41] The Canadian Human Rights Tribunal and some other courts and tribunals soon followed suit.[42] Other decisions from human rights bodies framed trans discrimination

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[36] See e.g. *Andrews, supra* note 27, citing with approval *Ontario Human Rights Commission v Simpsons-Sears Ltd*, [1985] 2 SCR 536 at 547, 23 DLR (4th) 321 (describing the "main approach" of antidiscrimination laws embodied in provincial human rights codes as "not to punish the discriminator, but rather to provide relief for the victims of discrimination").

[37] For an important critique of the conceptualization of equality as "no more than protection from discrimination on specific grounds" see e.g. Iyer, *ibid* at 180.

[38] For further discussion of the tendency of law to rely upon binary notions of sex and gender, see e.g. Leslie Pearlman, "Transsexualism as Metaphor: The Collision of Sex and Gender" (1995) 43:3 Buff L Rev 835; and Julie A Greenberg, "Defining Male and Female: Intersexuality and the Collision between Law and Biology" (1999) 41 Ariz L Rev 265.

[39] Lamble, *supra* note 17 at 114 (noting a similar impact with respect to lesbian realities).

[40] To date, no case specifically involving trans issues has been adjudicated on the basis of the *Charter*, *supra* note 28.

[41] *Québec (Commission des droits de la personne & des droits de la jeunesse) c Maison des jeunes A-Ma-Baie inc*, (1998), 33 CHRR D/263, 1998 CarswellQue 2602 (TDPQ).

[42] See e.g. *Ferris v Office and Technical Employees Union, Local 15*, [1999] BCHRTD no 55; *Vancouver Rape Relief v BC Human Rights*, 2000 BCSC 889 at para 59, 75 CRR (2d) 173; and *Waters v British Columbia (Minister of Health)*, 2003 BCHRT 13, 46 CHRR D/139. More recently, see *MacDonald v Downtown Health Club for Women*, 2009 HRTO 1043 at para 31.

as a matter of disability or, less frequently, sex and disability together.[43] The inconsistent and at times *ad hoc* nature of the grounds analysis in trans rights cases led the Northwest Territories in 2002 to become the first jurisdiction to explicitly include "gender identity" as a prohibited ground of discrimination in its territorial *Human Rights Act*.[44]

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[43] See e.g. *Hogan v Ontario (Health and Long-Term Care,* 2006 HRTO 32, 58 CHRR D/317 (characterizing Gender Identity Disorder as a disability); and *Kavanagh v Canada (Attorney-General)* [2001] CHRD no 21 (QL) (CHRT) at para 135 (finding discrimination based on trans status to be a matter of sex and disability). With the recent addition of the grounds of "gender identity and gender expression" to the *Code*, *supra* note 6, the question of whether trans persons experience discrimination on the bases of sex, disability or both should be rendered moot.

[44] The Northwest Territories was the first jurisdiction in Canada to expressly enumerate legal protections for trans people in law by including "gender identity" as a prohibited ground of discrimination in 2002: *Human Rights Act*, SNWT 2002, c 18 s 5(1). Prior to 2002, the Northwest Territories was one of only two jurisdictions in Canada — the other being Nunavut — that did not have a comprehensive human rights regime, lacking both a legislative definition of discrimination on prohibited grounds and a Human Rights Commission to deal with complaints. As a result, federal human rights legislation applied in the Northwest Territories prior to 2002 (Northwest Territories, Standing Committee on Social Programs, *Report on Bill 1: Human Rights Act* (2002) at 1 (Chair: Mr. Brendan Bell). After the bill to create a territorial *Human Rights Act* received Second Reading in the Legislative Assembly on February 22, 2002, the Standing Committee on Social Programs was asked to table recommendations, which included adding both "sexual orientation" and "gender identity" as prohibited grounds of discrimination. In keeping with submissions received from LGBTQ organizations such as Egale and OutNorth, the Standing Committee noted that the inclusion of "gender identity" would be "a first in Canada", *ibid* at 10). It concluded that including "gender identity" promoted the overarching goals of the legislation, explaining:

> ...[T]he fundamental purpose of human rights legislation is to prohibit discrimination and to promote equality so that *all* members of our community can participate freely in everyday life. Recognition of gender identity as a prohibited ground of discrimination falls squarely within this purpose.
>
> Although some have argued that this protection is already available through case law, the Committee believes that it is more useful to be explicit about the types of discrimination the *Act* aims to prevent. Furthermore, by including it in the legislation, the Committee believes that we are furthering the educative goals of the *Human Rights Act.* [*Ibid* at 11, emphasis on that of the Standing Committee]

When the Legislative Assembly returned on October 29, 2002 for Third Reading of the *Human Rights Act*, some members posed questions attempting to clarify the meaning of "gender identity" and the likely effects of its inclusion in the legislation. For example, Mr. Leon Lafferty stated: "I will give an example of someone in a work place that is one sex but continues to use a different sex's washrooms or facility and then is fired because they are

Legal actions adjudicated through human rights mechanisms have sparked important, progressive changes in a number of areas, not least in identifying and punishing discriminatory treatment of trans individuals in the public domain, including the workplace. For example, in *Ferris v Office and Technical Employees Union, Local 15*,[45] a trans woman alleged that her union had discriminated against her on the basis of her trans status.[46] Leslie Ferris had used the women's washroom at her workplace for more than ten years without incident when an anonymous complaint by a co-worker was made to her employer. Although Ferris was never informed of a meeting between her employer and her union to discuss the complaint, she was reprimanded for failing to attend. Ferris initially resigned from her job but later filed a grievance with her union against the employer. The union representative refused to support her grievance, stating that the washroom complaint seemed "valid."[47] Suffering extreme anxiety as a result of the dispute, Ferris eventually left her job. The British Columbia Human Rights Tribunal held that by condoning the employer's handling of the anonymous complaint, failing to contact Ferris about the meeting and because of its "implicit characterization of the Complainant as a problem who required some accommodation," the union had "treated the Complainant worse than it would have treated another Union member in similar circumstances and that her status as a transsexual was a

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violating the privacy of the opposite sex. Is that a ground for firing this person? What happens here?", Northwest Territories, Legislative Assembly, *Hansard*, 14th Assembly, 5th Sess, No 35 (29 October 2002) at 1257 (Mr. Leon Lafferty). In general, however, debate in the Legislative Assembly appears to have been short, collegial, and ultimately uncontroversial. The Northwest Territories thus became the first Canadian province or territory to include "gender identity" as a prohibited ground of discrimination in its *Human Rights Act*.

[45] *Ferris*, *supra* note 42. For further discussion of *Ferris*, see e.g. Lori Chambers, "Unprincipled Exclusions: Feminist Theory, Transgender Jurisprudence, and Kimberly Nixon" (2007) 19:2 CJWL 305 at 316; Gerald Hunt & Jonathan Eaton, "We Are Family: Labour Responds to Gay, Lesbian, Bisexual, and Transgender Workers" in Gerald Hunt & David Rayside, eds, *Equity, Diversity, and Canadian Labour* (Toronto: University of Toronto Press, 2007) at 145-146.

[46] In *Ferris,* supra note 42 at paras 1-2 (noting the grounds of discrimination alleged were "sex and/or disability." Ferris' complaint also alleged discrimination by her employer, a taxi company, but the company settled with Ferris before the Tribunal hearing).

[47] *Ibid* at para 63 (the union further endorsing the employer's "accommodation" scheme for Ferris, whereby she could continue to use the women's washroom on the condition that she knock and announce herself and, if someone objected, she must wait until they left. Alternatively, the union offered to request that everyone in the workplace use the key and lock the door.)

factor in her treatment."[48] The Tribunal awarded compensation for injury to the applicant's dignity, feelings and self-respect.[49]

Since *Ferris,* cases involving discriminatory treatment of trans individuals have led to changes to the rules governing police policies regarding strip searches of trans people in Ontario,[50] have challenged gender-specific washroom-use policies of private establishments in British Columbia,[51] and have affirmed the rights of trans people in Québec not to be refused employment on the basis of trans status.[52] Yet not all trans jurisprudence involves such relatively straightforward claims of discrimination or unequal treatment; judicial analyses have been fraught in cases pitting trans interests against the competing interests of another historically marginalized group. For example, in 2001 the Canadian Human Rights Tribunal concluded that Synthia Kavanagh, a federally-sentenced trans woman serving a life sentence in a men's prison in British Columbia, was not entitled to be housed in a woman's prison despite the fact that she had lived as a woman for twenty years, because she was still "anatomically a male."[53] Although the judge in Kavanagh's murder case recommended that she serve her sentence in a prison for women, the Correctional Service of Canada denied her repeated requests to be

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[48] *Ibid* at paras 103, 113.

[49] *Ibid* at paras 106, 111 (awarding $1000.80 in lost wages and $5000 in compensation for injury to dignity, feelings, and self-respect).

[50] *Forrester v Peel (Regional Municipality of) Police Services Board*, 2006 HRTO 13, [2006] OHRTD no 13 (QL) [*Forrester*] (finding that a strip search on a pre-operative MTF constituted "unintentional discrimination on the basis of sex" at para 476. The Tribunal directed that the Police Association revise its policy on strip searches of "transsexuals" providing detainees of the option of choosing whether a male officer, a female officer, or both perform the search). For commentary on *Forrester* see e.g. Kyle Kirkup, "Indocile Bodies: Gender Identity and Strip Searches in Canadian Criminal Law" (2009) 24:1 CJLS 107.

[51] *Sheridan v Sanctuary Investments Ltd*, [1999] BCHRTD No 43 (QL), 33 CHRR D/467 (BCHRT) [*Sheridan* cited to CHRR] (the BC Human Rights Tribunal concluding that the policy of a GLBT nightclub, B.J.'s Lounge, disallowing pre-operative trans women from using female washrooms to be discriminatory, and concluding that pre-operative transgendered individuals who are transitioning, and have medical certification of such from a doctor, should be able to use washrooms of their choice. The Tribunal further found at para 107 that for the purposes of human rights legislation, "transsexuals in transition who are living as members of the desired sex should be considered to be members of that sex").

[52] *Montreuil v National Bank of Canada*, 2004 CHRT 7 at paras 56 and 62-66, [2004] 48 CHRR 436 (the Canadian Human Rights Tribunal concluding that the National Bank discriminated against a trans individual when it refused to hire her based on the assumption that her "real motive for applying [to be a customer service representative in its call centre] was to use the position to promote the rights of transgendered persons").

[53] *Supra* note 43 at paras 155-160 (CHRT).

transferred to a women's prison.[54] The Tribunal found a limit to accommodating pre-operative male-to-female transsexuals in women's prisons, citing the need to consider the interests of female inmates in this setting, many of whom "are psychologically damaged as a consequence of the physical, psychological and sexual abuse they have suffered at the hands of men. Like transsexuals, female inmates are a vulnerable group, who are entitled to have their needs recognised and respected."[55]

The case of *Nixon v Vancouver Rape Relief and Women's Shelter*[56] has been perhaps the most fractious legal decision on trans rights to date, generating a great deal of commentary and firmly establishing trans subjectivity as a matter of social and legal significance in Canada.[57] Kimberly

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[54] *R v Kavanagh*, [1989] OJ no 2620 (QL) (Ont H Ct J) (the sentencing judge explaining that "[s]imple humanity would justify the prison authorities making such arrangements as will accommodate [her self-identification as a woman]").

[55] *Kavanagh, supra* note 53 at paras 158-160 (the Tribunal further explained at paras 184-191 that if the inmate's physician viewed sex reassignment surgery for his or her patient as being "essential," then the Correctional Service of Canada would be expected to cover the costs of the surgery. If the inmate's physician viewed sex reassignment surgery as being "non-essential," then the inmate could obtain the surgery only at his or her own expense. The Tribunal ordered the Correctional Service of Canada to amend its sex reassignment surgery policy within six months of the decision at para 198.) For a comparative discussion of prison policies on gender-affirming treatment including surgery in the United States, Australia, and Canada see e.g. Mann, *supra* note 26 at 128.

[56] 2002 BCHRT 1, [2002] BCHRTD no 1 [*Nixon* (Tribunal Decision)].

[57] Carissima Mathen, "Transgendered Persons and Feminist Strategy" (2004) 16:2 CJWL 291 at 292, explains the divisiveness of *Nixon* in these terms:

> Nixon's complaint has sparked painful disagreement within the feminist movement in Canada. Women, who have worked through issues such as the incorporation of lesbian or race-conscious perspectives into feminist theory, find themselves on opposite sides of a deep chasm. Advocates disagree about the appropriate use of formal equality analysis, about the extent to which self-identification is sufficient for inclusion in a particular group, and about whether *Kimberly Nixon v. Vancouver Rape Relief and Women's Shelter*...threatens the very existence of "women-only" spaces.

See also Christine Boyle, "The Anti-Discrimination Norm in Human Rights and *Charter* Law: *Nixon v. Vancouver Rape Relief* (2004) 37:1 UBCLR 31 at 44 (characterizing Nixon's claim as one of formal, rather than substantive, equality); Lori Chambers, *supra* note 45 at 311 (noting that the "outcome of her case has implications beyond the post-operative male-to-female (MTF) individual. At issue is when and how we draw lines around women-only space. If all sex/gender identification exists on a continuum, how are such distinctions to be made?"); Patricia Elliott, "Who Gets to Be Woman?: Feminist Politics and the Question of Trans-inclusion" (2004) 29:1 Atlantis: A Women's Studies Journal 13 at 14 (describing the *Nixon* case as raising "questions about feminists' complex relationships to, and assumptions about,

Nixon had undergone gender-affirming surgery and, according to her amended birth registration, was legally female. Having benefitted from counseling after suffering abuse by a male partner, Nixon sought to qualify as a volunteer at Vancouver Rape Relief, a "women-only" feminist collective providing counseling and other services to women victims of male violence. Upon arriving at the volunteer training session, a Rape Relief worker "identified Ms. Nixon as someone who had not always lived as a girl or woman, based solely on her appearance."[58] After confirming this was true, Nixon was asked to leave the volunteer training session. Rape Relief explained that "men were not allowed in the training group" because "a woman had to be oppressed since birth to be a volunteer...and...because she [Nixon] had lived as a man she could not participate."[59]

Nixon initiated a complaint under British Columbia's *Human Rights Code*.[60] She argued that the decision of Rape Relief to categorically deny trans women access to training sessions and bar them from becoming volunteer counselors constituted discrimination on the basis of sex and disability.[61] Rape Relief responded that because it was statutorily permitted[62] to have a "women

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gender, sexuality, and support for diverse sexual struggles"); barbara findlay, "Real Women: *Kimberly Nixon v. Vancouver Rape Relief*" (2003) 36:1 UBCLR 57 (documenting findlay's experiences as counsel for Nixon); Ummni Khan, "Perpetuating the Cycle of Abuse: Feminist (Mis)use of the Public/private Dichotomy in the Case of *Nixon v. Rape Relief*" (2007) 23 Windsor Rev Legal Soc Issues 27 (noting that the shelter's reliance upon the public/private distinction undermines equality for trans women and non-trans women alike); Graham Mayeda, "Re-imagining Feminist Theory: Transgender Identity, Feminism, and the Law" (2005) 17:2 CJWL 423 at 464 (arguing that the decisions of the British Columbia Supreme Court and the British Columbia Court of Appeal "seem to be a setback, in particular because they continue to confuse gender and sex and, therefore, uncritically affirm that biological criteria are a valid basis for differential treatment"); and Ajnesh Prasad, "Reconsidering the Socio-Scientific Enterprise of Sexual Difference: The Case of Kimberly Nixon" (2005) 24:2,3 Canadian Woman Studies 80 (concluding at 83 that "Nixon becomes part of the feminist revolution, resisting masculinity and patriarchy, while simultaneously embodying a 'subject of differentiation—of sexual contradictions'" (citing Julia Kristeva in Susan Hekman, "Reconstituting the Subject: Feminism, Modernism, and Postmodernism" (1991) 6:2 Hypatia: A Journal of Feminist Philosophy 44 at 56)).

[58] *Vancouver Rape Relief Society v Nixon*, 2003 BCSC 1936 at para 9, 48 CHRR D/123 [*Nixon* (BCSC Decision)].

[59] *Nixon* (Tribunal Decision), *supra* note 56 at para 31.

[60] *Human Rights Code*, RSBC 1996, c 210 [*BC Code*].

[61] *Nixon* (BCSC Decision), *supra* note 58 at para 12.

[62] Section 41 of the *BC Code*, *supra* note 60, provides a "group rights" exemption:

> (1) If a charitable, philanthropic, educational, fraternal, religious or social organization or corporation that is not operated for profit has as a primary

only" hiring policy for its provision of counseling services, it was "entitled to determine who is a woman for purposes of that policy consistent with its collective political beliefs."[63] The case pitted the interests of trans women against the interests of women who had experienced male violence. The resolution of the dispute was premised largely on the thorny question of how one defined the category or identity of "woman."

The British Columbia Human Rights Tribunal agreed that Rape Relief had discriminated against Nixon. The Tribunal concluded that Rape Relief had failed to demonstrate that its policy of excluding trans women was reasonably necessary to meet its goal of assisting women who had experienced male violence.[64] Rape Relief's application for judicial review before the Supreme Court of British Columbia quashed the Tribunal's decision,[65] a result that was ultimately upheld by the Court of Appeal for British Columbia.[66] While the exclusion of trans women was found to constitute discrimination within the meaning of the provincial *Human Rights Code*, the Court of Appeal found that the statutory framework exempted the shelter, as an organization with the primary purpose of promoting "the interests and welfare of an identifiable group" characterized by sex or political belief, to grant preference to members

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> purpose the promotion of the interests and welfare of an identifiable group or class of persons characterized by a physical or mental disability or by a common race, religion, age, sex, marital status, political belief, colour, ancestry or place of origin, that organization or corporation must not be considered to be contravening this Code because it is granting a preference to members of the identifiable group or class of persons. [...]

[63] *Nixon* (BCSC Decision), *supra* note 58 at para 23.

[64] *Nixon* (Tribunal Decision), *supra* note 56 at para 207. The Tribunal at para 221-224 found that Rape Relief was not protected by section 41 of the *BC Code*, *supra* note 60 because the "objects" of Rape Relief did not show a primary purpose of promoting the interests of people who share their political belief or who share a life-long experience as girls and women. The Tribunal awarded Nixon $7,500 in damages, the largest amount then ever awarded in British Columbia to compensate injury to feelings and dignity: "Vancouver Rape Relief and Women's Shelter Expresses Serious Concern About Human Rights Tribunal Decision" (18 January 2002), online: Vancouver Rape Relief & Women's Shelter <http://www.rapereliefshelter.bc.ca/learn/resources/vancouver-rape-relief-and-women%E2%80%99s-shelter-expresses-serious-concern-about-human-righ>.

[65] *Nixon (*BCSC Decision), *supra* note 58.

[66] *Vancouver Rape Relief Society v Nixon*, 2005 BCCA 601, 262 DLR (4th) 360 [*Nixon* (Court of Appeal Decision)].

of that group, from compliance with the *Code*.[67] The Supreme Court of Canada dismissed Nixon's application for leave to appeal.[68]

Throughout the evolving lineage of trans cases adjudicated by Canadian courts and human rights bodies over the past fifteen years, a distinct discursive construction of the trans legal subject has begun to emerge. While each case necessarily turns on the unique facts of the claimant and the nature of the dispute at hand, it is possible to discern some threads of commonality in how the discourse of antidiscrimination law tends to conceptualize trans subjectivity. Many of these elements are evident in *XY,* the most recent antidiscrimination case to consider, engage and construct the trans subject through legal discourse

III. The Decision of the Ontario Human Rights Tribunal in *XY v Ontario*

A. Facts

The sex designation listed on the birth registration at the time of XY's birth was male, however XY identified as a girl from a young age.[69] She legally changed her name and began living as a woman while attending university, where XY battled mental health issues and faced discrimination based on her trans status.[70] XY left university without completing her degree, eventually returning home "'to live in' a community where she was known as male 'and nothing more than that.'"[71] XY's family was embarrassed about her trans status and "tried to hide her from the community."[72] XY eventually legally reverted to her birth name and began working as a male. She was afraid that if she tried to live and work as a woman, her identification, which indicated she was a male, "might catch up to her" and expose her to

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[67] *Ibid* at paras 43-59.

[68] *Nixon v Vancouver Rape Relief Society*, 2007 CanLII 2772 (SCC). No case specifically involving trans issues has reached the Supreme Court of Canada.

[69] *Supra* note 4 at paras 41-43. An infants' sex at time of birth is determined by reference to external genitalia. The parent(s) of a newborn, and the doctor or midwife who attended the birth, must each register the sex of a newborn infant, along with other information, with the Office of the Registrar General: at para 32. Section 43(1)(d) of the *VSA*, *supra* note 5, makes it mandatory to include sex designation, among other pieces of information, on a birth certificate.

[70] *Supra* note 4 at paras 43-47 (XY testified that when the Dean of the Faculty of Nursing in which she was enrolled discovered that she was transgendered, he refused to support or accommodate her position and "pressured her to switch to a Bachelor of Science Degree,... which she did because she did not see any other option.")

[71] *Ibid* at para 50.

[72] *Ibid.*

transphobic violence and discrimination.[73] In 2007, XY qualified as a tradesperson and moved to Alberta for work; however she was fired as a result of a fight with a co-worker who was harassing her with homophobic slurs.[74]

XY knew that in order to change the sex designation on her birth registration, she had to comply with section 36 of the Ontario *VSA*, entitled "Changes Resulting from Transsexual Surgery." The long form birth registration serves as a "foundation document" used by government and non-government organizations to determine an individual's eligibility for benefits including health insurance, a driver's licence, a social insurance number and a passport.[75] Section 36 of the *VSA* provides:

> 36. (1) Where the anatomical sex structure of a person is changed to a sex other than that which appears on the registration of birth, the person may apply to the Registrar General to have the designation of sex on the registration of birth changed so that the designation will be consistent with the results of the transsexual surgery.[76]

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[73] *Ibid* at paras 50, 51.

[74] *Ibid* at paras 52-54.

[75] *Ibid* at paras 30, 34. See also online: *Ontario Birth Certificates*, online: Ontario Vital Certificates <http://www.vitalcertificates.ca/ontario/birth-certificate/> (noting that a birth certificate is required "to establish legal identity, obtain a Canadian passport, apply for a health card, driver's license, social insurance number, enrol in school, settle an estate or access pension benefits." The long form birth certificate is considered the official or "certified" copy of birth registration. Like the unofficial short form birth certificate, the long form includes an individual's name, date of birth, certification number, sex, date of registration and the date issued, as well as additional information including the names of one's parents, how long one's mother was pregnant with them and how many children were born to that mother). For judicial analysis of the similar role played by driver's licenses in the modern Canadian administrative state, see e.g. *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567.

[76] *Supra* note 5, s 36. This scheme for changing sex designation on a birth certificate, including the surgery requirement, is akin to that in place in other provinces. See e.g. the Nova Scotia *Vital Statistics Act*, RSNS 1989, c 494, s 25 (requiring affidavits from two medical practitioners "deposing that the anatomical sex of the person has changed"); and the Saskatchewan *Vital Statistics Act, 2009*, SS 2009, c V-7.21, s 31 (stipulating that only an individual who "has undergone gender reassignment surgery may apply to the registrar to have the designation of sex on the individual's statement amended to be consistent with the results of the surgery").

Section 36 further specifies that an applicant wishing to change the sex designation on his or her birth registration must provide two medical certificates in support of the application: the first confirming that the certifying doctor performed "transsexual surgery on the applicant" and that "as a result of the transsexual surgery, the designation of sex of the applicant should be changed on the registration of birth of the applicant"; and the second confirming that a certifying doctor who did not perform the "transsexual surgery" has examined the applicant and confirmed the "transsexual surgery was performed" and as a result, the applicant's sex designation should be changed on his or her birth registration.[77] The applicant must also pay a fee to process his or her request.[78]

The *VSA* is administered by the Office of the Registrar General (Minister of Government Services), which has no specific standards regarding the kinds of surgical procedures that qualify as "transsexual surgery" for the purposes of section 36. Instead, it is left to the discretion of the doctors completing the medical certificates required for a section 36 application to determine whether a certain procedure "'in their minds' meets the definition of 'transsexual surgery.'"[79] If two doctors are willing to certify that "transsexual

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[77] *VSA*, *supra* note 5, s 36 (2)(a)-(b). See s 36 (3)-(6):

> (3) Where it is not possible to obtain the medical certificate referred to in clause (2) (a) or (b), the applicant shall submit such medical evidence of the transsexual surgery as the Registrar General considers necessary.
>
> ...
>
> (4) The Registrar General shall, upon application made to him or her in accordance with this section, cause a notation to be made on the birth registration of the applicant so that the registration is consistent with the results of the surgery.
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> ...
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> (6) Every birth certificate issued after the making of a notation under this section shall be issued as if the original registration of birth had been made showing the designation of sex as changed under this section. R.S.O. 1990, c. V.4, s. 36.

[78] *XY*, *supra* note 4 at para 39. According to *Changing Your Sex Designation on your Birth Registration and Birth Certificate*, online: ServiceOntario <http://www.ontario.ca/en/services_for_residents/ONT05_040622.html>, fees associated with changing sex designation on a birth certificate include: 1) $37.00 to process the amendment request; and 2) a fee to issue a new birth certificate with the changed sex designation ($35.00 for a long form birth certificate, $25.00 for a short form birth certificate).

[79] *XY*, *supra* note 4 at para 209 (testimony of the Deputy Registrar General).

surgery" has occurred, the Office of the Registrar General "does not look underneath the certification."[80]

In 2007, XY made the decision to physically transition to her gender by having "transsexual surgery."[81] She travelled to the United States, where she underwent a bilateral orchiectomy (surgical removal of both testicles). After submitting to the Office of the Registrar General the two required certifications pursuant to section 36 of the *VSA*, XY was issued a new birth certificate indicating her sex as female. Although "she felt very angry that surgery had been required in order to obtain a change in sex designation on her birth registration" and was "insulted and degraded by the experience of having the validity of her gender based on [her doctors' assessment of] her genitals," XY believed that a birth registration listing her sex designation as female "was the foundation she needed to live and work as a woman without discrimination or harassment."[82] XY brought an application challenging section 36 of the *VSA* on the basis that "the requirement that she have and certify that she had 'transsexual surgery' in order to obtain a birth certificate which accorded with her gender identity infringed her right to equal treatment without discrimination on the basis of sex and/or disability with respect to services contrary to s.1 and s.11 of the [*Human Rights*] *Code*."[83]

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[80] *Ibid.* Further testimony at para 70 indicated that XY's physician personally inquired with the Office of the Registrar General as to the requirements for "transsexual surgery" and was told that an orchiectomy combined with "living and looking like a woman" would satisfy the *VSA* requirements for a change in sex designation.

[81] *Ibid* at para 55.

[82] *Ibid* at paras 61, 72 and 55. The respondent argued that XY underwent the orchiectomy for reasons other than a desire to satisfy the requirements of the *VSA* and obtain a change in the sex designation her birth registration. This argument was rejected by the Tribunal, concluding at para 130 "that the applicant had an orchiectomy at least in part (and in significant part, in my view) to satisfy the respondent's requirements for a change in sex designation on her birth registration..."

[83] *Ibid* at para 5. See *Code, supra* note 6, s 1. Section 11 of the *Code* guarantees:

> 11. (1) A right of a person under Part I is infringed where a requirement, qualification or factor exists
>
> that is not discrimination on a prohibited ground but that results in the exclusion, restriction or
>
> preference of a group of persons who are identified by a prohibited ground of discrimination and
>
> of whom the person is a member, except where,
>
> (a) the requirement, qualification or factor is reasonable and *bona fide* in the circumstances; or

B. Reasoning and Result

Ontario Human Rights Tribunal adjudicator Sherri Price agreed that the Office of the Registrar General had "infringed [XY]'s right to be free from discrimination with respect to services on the basis of sex and/or disability."[84] The Tribunal's decision focused on the question of whether the Office of the Registrar General had discriminated against XY as a "transgendered person." The Tribunal relied on the two-part analytical framework for establishing discrimination set out in *Kapp*.[85] The *Kapp* test asks: 1) whether the law creates a distinction based on a prohibited ground that creates a disadvantage; and 2) whether that distinction perpetuates prejudice or stereotyping.[86]

On the first step of *Kapp*, the Tribunal found that section 36 of the *VSA* treats transgendered persons in a distinct way by mandating that they have, and certify that they have had, "transsexual surgery" in order to change the sex designation on their birth registration. The Tribunal further held that XY herself had been treated in a distinct manner because she was required to fulfill these requirements in order to change her sex designation.[87] This distinction created a disadvantage for XY in two ways. First, "she was demeaned by the fact that it fell to [her doctors] to determine whether [her] gender would be recognized as valid based on the manner in which her body had been altered by

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(b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right.

(2) The Tribunal or a court shall not find that a requirement, qualification or factor is reasonable and *bona fide* in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

[84] *Supra* note 4 at para 18.

[85] *Kapp*, *supra* note 31. According to the Ontario Court of Appeal decision in *Ontario (Disability Support Program) v Tranchemontagne*, 2010 ONCA 593 at paras 86-91, 222 CRR (2d) 144 , the discrimination analysis developed under section 15(1) of the *Charter, supra* note 28, applies to challenges to legislation and government policy brought under section 1 of the *Code, supra* note 6. For in-depth analyses and insightful commentary on the *Kapp* decision and its impact on section 15 equality claims under the *Charter* see e.g. Margot Young, "Unequal to the Task: 'Kapp'ing the Substantive Potential of Section 15" in Sanda Rodgers & Sheila McIntyre, eds, *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (Markham, Ontario: LexisNexis, 2010) 183; Patricia Hughes, "Resiling from Reconciling?: Musings on *R. v. Kapp*" (2009) 47 SCLR (2d) 255.

[86] *Kapp*, *supra* note 31 cited in *XY, supra* note 4 at para 92.

[87] *Ibid* at paras 103-104.

'transsexual surgery'."[88] This disadvantage was based not on the fact of certification, but on what had to be certified – that is, that her "sex designation should be changed *as a result of 'transsexual surgery.'*"[89] Second, the Tribunal found that XY experienced disadvantageous treatment on the basis of her status as a transgendered person because the "transsexual surgery" requirement of section 36 of the *VSA* was a "significant factor" in her decision to undergo an orchiectomy in 2008.[90] The Tribunal accepted that XY felt a "compelling need to have all of her identification, including her birth certificate, identify her as female so that she could 'live her gender'" and because she feared exposure to transphobic discrimination and violence when presenting herself as a woman and showing identification indicating she was male.[91] As such, XY "was obliged to have surgery in order to obtain a benefit, namely a birth certificate with a sex designation that matched her gender identity, whereas non-transgendered persons are not subject to any such obligation or burden."[92]

The Tribunal also answered the second *Kapp* question – whether the disadvantageous distinction created by the *VSA* perpetuates prejudice or stereotyping – in the affirmative. Section 36 of the *VSA* was first found to perpetuate disadvantage against transgendered persons by exacerbating their situation as a historically disadvantaged group.[93] Because transgendered persons cannot obtain a birth certificate that reflects their gender identity without undergoing "transsexual surgery," section 36 of the *VSA* "gives force to the prejudicial notion that transgendered people are not entitled to have their

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[88] *Ibid* at para 113.

[89] *Ibid* at para 114 [emphasis added]. The Tribunal agreed with the Office of the Registrar General (at para 114), which argued that "the need for corroboration is a generally applicable vital statistics principle that applies any time a person seeks to amend registered vital event data."

[90] *Ibid* at para 122.

[91] *Ibid* at paras 123, 127.

[92] *Ibid* at para 135. The Tribunal reiterated this conclusion at para 153, stating "...the *status quo* (i.e. birth certificates that reflect the sex assigned at birth) affects transgendered persons in a differential and adverse manner as compared to non-transgendered persons" [emphasis in original].

[93] *Ibid* at paras 159-162. Although it reached the conclusion that XY's right to equality had been infringed via inference, as is frequently the case in the human rights context (per *Tranchemontagne, supra* note 85 at para 90), the Tribunal (at para 163) further assumed, "without finding, that [if] this is a case that requires a more nuanced inquiry", XY still satisfies the second step of the *Kapp* test "by showing that the scheme for issuing birth certificates pursuant to the *VSA* perpetuates disadvantage against transgendered persons by exacerbating the situation of this historically disadvantaged group."

gender recognized unless they surgically alter their bodies" promoting the view that "transgendered persons who, for whatever reason, do not have surgery are less deserving of respect, in [the] sense that they are less deserving of having their gender identity respected; and thus reinforces the notion at the very core of the prejudice against transgendered persons in our society."[94]

The Tribunal was further of the view that the application of section 36 perpetuates stereotypes about transgendered persons that do not correspond to their actual circumstances or characteristics. The Tribunal concluded that the surgical requirement for changing sex designation on birth registration "is based on the stereotypical belief that transgendered persons can only 'be' their gender by having surgery; and that surgery somehow changes them from male to female, or vice versa...s.36 gives force to the stereotypical idea that a transgendered woman who has had surgery, for example is more 'female' than a transgendered woman who has not."[95] Accordingly, the section 36 requirements for changing sex designation are not based on the actual characteristics or circumstances of transgendered persons but on "assumptions about...what they must do in order to 'be' their gender."[96] A *prima facie* case of discrimination under the *Code* was established, and neither of the available defences under sections 11(1)(a)[97] or 14[98] of the *Code* applied to relieve the Office of the Registrar General from liability.

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[94] *Ibid* at para 172.

[95] *Ibid* at para 212.

[96] *Ibid* at para 215.

[97] *Ibid* at paras 231-256. See *Code*, *supra* note 6, s 11. The Tribunal concluded in *XY, supra* note 4 at paras 238-239, that the respondent failed to demonstrate that the "transsexual surgery" requirement in section 36 of the *VSA* was "reasonably necessary" to accomplish the goal of "ensuring the accuracy and reliability of registered vital event data." The respondent's argument that removing the surgical requirement for a change in sex designation would undermine the accuracy and reliability of registered vital event data was found to wrongly presuppose a "direct correlation between surgery and sex that has not been established in evidence" at para 241.

[98] *Ibid* at paras 257-267. Section 14 of the *Code, supra* note 6, states:

> (1) A right under Part I is not infringed by the implementation of a special program designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity or that is likely to contribute to the elimination of the infringement of rights under Part I.

The Tribunal found in *XY, supra* note 4 at para 265, that even if section 36 of the *VSA* could be construed as a "special program" within the meaning of s 14 of the *Code*, there is no "rational or logical basis for discriminatorily restricting the benefit available under the 'special program' (i.e. change in sex designation on birth registration such that it

Finally, on the question of remedy, the Tribunal determined this was not an appropriate case in which to mandate an apology[99] or award monetary damages, since there was no evidence that in applying section 36 of the *VSA* to XY, the Office of the Registrar General "acted in a manner that was clearly wrong, in bad faith, [or] an abuse of its powers."[100] The Tribunal made an order for future compliance with the *Code*, directing the Office of the Registrar General to take steps to eliminate the discriminatory effect of the legislative scheme for issuing birth certificates on transgendered persons under the *VSA*, "up to the point of undue hardship, and in accordance with the principles reflected in this decision."[101] Lacking jurisdiction to craft or require the adoption of a specific legislative scheme,[102] the decision of how to amend the *VSA* to comply with the *Code* was left to the discretion of the Office of the Registrar General.[103]

The government was given 180 days from the April 11, 2012 ruling to revise the criteria for a sex designation change on birth registration.[104] After

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accords with gender identity) to those transgendered persons who have had 'transsexual surgery'."

[99] *Ibid* at paras 285-287 (citing *Abdallah v Thames Valley District School Board*, 2008 HRTO 230, 65 CHRR D/91, the Tribunal explained its general reluctance to order apologies because "such orders are viewed as inappropriate or an ineffective remedy and raise potential freedom of expression concerns.")

[100] *Supra* note 4 at para 282.

[101] *Ibid* at para 295.

[102] See e.g. *Malkowski v Ontario Human Rights Commission (2006)*, 219 OAC 238, [2006] CanLII 43415 at para 36 (Ont Div Ct): "The [*Human Rights*] *Code* is not a constitutional document. It has been described as *quasi*-constitutional...but it falls short of being a constitutional document entitling the Tribunal or the Courts to disallow legislation or require changes to it" [emphasis in original].

[103] *XY, supra* note 4 at paras 296-297.

[104] Before the new guidelines were introduced, lawyer Nicole Nussbaum noted: "One idea that is being considered is having a guarantor process, so there would be some third-party guarantor confirm that a person is living in a particular gender" (Nicole Nussbaum quoted in Houston, *supra* note 8.) Others suggested that the government considered amending the *VSA* requirements to more closely match the scheme used to make changes to sex designation on Ontario driver's licenses: the Ministry of Transportation "simply requires a doctor to certify — without elaboration — that a person is an 'appropriate candidate' for the gender-designation [*sic*] change." Colin Perkel, "No surgery to change sex on birth certificate" *Metro* (20 April 2012), online: Metro News <http://metronews.ca/news/canada/112579/no-surgery-to-change-sex-on-birth-certificate/>. See also: *Gender Designation Change*, online: Ontario Ministry of Transportation <http://www.mto.gov.on.ca/english/dandv/driver/genderchange.shtml>. The Ministry of Transportation requirements were the result of a mediated case, *AB v Ministry of Transportation and Minister of Government Services*, where the parties agreed that the sex

consulting stakeholders and examining practices of other jurisdictions, the government of Ontario communicated the revised criteria to the public on October 5, 2012.[105] Individuals wishing to change the sex designation on their birth registration documents must now satisfy two requirements: 1) the individual must complete a statutory declaration indicating that they have assumed or have always had the gender identity that accords with the change in sex designation, that they are living full-time in that gender identity, and that they intend to maintain that gender identity; and, 2) the individual must provide a letter from a physician or psychologist authorized to practice in Canada who can support the requested change in sex designation.[106] The revised legislation essentially replaces the requirement of "transsexual surgery" that is corroborated by a medical professional with the requirement of a "statutory declaration of gender identity" that is certified by a medical professional.

IV. Locating the Trans Legal Subject in Canadian Law

The Tribunal in *XY* identifies the "real issue" in the case as "whether the respondent discriminated against the applicant *as a transgendered person*?"[107] Who is the "transgendered person" as understood in law? Who is the legal subject created in the *XY* decision? What are the assumptions about trans identity and trans lives that inform the Tribunal's understanding of the trans legal subject in *XY*? In exploring these questions, we hone in on three key characteristics of the trans legal subject created in *XY*, which are also reflected throughout much of the earlier trans jurisprudence canvassed above. Here, we contend that the trans legal subject created in *XY*: 1) is

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designation on ones' driver's license could be changed through a simple application by the individual and a confirming letter from their physician, laying the groundwork for *XY*. The Tribunal made note of the process for changing sex designation on a driver's license: *XY*, *supra* note 4 at paras 11, 177.

[105] See e.g., Sandra Leonetti, "Breaking! ServiceOntario Announces New Criteria for Change of Sex Designation on Ontario Birth Registration" (5 October 2012) online: QueerOntario <http://queerontario.org/2012/10/05/new-criteria/>.

[106] Ontario, Office of the Registrar General, "Changing Your Sex Designation on your Birth Registration and Birth Certificate" (5 October 2012) online: ServiceOntario <http://www.ontario.ca/en/services_for_residents/ONT05_040622.html>. Although the Service Ontario website indicates that "[a]lternative evidence to the required letter [from a medical professional] as detailed on the application form may be acceptable" the government has not yet specified what kinds of alternative evidence will suffice [Changing Your Sex Designation]. See also Leonetti, *supra* note 105.

[107] *XY*, *supra* note 4 at para 90 [emphasis added].

overdetermined by trans status; 2) has an immutable trans identity based on a disconnect between sex and gender that the trans individual seeks to 'resolve'; and 3) lacks the autonomy to self-define. Having described this dominant model of the trans subject, we then step back to problematize reliance on this model in legal strategies designed to improve the lived realities of trans Canadians.

A. Uncovering the Trans Legal Subject

i) The Trans Legal Subject is Overdetermined by Trans Status

Legal discourse understands trans subjectivity as predominately, if not entirely, determined by trans status. The narrative of XY's life is told through the singular lens of her position as a "transgendered woman," and we learn little about how her race, class, disability or sexual orientation might have impacted her life or her experiences of discrimination.[108] XY spent time in a shelter, worked as a bicycle courier and was licensed as a tradesperson, but these bare facts give rise to little more than assumptions about her economic circumstances.[109] XY was diagnosed with "Gender Identity Disorder" and the Tribunal references her past struggles with "depression and anxiety" and a "suicidal fantasy" but no further discussion of possible mental illness is included in the analysis.[110]

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[108] *Ibid* at para 3 (stating, the "applicant identifies herself as a male-to-female transgendered person, a transgendered woman.").

[109] *Ibid* at para 52.

[110] *Ibid* at paras 5 and 48-49. XY's testimony clearly indicated that she "does not regard her gender identity as a 'disability.'" The question of whether and when Gender Identity Disorder should be expressed using the language of disability is deeply contested. For some scholars and activists, expressing trans identities using the language of "disability" and "disorder" usefully captures the lived realities of persons who experience a disconnect between their sex and their gender and may allow trans people to access gender-affirming medical care, including mental health services, and funding for hormone therapy and surgery, where it is desired. See e.g. Jennifer L Levi, "Clothes Don't Make the Man (or Woman), but Gender Identity Might" (2006) 15:1 Colum J Gender & L 90; Nicole M True, "Removing the Constraints to Coverage of Gender-Confirming Healthcare by State Medicaid Programs" (2011-2012) 97:4 Iowa L Rev 1329. Others reject the language of "disability" as inaccurate and stigmatizing of trans realities, arguing that it is society that participates in the construction of Gender Identity Disorder by continuing to hold onto rigid, essentialist conceptions of gender and stigmatizing those who do not conform to the dominant gender binary. Scholars and activists on this side of the debate also tend to make the point that, when we situate the relationship between disability and non-normative expressions of gender and sexuality in their historical context, it becomes apparent that we ought to view medicalized discourse skeptically. See e.g. Jeannie J Chung, "Identity or Condition?: The Theory and Practice of

The discursive creation of a legal subject wholly determined by trans status or "gender identity" is connected to one of the core mechanisms of antidiscrimination law: the focus on grounds. As noted above, the threshold question for any claim brought pursuant to antidiscrimination law is whether the individual claimant falls within one of the prohibited categories of discrimination; that is, does the claimant belong to one of the enumerated categories of people who share a characteristic upon which discriminatory treatment is prohibited?[111] There is a clear tendency in antidiscrimination law to treat enumerated grounds as "mutually exclusive categories of experience and analysis."[112] As Professor Dianne Pothier observes, "[a]lthough there are no specific statutory bars to claims based on multiple and intersecting grounds, the legal mindset has had difficulty with such claims."[113] The dominant "single-axis" framework for addressing discrimination requires individuals who experience discrimination on the basis of multiple, intersecting or interlocking axes of discrimination to distil complex social identities and experiences into a single enumerated ground.[114]

Applying State Disability Laws to Transgender Individuals" (2011-2012) 21:1 Colum J Gender & L 1; and Romeo, *supra* note 3.

[111] See Dianne Pothier, "Connecting Grounds of Discrimination to Real People's Real Experiences" (2001) 13:1 CJWL 37 at 39 (describing the grounds of discrimination as "a principal focus of anti-discrimination law, both statutory and constitutional."). Under section 15 of the *Charter* the 'analogous grounds' provision permits recognition of new prohibited grounds; see e.g. *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, at paras 58-62, 173 DLR (4th) 1 [*Corbiere*]. Since *Vriend v Alberta,* [1998] 1 SCR 493, 31 CHRR D/1 [*Vriend* cited to CHRR], the *Charter* can also dictate the addition of further grounds of discrimination to human rights statutes (the Court at para 153 of *Vriend* explaining that reading the ground of sexual orientation into the *Charter* enhanced the purpose of promoting and protecting "inherent dignity and inalienable rights").

[112] Kimberle Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" [1989] U Chicago Legal F 139 at 139. See also Denise G Réaume, "Of Pigeonholes and Principles: A Reconsideration of Discrimination Law" (2002) 40:2 Osgoode Hall LJ 113; Sherene H Razack, "Gendered Racial Violence and Spatialized Justice: The Murder of Pamela George" (2000) 15:2 CJLS 91; Sherene H Razack, *Race, Space, and the Law: Unmapping a White Settler Society* (Toronto: Between the Lines, 2002).

[113] Pothier, *supra* note 111 at 39.

[114] There are exceptions to the trend toward single-axis analyses, particularly in the context of section 15 cases where courts have attempted, with varying degrees of success, to engage multiple dimensions of discrimination. See e.g. *Falkiner v Ontario (Ministry of Community and Social Services)*, (2002), 59 OR (3d) 481, 212 DLR (4th) 633 (CA) [*Falkiner*], where Laskin JA found discrimination on the basis of the enumerated ground of sex and the analogous ground of marital status, but also considered the ground of "social assistance

In *XY*, the Registrar General conceded that "discrimination against the applicant as a transgendered person would constitute discrimination on the basis of sex and/or disability", both prohibited grounds under the *Code*, leading the Tribunal to conclude that it did not need to conduct any further analysis of grounds.[115] By failing to do so, however, the analysis flattened trans subjectivity, creating an overly-simplified trans legal subject. *XY* is the most recent example of legal decision-making that distills complicated lived realities into the narrow identity categories required by anti-discrimination law. For example, *Forrester v Peel (Regional Municipality of) Police Services Board*[116] involved an allegation by a trans woman that police had discriminated against her on the ground of sex when they refused to honour her requests to have a female officer conduct her strip searches.[117] The Ontario Human Rights Tribunal pithily described the complainant, Rosalyn Forrester, as "a forty-three year-old Black, lesbian, pre-operative transsexual woman, who lives in Mississauga."[118] This statement marks the Tribunal's single reference to Forrester's status as a racialized woman and a lesbian throughout its nearly 500-paragraph decision.[119] The Tribunal fails to acknowledge, let alone grapple with, the ways that Forrester's race and/or sexual orientation may have

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recipient" and noted at para 71, "no single comparator group will capture all of the differential treatment complained of in this case." For useful commentary on *Falkiner* see e.g. Daphne Gilbert, "Time to Regroup: Rethinking Section 15 of the *Charter*" (2003) 48:4 McGill LJ 627 (arguing at 633-34 for a shift away from enumerated grounds of discrimination and for the development of a groups-focused approach that would allow equality claimants to "self-identify with the group that most aptly reflects the individual's lived experience," shifting the inquiry to "identifying a group with whom the claimant shares a history of marginalization or social vulnerability"). See also the concurring judgment of Justice L'Heureux Dubé in *Corbiere, supra* note 111 at para 72 (in the context of assessing the discriminatory effect of s 77(1) of the *Indian Act*, which precluded band members who were not "ordinarily resident" on the reserve from voting in band elections, noting the unique impact on Aboriginal Women, "who can be said to be doubly disadvantaged on the basis of both sex and race, [and thus] are among those particularly affected by legislation relating to off-reserve band members, because of their history and circumstances in Canadian and Aboriginal society.")

[115] *XY*, *supra* note 4 at paras 88-90.

[116] *Forrester*, *supra* note 50.

[117] The case arose as a result of three separate incidents where Forrester was strip searched following arrest. On two of these occasions male officers conducted the searches despite Forrester's protests; on a third occasion Forrester was subject to a 'split search' where a male officer searched her from the waist down, and a female officer searched her from the waist up: *Ibid* at para 1.

[118] *Ibid* at para 28.

[119] The *Forrester* decision totals 476 paragraphs and 123 pages in length.

affected her lived experiences or impacted her interactions with police during the strip searches, which made her feel as though she had been "raped, sexually assaulted."[120] Instead, the discourse in *Forrester* creates a two-dimensional subject, one who can only be understood through the singular lens of gender identity.

The overemphasis in antidiscrimination discourse on trans status at the expense of engaging other axes of oppression sends the message that questions related to whether and how the trans subject's race, class, disability or sexual orientation affect that individual's experiences are less important, or simply irrelevant to legal analysis. This tendency is problematic for its failure to accurately engage and reflect the lived realities of trans people. Single-axis analyses are also likely to lead to overly-simplified legal understandings of the nature of transphobic discrimination because claimants "who are discriminated against in complex ways will fail if they cannot simplify the story of who they are and of their unequal treatment so that it resonates with the dominant group's narrower understanding of the category grounding their claim."[121] Without a complete understanding of how, for example, Rosalyn Forrester's encounters with police were a product not only of her trans status but of her race and sexual orientation, antidiscrimination law is less likely to be able to craft appropriate remedies to combat discrimination experienced by trans people.

ii) The Trans Subject has an Essential Gender Identity

Legal discourse establishes trans status through an understanding of gender as a static, immutable identity trait that ought to correspond to one of the two binary sex categories. In *XY*, the narrative emphasizes the fact that XY "knew she was 'different' as early as age 5" and "always identified as female", casting her trans status as an "unfortunate" but unchangeable identity trait.[122] In previous cases, applicants Kimberly Nixon and Tawni Sheridan were similarly described as realizing "at an early age" that their "physical maleness" did not accord with their sense of themselves as female,[123] while Rosalyn

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[120] *Forrester*, *supra* note 50 at para 39.

[121] Iyer, *supra* note 27 at 179.

[122] *XY*, *supra* note 4 at para 42. In another context, some have criticized the presentation of sexual orientation as an immutable characteristic in antidiscrimination cases involving rights based on sexual orientation. See e.g. Didi Herman, "Are We Family?: Lesbian Rights and Women's Liberation" (1990) 28 Osgoode Hall LJ 789 at 811-813.

[123] *Nixon* (Court of Appeal Decision), *supra* note 66 at para 2, citing *Nixon* (Tribunal Decision), *supra* note 56; *Sheridan, supra* note 51 at para 14.

Forrester experienced "'confusion in [her] head' about her gender from childhood onward".[124]

The discursive creation of a core trans identity necessarily shared by those categorized as falling within that group or ground promotes an essentialist understanding of gender "as intrinsic to individuals, rather than comparative or relational; as inevitable, rather than historically and geographically variable; and as neutral, rather than reflecting a particular pattern of social relations."[125] Essentialist understandings of gender[126] thus locate the source of the "problem" of trans identity squarely with the trans individual; for example, in *Sheridan* the British Columbia Human Rights Tribunal characterized the nature of discrimination experienced by transsexuals as resulting from "the lack of congruence between the criteria which determine sex."[127] This comment assumes that the "criteria" for determining sex are established and unchanging and, further, that the problem or failure of trans status lies in the inability of the trans individual to reconcile his or her experience with established criteria. Similarly, in *Kavanagh*, the Canadian Human Rights Tribunal opened its decision by announcing: "Synthia Kavanagh was born with male anatomy. From her earliest childhood, however,

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[124] *Forrester*, *supra* note 50 at para 29 (the Tribunal proceeds to describe a series of childhood events where Forrester had "torn up her childhood photographs because she could not recognize herself in that image" further bolstering the understanding of Forrester as having an essential, fixed identity as a trans person).

[125] Iyer, *supra* note 27 at 189 (critiquing all of the grounds in antidiscrimination law as having this effect). See also Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge, 1990) at 14-15 (describing gender as an ascribed social characteristic, "always relative to the constructed relations in which it is determined."); Craig, "Trans-Phobia", *supra* note 13 at 138 (describing gender as "produced through relational, contextually influenced, interpretative processes"); Graham Mayeda, "Who Do You Think You Are? When Should the Law Let You Be Who You Want to Be?" in Laurie J Shrage, ed, *"You've Changed": Sex Reassignment and Personal Identity* (Oxford: Oxford University Press, 2009) 194 at 200 (identifying two aspects to the constructed nature of gender: first "that an individual's gender identity is the result of a process of socialization into the signs and symbols that identify a man and a woman, along with the performance of these signs and symbols in the individual's life. Second...the signs and symbols that identify men and women are the result of a historical process of construction.").

[126] See Elaine Craig, *Troubling Sex: Towards a Legal Theory of Sexual Integrity* (Vancouver: UBC Press, 2012) [Craig, *Troubling* Sex] at 46 considering the operation of categorical analysis of discrimination in relation to equality claims on the basis of sexual orientation and arguing that the categorical approach "...encourages claims for freedom from discrimination that are premised on essentialist conceptions of sexuality").

[127] *Sheridan*, *supra* note 51 at para 93 (citations omitted).

she understood that there was something different about her - that *something was not right.*"[128]

Legal discourse conceptualizes essential trans identity as based on an inherent, longstanding disconnect between sex and gender that can be reconciled only by living and presenting as the 'other' sex, as did XY, Nixon, Sheridan, Ferris, Forrester and Kavanagh. This particular vision of trans subjectivity is firmly grounded in the binary model of sex and gender which assumes that each of two gender categories (man/woman) corresponds tidily to one of the categories of biological sex (male/female). In *Kavanagh*, for example, the Tribunal noted that "[t]hrough the controlled administration of opposite-sex hormones, individuals can start to acquire some of the secondary sex characteristics of the desired gender".[129]

In *XY*, the Tribunal recognizes the limits of an anatomy-based framework for understanding trans identity, acknowledging that not all trans individuals want or are able to undergo gender-affirming surgery or treatment,[130] and pointing out that the sex designation on a birth registration document signifies "a broader notion of sex that includes gender identity and ...[is] ...not merely descriptive of anatomy."[131] Yet these important lines of analysis are undercut by the implicit acceptance that gender and sex ought to correlate, with the Tribunal describing the "benefit" sought as "a birth certificate with a sex designation that matched her gender identity..."[132] This essential notion of gender as a simple, uncomplicated fact of existence that easily "matches" a certain anatomical sex, rather than a series of performative norms that simultaneously enable and control human agency,[133] risks endorsing conservative notions of sex and gender. As a result, the trans legal

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[128] *Kavanagh, supra* note 53 at para 2 [emphasis added].
[129] *Ibid* at para 21.
[130] *XY, supra* note 4 at paras 170-172 (finding that where a trans person has an official government document with a sex designation that is "dissonant" with their gender identity, the message conveyed is that "their gender identity in and of itself is not valid.").
[131] *Ibid* at paras 199-206 (concluding that under the *VSA* the Office of the Registrar General "*attribute[s]* a change in sex to persons who have had 'transsexual surgery'" [emphasis in original]).
[132] *Ibid* at para 135.
[133] Katherine M Franke, "The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender" (1995) 144:1 U Penn L Rev 1 at 5 (noting that "[d]efining sex in biological or anatomical terms represents a serious error").

subject contributes to the reification of the "the very categories that have generated heterosexual privilege and Queer [and trans] oppression."[134]

The exclusionary effects of gender essentialism have been extensively documented by feminists in the context of analyzing the discursive creation of the category "women" in law, and a those insights are applicable in the present context: understanding gender identity as essential, immutable and acontextual excludes various trans realities from the domain of law.[135] Creating a trans legal subject who necessarily seeks to reconcile an inherent disconnect between sex and gender reflects only one model of trans life; that most often associated with the label transsexuality. Those with fluid or changing gender identities or expressions, including genderqueer, intersex and cross-dressing individuals and others who fall outside the two-category models of sex and gender, do not fall neatly into the model of trans subjectivity evident in *XY*. These trans people are more likely to be rendered legally incomprehensible when the trans legal subject is cast in essentialist terms.[136] Indeed, in a long line of early cases, a trans claimant's failure to 'fully transition' from one anatomical sex to another through surgery was used as a basis to negate arguments for legal recognition of his or her proffered gender identity.[137]

While the experiences of XY and others may track the particular mould of trans experience that seeks sex and gender correlation along binary lines, the construction of trans subjectivity as *necessarily* defined by these traits is problematic. The exclusionary effects of upholding a single model of trans experience or identity risks casting outside the domain of law those seeking to challenge binary understandings of sex and gender, those with ambiguous or undefined sex or gender identities, or those seeking legal recognition outside the accepted categories of sex and gender.

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[134] Martha Albertson Fineman, "Introduction: Feminist and Queer Legal Theory" in Martha Albertson Fineman, Jack E Jackson & Adam P Romero, eds, *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations* (Burlington: Ashgate Publishing Company, 2009) at 5.

[135] See e.g. Angela P Harris, "Race and Essentialism in Legal Theory" (1990) 42 Stan L Rev 581; Radha Jhappan, "Post-Modern Race and Gender Essentialism or a Post-Mortem of Scholarship" (1996) 51 Studies in Political Economy 15; and Patricia Monture-Angus, "Standing against Canadian Law: Naming Omissions of Race, Culture, and Gender" in Elizabeth Comack, ed, *Locating Law: Race/Class/Gender/Sexuality Connections*, 2d ed (Halifax: Fernwood Publishing, 2006) 73.

[136] For further analysis on the shortcomings of the categorical model see e.g. Iyer, *supra* note 27; and Douglas Kropp, "'Categorical' Failure: Canada's Equality Jurisprudence – Changing Notions of Identity and the Legal Subject" (1997) 23 Queen's LJ 201.

[137] See e.g. *supra* note 24.

iii) The Trans Subject Lacks the Autonomy to Self-Define

Legal discourse constructs trans status as inherently suspect, always requiring expert corroboration or verification. In *XY*, the Tribunal was careful to clarify that its finding that the distinct and disadvantageous treatment resulting from the application of section 36 of the *VSA* was "not based on the fact that the applicant had to go through *any kind* of certification process in order to change the sex designation on her birth registration" but on what had to be certified; that is, only verification of "transsexual surgery" could support an application for change of sex designation on birth registration.[138] As noted above, the result in *XY* was narrowly circumscribed to require the government to develop a different scheme for corroborating or verifying the gender identity of a trans individual seeking to change his or her sex designation; it did not call into question the fact of corroboration itself.[139]

By endorsing a scheme requiring or permitting third-party corroboration of gender identity, the Tribunal in *XY* constructs a trans subject who lacks the autonomy to define personal gender identity in a legally meaningful way. The tendency to construct the trans subject as in need of oversight or verification is similarly evident throughout the lineage of cases that preceded *XY*. In some instances, adjudicators have imposed their own reading of a trans claimants' gender identity. For example, in *Montreuil v Québec (Directeur de l'etat civil)*, the three judge panel utilized different gender pronouns to refer to the claimant, a trans woman: the judge writing for the majority applied the female gender in her reasons, whereas Mr. Justice Morin, noting that the complainant was "still physically a man," preferred to

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[138] *XY, supra* note 4 at para 114 [emphasis added] (adding, "[t]he respondent argues, and I agree, that the need for corroboration is a generally applicable vital statistics principle that applies any time a person seeks to amend registered vital event data.).

[139] *Ibid* at paras 244, 256 (The Tribunal surveyed some of the possible ways that section 36 of the *VSA* could be brought into compliance with the *Code,* stating, *inter alia* that the duty to accommodate the needs of transgendered persons does not oblige the government to permit individuals to "self-select" their sex designation on birth registration, and suggesting at para 297:

> [T]he respondent could fulfill its duty under the *Code* to accommodate the needs of transgendered persons by allowing them to change the sex designation on their birth certificates by submitting doctors' certificates certifying that the sex designation on their registrations of birth should be changed (i.e. s. 36 of the *VSA* minus the surgical requirement). I also agree that, if it wishes to do so, the respondent could opt to accept guarantors' statements as satisfactory evidence to support a change in sex designation without running afoul of the *Code*.).

use the male gender to refer to the claimant throughout his dissenting judgment.[140]

More frequently, adjudicators have accorded significant power to third party decision-makers to scrutinize and determine a trans individual's status, and, in some instances, to substitute their own judgment for the gender identification proffered by trans people. In *Forrester*, the Tribunal held that detainees who self-identify as trans, regardless of whether they have "completed" surgical transition, should be offered the choice to be strip-searched by a female officer, a male officer, or to undergo a "split search" involving both a male and a female officer depending on the area of the body being searched.[141] The Tribunal added, however, that police were entitled to conduct a "gender determination" if they had "reason to doubt the detainee's self- identification." The "determination" included police asking the detained person a series of highly intrusive questions, including, "[w]hat steps are you taking to live full-time in a manner consistent with your gender identity?" and "[h]ow can you demonstrate that you are living full-time in your gender identity?"[142]

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[140] *Montreuil v Québec (Directeur de l'etat civil)*, [2002] JQ no 5004, REJB 2002-35333(CA).

[141] *Forrester*, *supra* note 50 at para 476.

[142] *Ibid* at para 436. The police policy guiding a "gender determination" states:

> 3. If an officer has a reason to doubt the detainee's self identification as a transsexual female, a transsexual male, or an intersexed person:
>
> a) the officer shall make notes as to the reasons for that doubt; and
>
> b) the officer may ask that individual a series of questions, as follows, that should assist in removing doubt. While no one question is determinative, answers to any or all of these questions should assist the officer in determining the gender identity of the detainee;
>
> Note: The below-identified questions that are asked, and answers to those questions asked, shall be recorded in the officer's notebook.
>
> (i) What name appears on your identity documents?
>
> (ii) Have you disclosed your identity to your friends and/or family?
>
> (iii) Have you sought or are you seeking medical or professional guidance from a qualified professional? If so, can you give the name(s) of these people and their professional designations?
>
> (iv) What steps are you taking to live full-time in a manner consistent with your gender identity? How can you demonstrate that you are living full-time in your gender identity?
>
> (v) What is your gender identity and what medical steps, if any, have you taken to help your body match your gender identity?
>
> 4. In the circumstance where the officer continues to have reason to doubt the detainee's self-identification, the officer shall defer to the Officer-in-Charge of the Division for a final determination.

As these cases demonstrate, the trans subject is denied the opportunity to meaningfully self-identify when standing before the law. Some scholars and advocates, including Professor Graham Mayeda, have argued that, despite any potential discomfort with the idea, the law should permit trans individuals to "identify their own gender for legal purposes without requiring medical certification or a guarantee that their gender identity will remain stable throughout their life."[143] Egale Canada, providing the Government of Ontario with recommendations on how to bring the *VSA* into compliance with the decision in *XY*, recently stated:

> It is incumbent upon the province of Ontario to...recognize and uphold the inherent right of trans people to determine their own identity, as is the case regarding other areas where personal and civic life converge—such as marital status, choosing one's own name, occupation or place of residence.[144]

Outside of Canada, there are further examples of governments permitting gender self-identification in law. Most recently, the Senate of Argentina unanimously approved new legislation entitled the *Right to Gender Identity,* which provides, *inter alia,* for the legal recognition of self-defined gender identity without corroboration from doctors or others, and without having to undergo any physical changes.[145] These developments call into

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The Tribunal added four caveats to this policy at *Forrester, ibid* at paras 444-447. The general thrust of the "Gender Determination" policy however, remains intact.

[143] Mayeda, *supra* note 125 at 195. See also Chambers, *supra* note 45 at 333 (noting that the category of 'women' "must be left open to self determination"); Kirkup, *supra* note 50 at 124 (arguing that trans detainees should be afforded the opportunity to self-identify prior to being strip searched).

[144] Letter from Egale Canada to Alexandra Schmidt, Senior Policy Advisor, Policy & Regulatory Services Branch, ServiceOntario, Ministry of Government Services (30 July 2012) online: Egale <http://archive.egale.ca/extra%5CMGS%20Consultation%20on%20Birth%20Registrations.pdf>.

[145] Argentina, *Derecho a la identidad de género* (English Translation), cited by Egale Letter, *ibid* at 2. The Argentinean law provides:

> All persons have the right,
> a. To the recognition of their gender identity;
> b. To the free development of their person according to their gender identity;
> c. To be treated according to their gender identity and, particularly, to be identified in that way in the documents proving their identity in terms of the first name/s, image and sex recorded there.

question the need for corroboration of gender identity, a premise that was easily accepted in *XY, Forrester, Kavanagh* and other trans jurisprudence in Canada, and one that endures in the post-*XY* legislative amendments to the *VSA*, noted above[146]

The ongoing role of corroboration in the legal construction of the trans legal subject is troubling for the scepticism it reveals about the fluidity and changeability of trans identities; guarantors provide some "guarantee that the change [in sex designation] will be permanent and stable."[147] Requiring verification of a trans individual's stated identity denies the autonomy of trans people to self-define and infringes upon their dignity and personhood in fundamental ways. The corroboration requirement, which continues to form the cornerstone of the post-*XY VSA* requirements for changing sex designation on birth registration, endorses the notion that the state is the final arbiter in defining who people are when they stand before the law – never mind who they say they are.

B. The Effects of the Trans Legal Subject on Trans Engagements with Law

A close reading of *XY* and previous trans jurisprudence from Canadian courts and human rights bodies reveals a dominant model of trans subjectivity created by legal discourse: the trans legal subject is understood predominately through an essential gender identity grounded in sex and gender binaries and is constantly subject to corroboration by a third party. That this description reflects the 'good' or the 'visible' trans legal subject in Canadian is neither incidental nor accidental. It flows from the complex interactions of multiple forces including law, legal culture and legal language; social understandings and assumptions about sex and gender; and difficult decision-making by legal and non-legal actors about when and whether to engage the law, which claims to pursue and who has access to lawyers and courts. The point here is not to lay blame on claimants, lawyers or judges, but instead to identify the tendency

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See also Michael Warren, "Argentina's Gender Identity Law Take Effect", *Huffington Post* (4 June 2012) online: Huffington Post <http://www.huffingtonpost.com/2012/06/05/argentina-gender-identity-law-takes-effect_n_1570830.html>; Fabiola Carletti, "Could Argentina's groundbreaking gender law work in Canada?" (13 June 2012), online: CBC <http://www.cbc.ca/news/yourcommunity/2012/06/could-argentinas-groundbreaking-gender-law-work-in-canada.html>.

[146] Changing Your Sex Designation, *supra* note 106.

[147] Mayeda, *supra* note 125 at 195.

of legal discourse to create and reify a singular vision of trans subjectivity and to consider its effects.

There can be little doubt that progress made on the back of the 'good' trans legal subject described above has resulted in important gains for trans Canadians, not least the elimination of the surgery requirement to change sex designation on a birth certificate in *XY*. Yet at the same moment that we acknowledge the progressive work being done by the dominant trans legal subject, we must be aware of its limitations and the unintended consequences that continued reliance on an unproblematized trans legal subject might create for trans people in Canada. We argue here that the trans subject created by legal discourse constrains trans engagements with the law by demarcating the lines of inclusion; only certain trans subjects – most often identified as transsexuals – making certain kinds of legal claims – those based on inclusion in existing systems and structures – are cognizable in antidiscrimination law.

The dominant trans legal subject most closely reflects the experiences of transsexual persons like XY, Nixon, Forrester and Ferris. The Ontario Human Rights Commission describes the term transsexual as generally used to describe a person who has "a strong and persistent feeling that they are living in the wrong sex. This term is normally used to describe individuals who have undergone sex-reassignment surgery. A male transsexual has a need to live as a man and a female transsexual has a need to live as a woman."[148] Mapping trans subjectivity in law according to this particular image of what it means to be a trans person casts the lines of inclusion and exclusion in troubling ways; by establishing a single model of the trans subject who properly falls within the law, legal discourse reinforces "the outlaw status" of those who continue to perform "bad" gender identities that do not neatly fit the mould established by the "good" trans subject.[149] What of genderqueer and intersex individuals who do not self-define within the sex and gender binary or define ambiguously; those with fluid or changing gender identities; racialized or disabled trans people; and those not willing to submit to corroboration? The perpetuation of the dominant model of trans subjectivity in cases like *XY* ensures that the "corporeal experiences and...identities [of these and other trans people] remain

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[148] *OHRC Policy*, *supra* note 3 at Appendix. See also Dean Spade, "Resisting Medicine, Re/modeling Gender" (2003) 18 Berkeley Women's LJ 15 at 16, note 2 (defining transsexuality as a "medical expectation or requirement for membership in this category, as defined by doctors for the purposes of evaluating who is eligible for gender reassignment.").

[149] Cossman, *supra* note 23 at 78 (in the context of the law's construction of "good" and "bad" sexual subjects).

largely unintelligible" in the Canadian legal system.[150] Transsexual individuals are those most likely to be heard, seen and ultimately understood in legal forums because their identities fit most readily into the mould established by the dominant trans legal subject.

The dominant trans subject also contributes to determining the kinds of claims that are likely to make it into the legal arena. By distilling and flattening trans identities to singular, essentialist tropes conditioned by the "liberal legalistic" discourse of antidiscrimination law, the dominant trans subject risks depoliticizing trans identity.[151] Legal discourse unhinges trans status from broader relations of social and political power and contains the trans subject within the individualized framework of antidiscrimination law. As a result, formal equality arguments for inclusion or recognition in the *status quo* are more like to be made by the dominant trans legal subject, instead of systemic arguments for structural change.[152] Indeed this was the effective argument in *XY:* "I want the sex designation on my birth registration to reflect my lived gender identity, just like everyone else's does."

It may be that, as Professor Elaine Craig observes, "until a certain degree of legal recognition is achieved, legal arguments based on disruption, transformative remedies, or a queering of the law or its subjects are likely to fail."[153] However, *status quo* arguments belie the goals of critical trans politics, described by Professor Dean Spade as demanding "more than legal recognition and inclusion, seeking instead to transform current logics of state, civil society security, and social equality."[154] Critical trans theory is a stream of theorizing and strategizing related to, but distinct from, queer theory that focuses specifically on the lived realities of trans people, revealing and analyzing the multiple, interlocking systems of oppression that continue to

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[150] Lamble, *supra* note 17 at 112 (Lamble finds that trans invisibility results both from legislative frameworks "that do not formally recognize gender identity as a distinct discrimination ground, and from social norms that marginalize gender variant people").

[151] Gotell, *supra* note 23 at 127.

[152] Spade, *Normal Life, supra* note 15 at 86, describes such arguments as relying on "a strategy of simile, essentially arguing 'we are just like you; we do not deserve this different treatment because of this one characteristic.'" See also Brenda Cossman, "Lesbians, Gay Men, and the *Canadian Charter of Rights and Freedoms*" (2002) 40:3&4 Osgoode Hall LJ 223 at 236 (noting that arguments for GLBTQ rights "driven by the discourse of sameness," ones which represented a "less radical shift" ...had greater "resonance with the Court" than did those..."where at least some of the litigants were explicitly concerned with resisting a politics of sameness").

[153] Craig, *Troubling Sex, supra* note 126 at 49.

[154] Spade, *Normal Live, supra* note 15 at 19.

shape their lives.[155] Critical trans politics endeavors to use both legal and non-legal strategies to improve the lived realities of trans people *qua* trans people. In contrast, antidiscrimination frameworks focus almost exclusively on legal strategies, tending to do so by seeking inclusion using already established categories such "man" and "woman" and "male" and "female."[156] Indeed, we can imagine what more radical, systemic claims grounded in critical trans politics might have looked like in *XY*; an argument for the right to legally self-identify without corroboration; an argument against the inclusion of sex designation on birth registration documents;[157] an argument for a third sex designation in addition to "m" and "f",[158] or an argument querying whether gender identity even constitutes a "legitimate domain of governance" at all.[159]

That said, the question of visibility can be particularly complicated for trans people, some of whom may equate trans visibility with failing to 'pass' in one's self-defined gender.[160] The tension between passing and legal

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[155] See e.g. Vivian Namaste, *Sex Change, Social Change: Reflections on Identity, Institutions and Imperialism* (Toronto: Women's Press 2005); Scott-Dixon, *supra* note 3; Dean Spade, "Documenting Gender" (2008) 59 Hastings LJ 731 [Spade, "Documenting Gender"]; Joey L Mogul, Andrea J Ritchie & Kay Whitlock, *supra* note 21; Craig, "Trans-Phobia" *supra* note 13; Julia C Oparah, "Feminism and the (Trans)gender Entrapment of Gender Nonconforming Prisoners" (2012) 18 UCLA Women's LJ 239; and Val Napoleon, "Raven's Garden: A Discussion about Aboriginal Sexual Orientation and Transgender Issues" (2002) 17:2 CJLS 149.

[156] Spade, *Normal Live, supra* note 15 at 29.

[157] See e.g. Craig, "Trans-phobia," *supra* note 13; Spade, "Documenting Gender", *supra* note 155 at 806 (suggesting that instead of including one's sex designation on the birth certificate itself, sex at the time of birth "could be reported with statewide vital statistics but not marked on birth certificates that stay with the individual for life as an identity verification document"). Spade makes similar arguments about the inclusion of sex designation on driver's licenses and passports at 807-808.

[158] As is the case in other jurisdictions including Australia and New Zealand which provide an option for trans individuals to designate an "X" on their passports: see "New Zealand Passports – Information for transgender applicants", online: Department of Internal Affairs <http://www.passports.govt.nz/Transgender-applicants>; and "Australia's Passport Policy for Sex and Gender Diverse Applicants (Revised Policy)", online: Department of Affairs and Trade <https://www.passports.gov.au/web/sexgenderapplicants.aspx>.

[159] Spade, "Documenting Gender", *supra* note 155 at 738. The starting assumption accepted by the Tribunal in *XY*, *supra* note 4 at para 28, is clearly that the collection, storing and report gender data is desirable and serves a useful social function because, *inter alia,* it provides important statistics for medical and social researchers to study population trends and determine different kinds of social needs.

[160] Some have drawn distinctions – at time hierarchical – between trans people who opt to remain ambiguous in their gender presentation, and trans people who attempt to 'resolve'

recognition as a trans person – instead of, or as well as, recognition as a man or woman – may be particularly fraught in the public domain of the courtroom, where "transpeople simultaneously experience hypervisibility, and stark invisibility, since legal narratives [which create and reify the trans legal subject] and media spectacle often prevent transpeople from fully representing themselves and their experiences."[161] While each potential trans claimant must resolve these issues individually, the dominant trans subject makes less likely the possibility that the realities of this tension might be recognized or understood in law as an element of trans experience, thus obscuring the complexity and diversity of trans realities.

The problem with the trans subject created by legal discourse, then, is not that it fails to reflect actual trans subjectivities or trans goals. The problem with the trans subject and its impact on trans engagements with law is that although it reflects only one version of the story of trans lives and trans goals, legal discourse reifies the subject in a singular way. The primacy accorded by law to the dominant trans legal subject renders other trans subjectivities and arguments for radical, systemic change more difficult to make, and less likely to be heard.

C. Problematizing the Trans Subject in Legal Strategies

The role of legal discourse in creating a dominant trans legal subject that constrains who and how trans people might engage in the legal arena

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through medical or other means the disconnect they experience between gender identity and their physical bodies by moving into one of the binary sex categories. See e.g. Judith Butler, *Bodies that Matter: On the Discursive Limits of "Sex"* (New York: Routledge, 1993) at 126-127. Others argue that, although the split between biological sex and gender experienced by many trans individuals is evidence of the constructedness of the categories of sex and gender, trans status is not subversive when it means aspiring to be a "real" man or woman within the existing, essentialist definitions of what those identities mean: Judith Halberstam, *In a Queer Time & Place: Transgender Bodies, Subcultural Lives* (New York: NYU Press, 2005); Terry S Kogan, "Transsexuals and Critical Gender Theory: The Possibility of a Restroom Labeled "Other"" (1997) 48 Hastings LJ 1223. See also Sharon Cowan, "'We Walk Among You': Trans Identity Politics Goes to the Movies" (2009) 21 CJWL 91 at 100-103 (describing two dominant positions in trans identity politics, "...one based on deconstructing sex/gender categories and the other on crossing boundaries but investing in sex/gender categories" and arguing that instead of encouraging the "passing-versus-transgression" dichotomy advocates and activists should be "striving for ways to enhance trans theorizing through an eclectic politics" that works to negotiate these political tensions.).

[161] Lamble, *supra* note 17 at 116. On trans visibility see e.g. Jamison Green, "Look! No, Don't! The Visibility Dilemma for Transsexual Men" in K More & S Whittle, eds., *Reclaiming Genders: Transsexual Grammars at the Fin de Siècle* (London: Cassell, 1999) 117.

raises a number of core questions about the role that law could or should play in strategies designed to improve the lives of trans Canadians. Does engaging with law necessarily result in an incomplete, exclusionary, limited production of trans subjectivity? Does even strategic reliance on antidiscrimination law raise questions about the "conditions in which [trans] subjects participate...in their own regulation"?[162] Or is it possible to imagine ways to avoid or undermine the exclusionary construction of the trans subject?

Considering these kinds of questions has led some critical trans activists and theorists to express scepticism about the utility of legal reform strategies for trans individuals, arguing that "the law...has too much invested in the existence of only two genders to admit the possibility that gender can be lived and expressed in many forms that go beyond the male/female dichotomy."[163] Others point out that even if legal discourse was to "say different things about a targeted group, that group may still experience disproportionate poverty as well as lack of access to health care, housing, and education."[164] Indeed, these critiques are well placed and pose important challenges to continuing engagements with the law.

Yet as the history of trans jurisprudence demonstrates, the law constitutes a potentially powerful tool in challenging the social and legal barriers that continue to disempower trans people, despite its work in constraining the trans legal subject. Accordingly, we call here not for the abandonment of law, but for increased problematizing, complicating and contextualizing of trans subjectivity in legal discourse. The question then becomes, in the words of feminist lawyer Mary Eaton, "...not so much whether to use law but how[?]"[165] The answer might include a number of strategies: ensuring that trans individuals from a diversity of lived experiences have access to legal forums and mechanisms; connecting legal claims-making

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[162] Lamble, *supra* note 17 at 114.

[163] Mayeda, *supra* note 125 at 195 (concluding that "the law is in bad faith in this regard: it shuts its eyes to the lived experience of many people that should be both recognized and affirmed.").

[164] Spade, *Normal Life*, *supra* note 15 at 29. But see Mary Eaton, "Lesbians, Gays and the Struggle for Equality Rights: Reversing the Progressive Hypothesis" (1994) 17 Dalhousie LJ 130 at 171 (arguing that "[a]nti-rights arguments oftentimes assume a rather romantic posture in relation to liberatory efforts outside the legal field: law is portrayed as shot through with power while the province of "politics" is envisioned as somehow more pure, less corrupt, and therefore the preferred venue in which to wage social struggle. Largely unacknowledged and untheorized in these...accounts is how power seems also to have contaminated extra-legal and non-institutional domains.").

[165] Eaton, *ibid* at 172 [emphasis in original].

to critical trans politics and making arguments for systemic change and against corroboration requirements; and looking beyond antidiscrimination law to consider the ways that other realms of legal regulation impact the lived realities of trans people. Additionally, problematizing the construction of the trans subject in legal discourse and its impact on trans engagements with law might include expanding strategic thinking to better "call into question and challenge the multiple and interlocking systems of inequality that remain, even as formal forms of discrimination begin to fall".[166] In practice, this more expansive thinking may mean engaging complementary non-legal strategies designed to directly address the realities of poverty, stigma and unemployment that affect the daily lives of trans Canadians.[167] The key to complicating the singular model of trans subjectivity apparent in *XY* and other trans jurisprudence is not to take it for granted.

D. Conclusion

The increasing number of legal cases related to trans Canadians forces us to question the ways that the law is implicated in maintaining dominant assumptions about sex and gender. We should seek to resist or transform those assumptions not only in the name of improving the lived realities of trans Canadians, but because, as Professor Sharon Cowan notes, "[a]ll of us are affected by the heteronormativity that pervades legal and political debates about trans issues."[168] The dominant norms of sex and gender that are reiterated and reinsribed in trans jurisprudence inform and constrain all of our lives in particular, often insidious, ways.

In the foregoing analysis we have examined the ways in which the discourse of antidiscrimination law constructs trans subjectivities, identifying and problematizing three of the key elements of the trans legal subject evident in *XY*, the most recent in a line of cases relevant to the lives of trans Canadians. We then considered how the trans legal subject might constrain trans engagements with law by informing both the kinds of subjects and the kinds of claims that are intelligible in legal arenas. We ended by raising some critical questions about trans engagements with law and concluded that strategic engagements in the legal arena should continue to problematize the dominant trans legal subject in the course of using the law as a tool for radical change.

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[166] Joey L Mogul, Andrea J Ritchie & Kay Whitlock, *supra* note 21 at 157-158.

[167] Spade, *Normal Life*, *supra* note 15 at 22 (calling for critical assessment of "education, health care, social service, media, and even our own self-conceptions").

[168] Cowan, *supra* note 160 at 95.

This leads us to conclude that the *XY* decision is properly understood as a partial victory, re-casting the lines of inclusion in ways likely to benefit some trans people, while others continue to be relegated to the outskirts of legal intelligibility. More broadly, this analysis gestures to the limitations of the trans legal subject constructed and upheld by antidiscrimination law for improving the lives of trans Canadians. Despite decisions such as *XY* that acknowledge and endorse the rights of trans people to be free from discrimination, members of the trans community continue to be murdered, harassed and assaulted, to experience poverty and joblessness and to be socially isolated in disproportionate numbers.[169] The challenge, then, goes beyond the elimination of formal legal barriers to inclusion, looking "toward a vision of communities where all LGBT people are free from violence and responsible to each other and to the broader communities of which they are part."[170] We believe the law has a role to play in reaching this goal; a role that must go beyond the dominant trans legal subject and strive to understand and address the experiences of a full range of trans people.

[169] See *supra* note 14.

[170] Joey L Mogul, Andrea J Ritchie & Kay Whitlock, *supra* note 21 at 157-158.