Explicit Legal Protections for Transgendered Canadians:

Why it is Necessary and How it Might be Done

by

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A thesis submitted in conformity with the requirements for the degree of Master of Laws (LLM)

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**Abstract**

Explicit legal protections for trans individuals are necessary in Canadian human rights and anti-discrimination jurisprudence. The current grounds of protection against discrimination that trans individuals must rely upon (i.e., sexual orientation discrimination, disability discrimination and sex discrimination) insufficiently recognize trans individuals and the trans discrimination they face. I propose that a multi-level framework of explicit legal protections is required to address these insufficiencies. This framework includes the recognition of an analogous ground of "gender identity and gender expression" under the *Charter*, amendments to human rights legislation incorporating trans protections into prohibited grounds of discrimination at federal and provincial levels, and finally explicit recognition of trans individuals and trans discrimination in legal arguments and in litigation. This framework will allow for mutual reinforcement at multiple levels and promote development of trans specific jurisprudence. With such explicit legal protections in place trans individuals will be better protected against trans discrimination in Canada.
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1 Introduction

Existing Canadian human rights and anti-discrimination protections are insufficient to meet the needs of trans individuals. Canada's commitment to human rights and protections against discrimination for all is enshrined in discrimination jurisprudence, however there has been little to no explicit recognition of trans individuals in this body of law. In this thesis, I propose that explicit recognition of trans protections by way of the Charter,¹ in human rights legislation, and in litigation and legal arguments are necessary in order to address the insufficiencies of existing protections, and will help to promote the development of trans specific jurisprudence.

Firstly, I seek to address why the current explicitly protected grounds used to protect against trans discrimination are insufficient. After noting how human rights are currently protected in Canada, focus will turn to legal arguments from explicitly protected grounds in anti-discrimination jurisprudence currently adapted for the protection of trans individuals. Specifically, I will look at sexual orientation discrimination, disability discrimination, and sex discrimination. There will often be aspects of different minority groups which are shared or are similar and thus can be compared, but there are also substantive differences between groups which cannot be overlooked by simple reference to such similarities. The legal arguments from these other minority rights groups fail at sufficient trans inclusion because they only focus on these similarities. As such, these legal arguments recognize only instances where trans individuals are facing the form of discrimination these arguments and protections cover.

¹ Canadian Charter of Rights and Freedoms, s 15(1), Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982 c 11 [Charter]
Whereas, they insufficiently recognize and insufficiently protect against instances of actual trans discrimination.

Secondly, I conceptualize what can be done to address the insufficient legal recognition and lack of explicit trans protections within Canada. A framework of trans recognition incorporating multiple levels of explicit protection is necessary. Constitutionally, this can be done through the recognition of a new analogous ground of "gender identity and gender expression" under the Charter. Legislatively, amendments to the Canadian Human Rights Act and Criminal Code will be necessary at the federal level.² At the provincial level, more homogenous explicit protections in human rights legislation are required. Finally, explicit recognition of trans claimants, trans discrimination, and trans specific legal arguments are necessary in tribunals and courts. I posit that each of these changes will support and reinforce the changes at other levels, and thus develop a reinforced legal framework of explicit trans protection and a coherent body of trans jurisprudence.

Having made a case for extensive explicit legal recognition, I conclude by addressing possible criticisms and concerns, and why they can be overcome in light of the framework developed. Although formal recognition of trans protections is still a long way from substantive equality for all individuals, it is a step that helps move Canada towards such a goal.

² Canada Human Rights Act, RSC 1985, c H-6 [CHRA]; Criminal Code, RSC 1985, c C-46.
2 Human Rights - Legal Equality and Freedom from Discrimination

In this thesis, "trans" will be a categorical term used to describe those who do not fall into the stereotypical “male” or “female” dichotomy, but do fall within the broader continuum of gender. Gender is the expression of masculine and or feminine characteristics, whereas sex is concerned with biological and physiological differences. One's gender expressions are the external characteristics by which an individual expresses themselves and through which others perceive that person's gender, such as through behaviours, appearance, dress, mannerisms, speech patterns, social behaviours, etc. One's gender identity is directly linked to a person's internal sense of self and a deeply felt sense of being male, female, or otherwise.

The "trans" gender identities include but are not limited to transgender, transsexuals, gender queer, intersex, and the full spectrum of gender variant individuals. The Ontario Human Rights Code defines each of these gender identities. Transgender indicates people whose life experience includes existing in more than one gender. Their gender identity or gender expression differs from the sex they were assigned at birth on the basis of their bodily

3 Contra Judith Butler, Gender Trouble: Feminism and the Subversion of Identity (New York: Routledge, 1990) at 135 (Butler critiques scientific and biological accounts of sex by arguing that sex is just as socially constructed as gender).


5 Ibid at para 6.

6 Ibid at para 13.
characteristics. Transgender people may include those who identify as transsexual and people who describe themselves as being on a gender spectrum who live outside the categories of man and woman. A transsexual is an individual identified at birth as one sex, but who identifies themselves differently. Individuals who are not easily classified as male or female based on their physical characteristics at birth or after puberty are intersexed individuals.

Trans individuals face many forms of extreme discrimination and prejudice in all aspects of their lives because of their gender identity or gender expression. Discrimination of trans individuals begins early in their lives. One study found that 95% of trans students felt unsafe at schools, whereas only 20% of the general student population felt similarly. Also, nine out of ten trans students have experienced verbal harassment due to their gender expression. As is typical where harassment, bullying, and violence are concerned, these figures are likely underestimated due to many instances going unreported. Unemployment, homelessness, mistreatment at work, denial of promotions, and loss of jobs are more commonly experienced by trans individuals than

\[\text{Ibid at para 9.}\]
\[\text{Ibid at para 10.}\]
\[\text{Ibid at para 11.}\]


\[\text{Ibid.}\]
the general population specifically because of their gender identity or gender expressions. Access to public relief systems such as medical assistance, foster care, welfare, public housing, and shelter systems are difficult or prohibitive as their rules and policies actively utilize sex segregated criteria. Trans individuals who fail to meet these sex criteria fall into a liminal, undefined, and unrecognized space in between the absolute thresholds of "male" or "female". Trans individuals who are often in great need of these resources because of their marginalized status are unable to access these services specifically because of their failure to conform to the gender requirements imposed by these institutions. Without addressing this systemic discrimination, trans individuals will continue facing prejudice and hardship in accessing these services. Legislation and policies may appear to be neutral, but they are often rigid and impose strict gender requirements that do not protect liminal subjects most in need of protection. This is trans discrimination. Legislation and policies can, and often do, prejudice trans individuals from accessing or securing employment, housing, public accommodation, credit, marriage, and law enforcement. Such trans discrimination must be addressed and rectified so that it does not continue, and suitable protections must be recognized so that transgressions against trans individuals can be met with legal redress.


14 Ibid at 718.

The right to be free from discrimination is a human right. Human rights are fundamental rights all people are entitled to simply by being human. Human rights are not a non-conflicting list of rights. For example, the fundamental right to freedom of speech may conflict with someone else's fundamental right to freedom of religion. Nor are human rights an exhaustive list of rights. For example, protection under the right to be free from racial discrimination does not otherwise protect someone from all other forms of discrimination. Although the ultimate goal of society should be substantive equality for all and the abolition of discrimination completely and thus there would be no need for explicit human rights recognition, this is an ideal we have not yet attained. In Canadian society, human rights infringements do continue to occur and these infringements must be met with practical solutions that meet these present exigencies. Human rights are therefore written into legislation which recognizes Canada's continued commitment to upholding and protecting these rights. The non-exhaustive and conflicting nature of human rights means that existing protections in Canada must not be anachronistic and rigid, but adaptable and amended according to societal needs and attitudes.

In Canada, the human right to freedom from discrimination and the principle of equality is provided for at various levels, in a variety of mechanisms. At the international level such protection is not directly enforceable, but Canada's on-going commitment to protecting the right to be free from discrimination has been shown by its signature onto various international documents. Canada signed onto the *Universal Declaration of Human Rights (UDHR)* in 1948.

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which has made human rights a part of Canadian law.\textsuperscript{17} Article 7 of the \textit{UDHR} states that “all are equal before the law and are entitled without any discrimination to equal protection of the law”.\textsuperscript{18} Article 2 dictates that this applies “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.\textsuperscript{19} Canada therefore has an internationally recognized commitment to promoting these human rights. This international commitment is to protect everyone in Canada from discrimination, even on grounds of gender identity and sexual orientation, and the fact that someone is lesbian, gay, bisexual, or transgendered should not limit their entitlement to enjoying the full range of human rights.\textsuperscript{20} Canada is also a signatory to the "UN Joint Statement on Human Rights, Sexual Orientation and Gender Identity", and thus Canada should make legislative changes necessary to bring about gender identity and gender expression protections into force.\textsuperscript{21} Signing onto such international documents indicates that Canada is committed to promoting these human rights. By being a signatory, Canada also opens itself up to scrutiny from the international community should they fail to meet these commitments. However, unless these international documents are ratified, implemented, or incorporated into domestic law they

\textsuperscript{17} \textit{Universal Declaration of Human Rights}, GA Res 217 A (III), UNGAOR, 3d Sess, UN Doc A/810 (1948) at 71.
\textsuperscript{18} \textit{Ibid} at Article 7.
\textsuperscript{19} \textit{Ibid} at Article 2.
cannot be directly relied upon by trans individuals attempting to bring claims of infringement of their rights in domestic courts.

The highest level of domestic human rights protection against discrimination is at the Constitutional level through the *Charter of Fundamental Rights and Freedoms*.\(^{22}\) Section 15(1) of the *Charter* indicates that every individual is equal before and under the law and has the right to the equal protection of the law without discrimination.\(^{23}\) This section is meant to encompass everyone, but it also explicitly enumerates some protected grounds. Recognition of these specific grounds make it possible for individuals whose rights infringement falls within these grounds to bring their claims before the Supreme Court of Canada. Not included in the *Charter's* enumerated grounds of protection are gender identity and gender expression, and so no constitutional claims of specifically trans discrimination can be brought.

At the federal level, equality and freedom from discrimination are protected under the *Canadian Human Rights Act*.\(^{24}\) This *Act* protects all Canadians from being discriminated against in areas under federal jurisdiction. Section 3 lists the prohibited grounds of discrimination, however gender expression and gender identity are not explicitly included.\(^{25}\) Claims of discrimination which fall under federal jurisdiction may be brought before the Canadian Human Rights

\(^{22}\) *Charter, supra* note 1.

\(^{23}\) *Ibid.*

\(^{24}\) *CHRA, supra* note 2 at s 2.

\(^{25}\) *Ibid* at s 3.
Tribunal, however given the lack of explicit gender identity and gender expression protection in the Act, no federal claims of specifically trans discrimination can be brought.

Finally, freedom from discrimination and the human right to legal equality is formally protected in every provincial and territorial jurisdiction in their respective human rights codes and legislation. Currently, the right to be free from discrimination is explicitly recognized for trans individuals on the basis of "gender identity" and or "gender expression" only at this level in a few jurisdictions. For example, in Ontario, Bill 33 (Toby’s Act) amended Ontario's Human Rights Code to specify that every person has a right to equal treatment, without discrimination because of gender identity or gender expression. Claims of discrimination which fall under provincial and territorial jurisdiction are brought before the human rights tribunal within each jurisdiction.

Even with these multi-level commitments to legal equality and the human right to be free from discrimination for all, trans individuals continue to experience discrimination and prejudice in Canada. In order to provide substantive legal protection for trans individuals, an explicit level of protection must be acknowledged in legislation and explicit trans litigation and legal arguments must be pursued in courts and tribunals. The lack of explicit protection has resulted in attempts to include trans protection under other explicitly protected groups such as sexual orientation,

26 See Part 4.2.2, for further discussion of explicit trans protection in Provincial and Territorial human rights legislation.

27 Bill 33, An Act to amend the Human Rights Code with respect to gender identity and gender expression, 1st Sess, 40th Leg, Ontario, 2012 (assented to 19 June 2012), SO 2012 c 7 [Toby's Act].
disability, and sex. However it will be shown that such attempts are insufficient in promoting and protecting the rights of trans individuals.

3 Insufficiencies of Trans Protections under other Explicitly Protected Groups

Protected grounds in anti-discrimination laws must be assigned and developed cognizant of the political power struggles these laws hope to balance. Recognition of many political and civil rights movements have been met with explicit legal protections of these groups. Freedom from discrimination on many grounds such as sexual orientation, disability, and sex are already explicitly protected in human rights legislation. Interpreting existing grounds of protection to extend protections for trans individuals is less difficult than adding a new ground of protection into legislation. These interpretations are not ineffectual and may afford some protection for trans individuals in circumstances where the discrimination being faced is actually sexual orientation, disability, or sex discrimination. However, many instances of discrimination against trans individuals would be better served with explicit gender expression and gender identity protection. Strained analyses and interpretations under established grounds of protection used by courts in claims brought by trans litigants fail to fully protect and represent these litigants against trans discrimination. Also, interpretation of current explicitly protected grounds to incorporate trans discrimination only develops the jurisprudence under these established grounds and undermines the political power and legal development that may be gleaned for the trans rights

movement and trans specific legal protection. An explicit ground of protection which recognizes an inherent right to determine one's own gender identity and gender expression would more sufficiently and directly address trans discrimination.

### 3.1 Sexual Orientation Rights

Trans individuals are grouped into the LGBTTIQ2SA (Lesbian, Gay, Bisexual, Transsexual, Transgender, Intersex, Queer/Questioning, 2 Spirited, Allies) acronym, and as such gay and lesbian sexual orientation rights provide a starting point to discuss trans anti-discrimination rights.

Legal protections against discrimination on the grounds of sexual orientation are explicitly recognized in law, but the trans community and other sub-categories are poorly represented in these laws, the jurisprudence, and its analyses. Although the gay and lesbian community is generally a diverse and supportive community, there are conflicts between those who do and

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29 Sexual orientation is an explicitly protected ground in all Human Rights Legislation and Codes within Canada provincially and federally, as well as a recognized analogous ground under the Charter (See Human Rights Act, SNWT 2002, c 18, 5(1); Human Rights Act, RSY 2002, s 7(g); Human Rights Act, SNu 2003, c 12, s 7(1); Human Rights Code, RSBC 1996, s 7(1); Alberta Human Rights Act, RSA 2000, c A-25.5, Preamble; The Saskatchewan Human Rights Code, SS 1979, c S-24.1, s 2(1)(m.01)(vi); The Human Rights Code, SM 2012, c 38, s 5, CCSM c H175, s 9(2)(h); OHRC, supra note 16; Human Rights Act, RSPEI 1988, c H-12, Preamble; Human Rights Act, 2010, SNL 2010, c H-13.1, s 9(1); Human Rights Act, RSNB 2011, c 171, Preamble; Human Rights Act, RSNS 1989, c 214, s 5(1)(n); Charter of human rights and freedoms, RSQ, c C-12, s 10; CHRA, supra note 2 at s 3(1); Charter, supra note 1; Egan v Canada, [1995] 2 SCR 513, 124 DLR (4th) 609 [Egan]).
those who do not believe that transgendered rights have a connection or claim to gay and lesbian rights.\textsuperscript{30}

There are some who consider the gay and lesbian community to be a viable social, political, and legal home for trans people for a variety of reasons. One reason is that the gay and lesbian community itself is supposed to be an open and welcoming space, embracing diversity. Also, homophobia and transphobia are often tightly intertwined as they both violate traditional social norms. Another reason for trans inclusion under sexual orientation is that a sizeable percentage of transgendered people also identify as gay, lesbian, or bisexual.\textsuperscript{31}

In addition, the trans rights movement covers much of the same historical ground as gay anti-discrimination rights and same sex marriage rights do. For example, while making a case for same sex marriage Eskridge discusses the two-spirit tradition and marriages involving "women passing as men".\textsuperscript{32} This mirrors Leslie Feinberg's discussion of how two-spirited people and female bodied people who live their lives as men are examples of transgendered people.\textsuperscript{33} Also, the historical beginnings of the gay and lesbian rights movement was launched in the 1960s by


drag queens, racial minorities, and transgender and transsexual activists who experienced the 
brunt of anti-gay and anti-lesbian violence and discrimination because of their visibility.\textsuperscript{34}

Although many in the gay and lesbian community acknowledge that trans individuals suffer 
discrimination and deserve legal protection, there are many who do not consider transgendered 
people a part of this community. One source of resistance from the gay community may be the 
genuine confusion and concern about how to reconcile transgender issues with the gay legal identity.\textsuperscript{35} Another source of resistance may stem from resentment and fear that the trans rights movement will co-opt or destabilize the hard won resources and political power gained by the gay rights movement.\textsuperscript{36} Countering discrimination based on violations of traditional gender norms and gender roles has been a struggle which the women's rights movement fights for, a struggle that is essential for the trans rights movement to fight for, and that the gay rights movement continues to fight for on certain issues, such as marriage equality. However, over time the gay rights movement has shifted its focus of the gay legal identity away from countering these notions about traditional gender role violations, and more towards a greater understanding of same-sex attraction.\textsuperscript{37} Inclusion of the trans rights movement may direct this focus back towards the struggle against gender roles. Yet another reason for exclusion may stem from the fact that trans individuals face substantively different issues and a different sort of discrimination

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\textsuperscript{35} Minter, \textit{supra} note 30 at 612.

\textsuperscript{36} \textit{Ibid} at 613.

\textsuperscript{37} \textit{Ibid} at 603.
(i.e., based on gender identity and expression) than those based on sexual orientation. Finally, there is a fundamental difference between sexual orientation which is the sex one is attracted to, and gender identity which is about the sex or lack thereof that one internally associates with.

Regardless of whether or not trans individuals as a group are part of the gay and lesbian community, it is important to recognize that legal protection on the ground of sexual orientation is substantively different than legal protection for gender identity and gender expression. For instance, protection on the ground of sexual orientation will not affect the gender classification on one's legal documents. Until recently, transsexual individuals who were also lesbian, gay, or bisexual were denied access to sex-reassignment surgery because they were not seen as "real" transsexuals. However such prejudicial views have begun to change and the separation of gender identity from the concept of sexual orientation has increased. For example, this separation can be found in the District of Columbia's Human Rights Act, which does not include transsexual people within the definition of sexual orientation. Also, in the D.C. case Underwood v Archer Management Services, the court dismissed a complaint brought forward by a transsexual person on the ground of sexual orientation discrimination because it was devoid of any claim of discriminatory conduct based on the plaintiff's real or perceived preference or practice of sexuality. The inability of gay and lesbian rights to fully protect and represent trans

38 Ibid at 613.


40 Underwood v Archer Management Services Inc, 857 F Supp 96 at 98 (DDC 1994).

41 Ibid.
individuals or properly address trans discrimination consequently requires explicit trans rights recognition in legislation and explicit litigation developing trans protections.

The wealth of lesbian and gay research and jurisprudence can help inform the trans rights movement of the steps to take towards explicit legal protection, recognition, and eventually substantive equality. This can be done by reviewing legislative trends that occur for lesbians and gays in their attempts to gain substantive equality, and mirroring these legislative trends for the trans rights movement. One such step is almost always the adoption of legislation explicitly prohibiting sexual orientation discrimination in areas such as in housing, employment, and other fields.42 This step has been adopted in some provincial and territorial human rights legislation for trans individuals by explicitly prohibiting gender identity and or gender expression discrimination. This step is also being taken at the federal level through Bill C-279 by its proposals for amending the Canadian Human Rights Act and the Criminal Code for the inclusion of the terms “gender identity”. These amendments will allow for explicit protection against discrimination on the ground of gender identity, and allow trans claimants to bring claims under this ground instead of strained interpretations and reliance on gay and lesbian protections.

3.2 Disability Rights

Protection of trans rights have also been grouped in with disability rights, which are explicitly recognized in law.\(^{43}\) The disability rights movement is based on an understanding that if social and physical environments were structured differently then there would be no such thing as disability.\(^{44}\) Disability rights and laws are not about normative arguments on what is abnormal, defective, or pathological, but about equal access and equal participation of capable individuals who are barred from participating because of artificial conditions which privilege one conception of a type of body and mind while excluding others.\(^{45}\) The trans rights movement has been grouped into disability law specifically because trans individuals are also combating entrenched conceptions about what normal and healthy minds and bodies are, and striving for equal access and protection from discrimination.\(^{46}\) Disability discrimination and access to health care and medical procedures may be an issue for some trans individuals, especially those seeking psychological treatments or medical procedures like sex reassignment surgery.

\(^{43}\) Disability and Sex are both explicitly prohibited grounds of discrimination in all Human Rights legislation within Canada provincially and federally, as well as enumerated grounds of protection under the Charter (See Human Rights Act, SNWT 2002, c 18, s(1); Human Rights Act, RSY 2002, s 7; Human Rights Act, SNu 2003, c 12, s 7(1); Human Rights Code, RSBC 1996, s 7(1); Alberta Human Rights Act, RSA 2000, c A-25.5, Preamble (sex is under "gender"); The Saskatchewan Human Rights Code, SS 1979, c S-24.1, s 2(1)(m.01); The Human Rights Code, SM 2012, c 38, s.5, CCSM c H175, s 9(2); OHRC, supra at 15; Human Rights Act, RSPEI 1988, c H-12, Preamble; Human Rights Act, 2010, SNL 2010, c H-13.1, s 9(1); Human Rights Act, RSNB 2011, c 171, Preamble; Human Rights Act, RSNS 1989, c 214, s 5(1); Charter of human rights and freedoms, RSQ, c C-12, s 10; CHRA, supra note 2 at s 3(1); Charter, supra note 1).


\(^{45}\) Dean Spade, "Resisting Medicine/Remodeling Gender" (2003) 18 Berkeley Women's LJ 15 at 34.

Trans inclusion under disability rights may benefit a small portion of the trans community who seek to gain access to certain types of mental and medical health care. Such medical models of disability rights focus on gender nonconformity as a psychological condition to be treated through medical services. Disability rights may help those transsexuals who wish to proceed with sex reassignment surgery, to physically transition to their lived gender identity, and gain access to government assistance. In many jurisdictions sex reassignment surgery is covered under government medical insurance like the Ontario Health Insurance Plan (OHIP) only after completion of a Gender Identity Clinic program, which requires extensive medical and psychological evidence and diagnoses demonstrating that the individual can meet certain norms of their lived gender.\footnote{Ministry of Health and Long-Term Care Ontario, Bulletin, 4480, "Subject: Relisting of Sex Reassignment Surgery under OHIP" (20 June 2008) online: Ministry of Health and Long-Term Care Ontario <http://www.health.gov.on.ca/english/providers/program/ohip/bulletins/4000/bul4480.pdf>.

Having a diagnosis of Gender Dysphoria may help transsexual individuals not only begin gender transitioning, but can also help bring trans discrimination
rights within the rubric of disability rights. Although inclusion under disability rights may be beneficial for some, it must be noted that not all trans individuals seek to gain access to this kind of mental and medical health care, and so these disability rights fail to provide extensive anti-discrimination protection and sufficient legal representation to all trans individuals.

Disability rights that focus arguments on medical models in which gender is understood to be determined through psychological, physiological, and biological indicators may actually foster more trans discrimination. Any variance from gender norms under these medical models may be seen as unnatural or fraudulent. In the United States, courts have used this as a reason to deny state funding for gender related medical expenses. In one instance the court denied prisoner access to estrogen treatments because the psychiatrist hired by the prison did not believe the inmate suffered from gender dysphoria and the inmate was unable to submit a contrary opinion by another qualified expert. In another case, the court focused on the fact that an inmate was diagnosed with "gender identity disorder not otherwise specified" instead of being diagnosed

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48 The psychological community has revised their DSM diagnosis from “Gender Identity Disorder” to “Gender Dysphoria”. This revision acknowledges that health care professionals should no longer support the characterization of trans people as mentally ill, diseased, or disordered, but as a marked “incongruence between one’s experienced/expressed gender and assigned gender.” This extends this community of people beyond just those seeking medical attention to those who live between the two binary categories of gender (See American Psychiatric Association DSM-5 Development, Recent Updates, "Recent Updates to Proposed Revisions for DSM-5" (2012) online: APA DSM-5 <http://www.dsm5.org/Pages/RecentUpdates.aspx>; See also Camille Beredjick, “DSM-V To Rename Gender Identity Disorder ‘Gender Dysphoria’”, The Advocate (23 July 2012) online: The Advocate <http://www.advocate.com/politics/transgender/2012/07/23/dsm-replaces-gender-identity-disorder-gender-dysphoria>). However, there is still considerable debate on whether this is an actual positive change as a diagnosis of dysphoria still brands an individual with a mental pathology and fails to adequately address a patient's location outside a rigid binary gender construct as defined by society (See generally Walter Bockting, Gail Knudson & Joshua Mira Goldberg, Counselling and Mental Health Care of Transgender Adults and Loved Ones (Vancouver: Vancouver Coastal Health Transgender Health Program; 2006) online: TransHealth VCH <http://www.vch.ca/transhealth/resources/library/tcpdocs/guidelines-mentalhealth.pdf>).

49 *Maggert v Hanks*, 131 F 3d 670 (7th Cir 1997).
specifically as a "transsexual" with characteristic behaviours and symptoms, such as a "persistent preoccupation" with getting rid of their primary and secondary sex characteristics, in order to reject the prisoner's claims of deliberate indifference to medical needs for gender dysphoria (i.e., access to hormones and surgery).\textsuperscript{50} These cases show that deviations from medical standards and professional diagnoses may result in denial of services. It is important to note that psychiatric diagnoses and even biological and medical models involving scientific data, genetics, chromosomes, gonads, internal reproductive morphology, external reproductive morphology, hormones, or secondary sex features can be variable and contradictory.\textsuperscript{51}

There are clear limitations of such biological, psychological, and medical models of legal disability rights claims brought by trans and other gender non-conforming individuals. One such limitation is that medical establishments and medical diagnoses would be seen as regulating access to legal remedies for trans individuals.\textsuperscript{52} Such disability analyses rely on medical evidence, psychological diagnoses, treatments such as hormone therapies, and gender related surgeries to legitimate those who are and are not entitled to protection under the law. This reduces human rights to a clinical decision made by medical authorities.\textsuperscript{53}

\textsuperscript{50} Long v Nix, 86 F 3d 761 (8th Cir. 1996).

\textsuperscript{51} Dylan Vade, "Expanding Gender and Expanding the Law: Towards a Social and Legal Conceptualization of Gender that is More Inclusive of Transgender People" (2005) 11.2 Mich J Gender & L 280.

\textsuperscript{52} Romeo, supra note 13 at 730.

establishments become gate-keeping institution that regulates gender non-conformity and legitimizes certain legal rights on access to health care.\textsuperscript{54}

Another limitation is that a medical model of disability rights privileges and legitimizes those who have the desire to access health care and choose available medical procedures, while marginalizing those who do not. Ki Namaste, a transgender activist, has said that such medical legal standards result in situations where at gender identity clinics transsexuals are encouraged to lie about their transsexual status and encouraged to invent personal histories in their chosen genders.\textsuperscript{55} For example, female-to-male transsexuals are encouraged to speak about their lives as little boys, or they are to define themselves as men or women, not as transsexual men and women, in order to be recommended for sex reassignment surgery. Additionally, courts relying on this disability model for analysis are much more invasive and detailed in examining a trans claimant's situation, such as examining person's stage of transitioning, critically analyzing his or her physical body in detail including genitalia, whether sex reassignment surgery has been undergone, evidence of psychological diagnoses etc., in order to determine what kind of discrimination the individual has experienced and to establish legal recognition of the trans individual's gender or protection of their disability status.\textsuperscript{56} Claimants who have not opted for these procedures would be at a disadvantage in court compared to those who have, when being so invasively analyzed under a medical model of disability rights.

\textsuperscript{54} Romeo, \textit{supra} note 13 at 730.


\textsuperscript{56} Romeo, \textit{supra} note 13 at 733.
This medical model of disability right also fails to provide legal protections particularly for low-income individuals who may not be eligible for insurance covered sex reassignment surgery because they do not fall within the prescribed diagnoses of Gender Dysphoria by medical establishments. Those would like to proceed with some cosmetic surgeries at their own expense, or are simply unable to afford trans-friendly healthcare would also be unprotected under a medical model of disability rights.\textsuperscript{57} In most Canadian jurisdictions, sex reassignment surgery is an insurance covered service only upon recommendation by a Gender Identity Clinic like that of the Centre for Addition and Mental Health (CAMH).\textsuperscript{58} However, even at CAMH there is an approximately 90\% rejection rate of individuals who have gone through two to six years of treatment at the clinic in hopes of getting a recommendation for sex reassignment surgery, but ultimately did not receive one.\textsuperscript{59} The average cost of sex reassignment surgery is between $10,000 to $20,000 for each patient and since the service is unavailable in Ontario, patients are sent to other jurisdictions such as Quebec or even out of the country for these surgeries.\textsuperscript{60} Such costs would prove prohibitive to low income trans individuals who were unable to obtain a clinic recommendation. Low income trans individuals are in a precarious situation where their lives are more likely to be entangled within systems that strictly regulate their gender presentation. These individuals are significantly less likely to be able to access trans-friendly health care, and

\textsuperscript{57} Ibid at 731.

\textsuperscript{58} Hogan \textit{v Ontario (Health and Long-Term Care)}, [2006] OHRTD 34, 2006 HRTO 32 at 38 (Quebec does not require a recommendation for the procedure, and the procedure is not insured even upon CAMH's recommendation in Prince Edward Island, Yukon, Nunavut and the Northwest Territories).

\textsuperscript{59} Ibid.

\textsuperscript{60} Ibid at para 37.
will have limited recourse to legal protections based on their gender nonconforming status. Disability rights do not protect gender non-conforming people who are unable to access trans-friendly health care, intersex people who refuse "corrective" medical procedures, people who identify as gender queer or otherwise express non-traditional gender identities, people who are unable to physically modify their bodies, and those who do not seek or do not choose to undergo medical, surgical, or hormonal treatments in order to express their gender.

Similar to trans protection under sexual orientation rights, the ground of disability rights may provide some limited protections against discrimination to certain members of the trans community, however complete trans representation and rights recognition on this ground is insufficient. An explicitly recognized protected ground for trans individuals in legislation would allow the trans movement to mobilize politically and produce activism. If legislation and courts could consider gender to be a healthy and legitimate expression of an individual's identity, whether or not it conforms with entrenched medical, biological, or psychological norms, the scope of claims available to trans litigants would become much more expansive.  

3.3 Sex Rights

The most frequent source of rights used to protect trans individuals are the explicitly protected rights against sex discrimination. Much of the sexual rights movement and feminist theory

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61 Romeo, supra note 13 at 739.

62 Supra, note 43.
literature have attempted to dislodged the notion that gender is the same as sex. Sex discrimination covers distinctions based on a person's biological sex at birth and extends to gender stereotyping. Protections against sex discrimination are defined and delimited not by chromosomes, genes, genitalia, gender presentation, or self-identification, but rather the political values of equality and the idea that biology is not destiny for men or for women. It is because trans individuals are subject to discrimination based on their biological sex at birth and stereotypical notions of gender that much of the academic and legal arguments have sought to extend sex discrimination rights to protect the trans community. However, trans discrimination is more than just discrimination based on male and female gender stereotypes. Trans discrimination is a result of considering these binary notions of gender as the norm, and that the trans identity violates these norms. As such the academic and legal arguments seeking to extend sex discrimination rights to protect the trans community are insufficient.

Transgendered rights can be subsumed and protected under the sex discrimination category insofar as the individual’s ability to fall within the distinction of man and woman. Discrimination based on sex usually recognizes sexual, economical, and social oppression,

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64 Lloyd, supra note 46 at 180.


subordination and unequal treatment faced by women in comparison to men. In jurisdictions including British Columbia and Quebec, cases have formally recognized that discrimination based on “sex” includes discrimination against transsexual individuals. However, it will be shown below that in such cases it is often a strained interpretation of the protected ground of sex, or an acknowledgement of the occurrence of discrimination combined with a need to formalize it under an explicitly recognized ground, rather than an actual broader understanding of sex which led to the inclusion of trans discrimination under sex discrimination.

Conversely, sex discrimination protections may result in indirect discrimination against trans people as many trans individuals fall outside of the binary male and female gender norm. Although some transsexual individuals may want recognition as male or female, and thus are capable of being protected under sex discrimination grounds, this ground fails to recognize and fully protect all trans individuals from the sorts of discrimination they face. Individuals who are transitioning from female to male have experiences that are vastly different from those transitioning from male to female. This emphasis on a binary male-female distinction also fails to capture those who do not intend to transition and choose to identify as gender queer or gender variant.

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68 *Sheridan v Sanctuary Investments Ltd (cob BJ's Lounge)(No 3)* (January 8, 1999), 1999 BCHRT 43, online: BCHRT <http://www.bchrt.bc.ca/decisions/1999/pdf/sheridan_vs_sanctuary_investments_ltd_dba_b.j.'s_lounge_jan_8_99.pdf> [Sheridan] (the BC Tribunal held that discrimination against transsexuals is sufficient to amount to discrimination on the basis of “sex” and “physical or mental disability” at para 97).
More extreme views have arisen against trans inclusion under the grounds of sex discrimination. One such view comes from Raymond and Daly, lesbian feminists, who demonize transsexual women as the epitome of misogynistic attempts of men to invade women’s space and appropriate women’s identity.\(^69\) Other extreme views have thought that the male to female transsexuals who still subscribe to the traditional stereotypes of women and seek to become "real" feminine women do a disservice to sex discrimination and feminism by maintaining and reinforcing these false and constructed notions of correct femininity and masculinity.\(^70\) Additionally, other extreme views seem rooted in prejudice. For example, in the American case *Ulane v Eastern Airlines Inc* a transsexual woman who was fired from her job as an airline pilot because she changed her sex, failed to state a viable claim of sex discrimination and the court was openly derisive of her identification as a woman.\(^71\) The court said things such as, "...even if one believes that a woman can be so easily created from what remains of a man" and "Ulane is a... biological male who takes female hormones, cross-dresses, and has surgically altered parts of her body to make it appear to be female" in its characterization Ulane.\(^72\) This description of Karen Ulane from the court excludes her from definitive identification as male or female, but in describing her as pathetic and delusion also effectively excludes her from being human.\(^73\)


\(^{70}\) Sheila Jeffreys, "Transgender Activism: A Lesbian Feminist Perspective" (1997) 1:3-4 J Lesbian Studies 55 at 57.

\(^{71}\) *Ulane v Eastern Airlines Inc*, 742 F 2d 1081 (7th Cir. 1984).

\(^{72}\) *Ibid* at para 21.

\(^{73}\) Currah & Minter, *supra* note 15 at 42.
There has been litigation in Canadian human rights cases where trans rights have been recognized formally under sex discrimination. In *Vancouver Rape Relief Society v Nixon*, a post-operative male to female transsexual, with her legal records amended to indicate her gender as female, complained to the Human Rights Commission that Vancouver Rape Relief and Women’s Shelter discriminated against her on the basis of sex by denying her services and refusing to employ her. Ms Nixon had experienced physical and emotional abuse by a male and attended similar support services to those offered by Rape Relief, where she received counselling for an extended period of time. Rape Relief required that everyone it trains as peer counsellor to have the shared experience of being “oppressed since birth” as a result of being born and raised female. The Tribunal found that Rape Relief was in breach of the B.C. *Human Rights Code* s.8 and s.13, being discriminatory on the basis of sex. British Columbia Court of Appeal also held that there was an exemption permitted under s.41 of the *Human Rights Code* for the women’s service organization to sexually discriminate against a sub-group of women, namely transsexual women, where the discrimination is meant to serve a specific group and is based on principles of good faith. The Supreme Court of Canada dismissed the application for leave to appeal from the Court of Appeal for British Columbia.

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75 *Vancouver Rape Relief Society v Nixon*, 2005 BCCA 601, 262 DRL (4th) 360 [Nixon].

76 Ibid.

77 Ibid.
Therefore Ms Nixon was found to be discriminated against formally based on her sex, but such discrimination was permitted based on a good faith exemption. However, it is unclear why being “oppressed since birth” as a woman is necessary in good faith to serve Rape Relief’s functions. It seems these guidelines are specifically discriminating against those who were not female from birth (i.e. trans individuals). The argument posed by the group was that men were not allowed in the training group, and that as a female safe haven only females could work there. However, the experiences of Ms Nixon pertinent to being a counsellor, having lived and been abused as a female, seem highly relevant and sufficient. Whereas the requirement of being born a biological female seems less relevant to how well one can counsel. Also, Rape Relief is relying on a category of ‘woman’ as being sufficiently identifiable and stable to make sense of a claim to be included in it, as well as to justify the exclusion of others from it.\(^\text{78}\) It is uncertain how far this good faith exception to discriminate against a sub-group of women can extend. For example, if there was a particularly butch woman hoping to volunteer, it is uncertain whether her lack of femininity or more masculine energy would also result in exclusion from the collective. The case creates a hierarchy of womanhood where individuals can be considered more a women or not woman enough. Boyle believes that although groups like Rape Relief are attempting to identify itself as a group for the goal of substantive equality, it could result in limiting the protection against discrimination exclusively to disadvantaged groups (i.e., it would ignore that the goal is substantive equal rights for all; not just for women, but for men, women, children, and all others).\(^\text{79}\) Pragmatically, Boyle suggests that decisions like *Nixon* could result in harming all


\(^{79}\) *Ibid* at 513.
disadvantaged groups and may result in hierarchies of whom is more deserving of rights recognition and protection. These results are exactly contrary to notion of substantive equality and human rights recognition for all.  

The Supreme Court of Canada’s dismissal of the Court of Appeal application for leave to appeal in *Vancouver Rape Relief Society v Nixon* leaves uncertain how to treat trans discrimination claimants in Canadian human rights law. The Court of Appeal's judgement focused not on strained interpretation of sex like at the tribunal level, but on whether there was any discrimination involved at all. Having found discrimination in this case the resulting judgement may not have been any different had there been an explicit ground of trans protection. However, the Court of Appeal's recognition of discrimination combined with its conclusion that the reviewing judge erred in finding that sex discrimination was not established, leaves this formally recognized as a case of sex discrimination. The requirement that every individual Rape Relief trains as a peer counsellor have the shared experience of being “oppressed since birth” as a result of being born and raised female seems to specifically discriminate against trans individuals who may identify as female and may have the lived experience of being a female, but failed to be born a biological female. This could have been recognized legally as an instance of trans discrimination and thus facilitated the development of trans specific jurisprudence. The trans rights movement would have been better served had there been an explicit ground of protection for Ms Nixon to bring a claim under, however without such formal protections this judgement simply adds to an already large body of sex discrimination jurisprudence. Clearly, there is still much tension regarding transgendered rights inclusion in the activism, legal analysis, and politics

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of sex discrimination.\textsuperscript{81} The good faith exemption in the \textit{Nixon} case leaves open the question of whether sex discrimination protection still allows for the continued discrimination of trans individuals in Canada.

Discrimination against trans individuals cannot simply be categorized as discrimination under sexual orientation, disability, or sex. Although these protected grounds provide some limited protections, they are insufficient in representing, recognizing, and protecting against trans specific discrimination. Legal recognition of trans rights as a continuum of individuals to be protected, and not just extensions of other categories, must be formally acknowledged. Trans discrimination claims would be better served by legislation which explicitly protects against discrimination based on gender expression and gender identity, and the development of trans specific legal arguments which can actually represent and provide justice to trans claimants.

\section{Multi-level Framework of Explicit Protections}

Canada would better serve the needs of the trans community through explicit gender identity and gender expression protection in human rights and anti-discrimination legislation, as well as through the development of trans specific legal arguments in litigation. The right for everyone to be free from discrimination is enshrined at various levels in the Canadian legal system, however trans discrimination and prejudice continues to occur. The current ways of addressing this discrimination and prejudice have been through strained extensions of other explicitly protected

\textsuperscript{81} Carissima Mathen, \textquotedblleft Transgendered Persons and Feminist Strategy\textquotedblright{} (2004) 16 CJWL 291.
grounds, which have proven insufficient. A systemic approach to explicitly protecting trans rights incorporating multiple levels of the Canadian legal system is suggested. Such a solution allows for reciprocal reinforcement and influence, and allows for expansive protections in a multitude of situations where trans discrimination may arise. As such, acknowledging trans individuals Constitutionally as an analogous grounds of protection under the *Charter of Rights and Freedoms* s.15 will signify Canada's commitment to the protection of trans individuals to legislators, lower courts, and tribunals. Amendments for explicit recognition of trans protections in federal and provincial human rights legislation will motivate the development of trans specific litigation and legal arguments, and also provide bottom up influence motivating Constitutional protections. Finally, litigation and legal arguments which explicitly focus on protecting trans individuals in situations of trans discrimination will allow judges and tribunals to provide a legal identity to trans individuals in decisions and judgements, which the trans rights movement can mobilize under and help society and legislators realize why explicit protections are still necessary at all levels.

### 4.1 Analogous Grounds

Currently, Canada's *Charter of Freedom and Rights* does not explicitly protect trans individuals against discrimination. However, acknowledging trans individuals Constitutionally as an analogous grounds of protection under the Section 15 of the *Charter* would signify Canada's commitment to the protection of trans individuals to legislators, courts, and tribunals. The purpose of s.15 is to prevent the violation of human dignity and freedom by the imposition of disadvantage, stereotyping or prejudice and to promote recognition at law of all persons as
equally deserving of concern, respect, and consideration. Legislative distinctions or government action that has the effect of discriminatory treatment of individuals or groups will violate this fundamental purpose of s.15 and warrant constitutional remedy. Under s.15(1) every individual is equal before and under the law and has the right to the 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. This list of characteristics are the enumerated grounds of protection, and gender identity and gender expression for trans protection are not included. In order to bring a constitutional claim of discrimination, an individual or group must prove that they experienced differential treatment because of legislation or government action which violated their human dignity on the basis of an enumerated or an analogous ground.

The recognition of analogous grounds is important to ensure that Charter protections are not static or anachronistic. It also ensures that the grounds reflect people who are subject to real discrimination and on-going social and political struggles. Currently, the recognized analogous grounds are citizenship status, marital status, off-reserve band member status, and sexual


\[83\] Charter, supra note 1.


\[85\] Miron v Trudel, [1995] 2 SCR 418, 23 OR (3d) 160.

\[86\] Corbiere v Canada (Minister of Indian and Northern Affairs), [1999] 2 SCR 203, 173 DLR (4th) 1 [Corbiere].
A new ground of discrimination is recognized as analogous if it is based on characteristics that "cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law".  

Reviewing how sexual orientation was recognized as an analogous ground can provide a framework for the potential recognition of gender identity and gender expression as an analogous ground. Sexual orientation was recognized as an analogous ground by the Supreme Court of Canada in *Egan v Canada*. In this case a homosexual partner applied for spousal allowance of Old Age Security but their application was rejected because their relationship did not fall within the definition of spouse under the *Old Age Security Act*. An action was brought seeking a declaration that the definition in the *Act* contravened s.15(1) because it discriminated on the basis of sexual orientation. It was held that exclusion of same-sex couples in the Act did violate s.15. Sexual orientation was considered a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs. Sexual orientation therefore fell within the ambit of s.15 protection as being analogous to the enumerated grounds. Similarly, gender identity and gender expression may be considered a deeply personal characteristic that is unchangeable or changeable only at unacceptable personal cost, and as such should also be considered analogous to the enumerated grounds.

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87 *Egan*, supra note 29.


89 *Egan*, supra note 29.

Other factors may be considered in establishing a new analogous ground, many of which directly apply to the trans community. Though none of these other factors are determinative, they influence the main consideration of whether the characteristic is unchangeable or changeable only at an unacceptable personal cost. Justice L'Heureux-Dubé mentions factors such as: whether the distinction was based on fundamental attributes that are considered to be essential to personhood; whether the group is victim to historical disadvantage; whether distinction is capable of aggravating or perpetuating that disadvantage; whether group members are vulnerable to stereotyping, social prejudice, and or marginalization; and whether the distinction exposes them to reasonable possibility of future vulnerability.  

Another factor to consider is whether the discriminated group is lacking in political power and vulnerable to having its interests overlooked. Also, Justice La Forest indicated that it did not matter whether the characteristic was based on biological or physiological factors as long as it was a deeply personal characteristic. All of these considerations can be successfully applied to the trans rights movement. A victim of trans discrimination might be able to argue these points successfully in court to support not only their claim of discrimination, but a claim that gender identity and gender expression should be recognized as an analogous ground. A trans claimant who can do so and demonstrate that they are subject to a burden or withheld a benefit on the basis of their trans status will not need to otherwise establish that they are male, female, disabled, a sexual minority, or any other enumerated ground in order to receive protection.

92 Ibid.
93 Ibid, La Forest para 5.
94 Mathen, supra note 81 at 294.
Such constitutional recognition of trans protection in the Charter is important because it is the highest law in Canada and influences all other levels of government and legal action. For example, governments have a responsibility to act in accordance with the Charter. Legislatures must uphold the commitments set forth in the Charter when enacting laws. Omissions in legislation that are discriminatory can be found unconstitutional and remedied. Also, the Supreme Court is empowered to decide whether enacted laws violate a Charter right, whether such limitation is justified and reasonable, and whether the law should be upheld. Courts must apply and interpret laws in light of Charter protections. The Supreme Court has repeatedly said that a broad, liberal, and purposive approach is appropriate when interpreting human rights legislation. As such, the judiciary has a responsibility in upholding Charter rights and recognizing when they have been infringed. If gender expression and gender identity were to be protected under the Charter as an analogous ground, it would promote amendments for increased trans protection in current legislation, support interpretations of legislation that would better protect trans individuals, and allow the courts to explicitly recognize such protection without claimants having to repeat the same strained legal arguments as to why they might be protected under other grounds that insufficiently represent their needs.


4.2 **Human Rights Legislation**

Only recently has gender identity and gender expression been explicitly recognized as grounds for anti-discrimination protection in some provincial human rights codes and legislations, but explicit protection in all jurisdictions are necessary to ensure that trans individuals are protected across all of Canada. Currently, amendments for explicit protections of this group are being made in federal and some provincial legislation. These developments suggest a change in political and social mood for greater protection against trans discrimination. Explicit recognition in federal and all provincial level human rights legislation will provide more consistent trans protections across all of Canada. It will also motivate development of trans specific litigation and legal arguments in courts and tribunals, and provide bottom up influence for constitutional protection.

The *Charter*'s protections against discrimination focus on whether legislation or government actions can be found unconstitutional contrary to s.15, whereas federal and provincial human rights legislation focus on whether actual respondents are liable for discrimination. Federal anti-discrimination protection is found in the *Canadian Human Rights Act 1985*, which outlaws discrimination in employment and the delivery of goods and services, and applies to people working for the Federal Government, for private companies regulated by the Federal Government, and anyone who receives goods and services from those sectors.⁹⁷ Provincial human rights legislation specifies that every person has a right to equal treatment without discrimination with respect to things such as services, goods and facilities, accommodation,

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⁹⁷ *CHRA, supra* note 2 at Part I.
contracting, employment, as well as membership in trade unions, trade or occupational associations, or self-governing professions. Schools, retail stores, restaurants, factories, and other such organizations are therefore under provincial jurisdiction. Human rights law at these non-constitutional levels have more relevance to everyday type situations where trans individuals experience discrimination. As such both federal and provincial level protections must be able to recognize and protect minority groups such as trans individuals, because these individuals are most in need of protection.

4.2.1 Trans Recognition in Federal Legislation

The *Canadian Human Rights Act* does not currently list gender identity or gender expression as explicitly prohibited grounds of discrimination however private member bills proposing for explicit trans protections have been brought forth since 2005. Bill Siksay from British Columbia sponsored bills to include "gender identity or expression" as explicitly prohibited grounds of discrimination in the *Canadian Human Rights Act* in 2005 and 2006 (Bill C-392 and Bill C-326 respectively). The Bill amendments would revise the purpose of the *Act* under s.2 to read "all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion,

98 *OHRC, supra* note 16.

age, sex, sexual orientation, gender identity or expression, marital status, family status, disability or convictions for an offence for which a pardon has been granted or in respect of which a record has been ordered". The amendments would also add "gender identity or expression" into s.3(1) of the *CHRA* as one of the explicitly prohibited grounds of discrimination.

Federal proposals for change in explicit trans protection were not limited to the *CHRA*. In 2007, Bill Siksay also sponsored Bill C-494 to amend the *Criminal Code* to include gender identity and gender expression protections. The proposed change to s.318(4) on advocating or promoting hate propaganda, which defined an "identifiable group" as only referring to any section of the public distinguished by colour, race, religion, ethnic origin, or sexual orientation," was to add "gender identity, gender expression" to the identifiable group list. Bill C-494 also proposed including "gender identity, gender expression" into the list of aggravating factors to be taken into consideration under s .718.2(a)(1) of the *Criminal Code* at the time of sentencing.

A more recent incarnation of these trans protection proposals came in 2009 with Bill C-389. This bill was also sponsored by Bill Siksay and was an act to include "gender identity and gender expression" into both the *CHRA* and *Criminal Code* like the previous bills separately proposed. This Bill passed a Senate first reading however did not progress beyond that. In 2011, Bill C-

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276, sponsored by Hedy Fry also proposed the same amendments, however failed to move past the first reading in the House of Commons.\(^{102}\)

The furthest any Bill allowing for explicit federal protection of trans individuals has come to being fully enacted is the ongoing Bill C-279. Bill C-279 is a private member bill sponsored by Randall Garrison of the NDP. It has passed a second Senate reading, and as of June 11th, 2013 the Standing Senate Committee on Human Rights report was presented.\(^{103}\) The Bill is on its way to the third reading in the Senate. Originally, Bill C-279 proposed amendments of the *Canadian Human Rights Act* and the *Criminal Code* to include "gender identity and gender expression" as prohibited grounds of discrimination.\(^{104}\) However the term "gender expression" was removed as it passed the House of Commons, in March 20, 2013.\(^{105}\)

The removal of "gender expression" is a step backwards from the goal of substantive equality and explicit trans protection, however it was a necessary one in order for the Bill to move forwards. Legislators were concerned at the lack of clarity and precision of the term "gender expression". As often occurs when "gender expression" is offered as an explicit grounds of protection, more extreme and prejudicial fears about men in dresses being sexual predators


gaining access to women's washrooms and change rooms arose, rather than legitimate political and legal concerns.\textsuperscript{106} Such opinions foster the trans discrimination and ignorance these Bills seek to protect against. Furthermore, jurisdictions such as California, Iowa, Colorado, and Washington which have had explicit "gender expression" provisions in place for years have never experienced attempts of illegal or illegitimate uses of these protections.\textsuperscript{107} Society would be better served with these legal protections in place, and increased education and awareness of what it means to be a transvestite, transsexual, gender queer, intersexed, or otherwise. Even now, at the Senate readings of Bill C-279, debates continue regarding the clarity and precision of the term "gender identity," and persistent misunderstanding of what it means to be a trans individual.\textsuperscript{108} The exclusion of gender expression and reliance only on status-based language (i.e., gender identity) may risk courts misinterpreting this language to allow for the exclusion of certain conduct from protection, such as undergoing sex reassignment or changing one's gender presentation.\textsuperscript{109} This reduces the scope of such protection considerably. However, the removal of "gender expression" in Bill C-279 was politically necessary as a \textit{Criminal Code} amendment with its inclusion would likely lead to a Constitutional challenge and the possibility of it being

\textsuperscript{106} Currah & Minter, \textit{supra} note 15 at 55.

\textsuperscript{107} \textit{House of Commons Debates}, 41st Parl, 1st Sess, No. 215 (27 February 2013) at 1840 (Randal Garrison).

\textsuperscript{108} Senator Plett said that "this bill will allow perverts to take advantage of the law, which is a problem I have" even after the exclusion of the term gender expression. See \textit{Debates of the Senate (Hansard)}, 41st Parl, 1st Sess, vol 148:174, (13 June 2013) at 1710 (Senator Plett).

\textsuperscript{109} Currah & Minter, \textit{supra} note 15 at 54.
struck down for being unconstitutionally vague or an unreasonable limit on the freedom of expression for an accused.\textsuperscript{110}

Those who would have otherwise been protected under "gender expression," such as cross-dressers who do not identify with the gender they express, will likely still be protected under a broader and more liberal interpretation of "gender identity" by the Canadian Human Rights Tribunal.\textsuperscript{111} Otherwise such discrimination could be determined on a case-by-case basis as they are likely to be highly fact specific.\textsuperscript{112} Finally, the \textit{Criminal Code} specifies "any other similar factors" to consider when sentencing, which could include discrimination based on gender expression. The concession of removing "gender expression" is unfortunate but politically necessary in order for Bill C-279 to progress towards enactment and help the trans community gain explicit legal protection.

Even though private member bills are rarely passed, it is clear that the many attempts culminating and including Bill C-279 indicate that the legislators are willing to consider legislating for explicit trans protections, and that there is persistent motivation from the general public who the Members of Parliament represent pushing for these protections.

\textsuperscript{110} Egale Canada, "Gender Identity Bill (C-279) Backgrounder: Gender Expression", Legislative Commentary (2013), online: Egale Canada <http://trans.egale.ca/gender-expression>.

\textsuperscript{111} Ibid.

\textsuperscript{112} Ibid.
4.2.2 Trans Recognition in Provincial and Territorial Legislation

Trans protection at the provincial level is inconsistently provided for across the different jurisdictions, but greater explicit protections must be in place especially since there is great reliance on these human rights laws to protect trans individuals in their day-to-day experiences of discrimination.

Explicit protection for both gender identity and gender expression can be found in Ontario's Human Rights Code,\textsuperscript{113} and in the Nova Scotia Human Rights Act.\textsuperscript{114} Gender identity and gender expression were enshrined in the Ontario Human Rights Code on June 19, 2012 following the passage of Toby's Act (Bill 33) introduced by NDP MPP Cheri DiNovo.\textsuperscript{115} Similarly, gender identity and gender expression were explicitly included in Nova Scotia's Human Rights Act as prohibited grounds of discrimination on December 6, 2012, following the passage of the Transgendered Persons Protection Act (Bill No. 140).\textsuperscript{116}

Explicit protection just for gender identity can be found in the Northwest Territories and in Manitoba. In the Northwest Territories' Human Rights Act it is against the law to discriminate

\textsuperscript{113} OHRC, \textit{supra} note 16.

\textsuperscript{114} Human Rights Act, RSNS 1989, c 214, s.5(1)(na)-(nb).

\textsuperscript{115} Toby's Act, \textit{supra} note 27.

against or harass people because of "gender identity". In Manitoba, gender identity is included under s.9(2)(g) as an applicable characteristic for the purposes of discrimination in *The Human Rights Code*. The Manitoba Human Rights Commission also indicates that it is unlawful to discriminate against a person on the basis of "actual or perceived gender identity" without reasonable cause. Potentially this definition could be interpreted to include gender expression.

Other provinces have failed to explicitly recognize gender identity or gender expression, but recognize it inconsistently and insufficiently under various other grounds, or not at all. In Nunavut's *Human Rights Act*, 17 grounds are explicitly protected but gender identity and gender expression are not among them. However, members of Iqaluit Pride and Friends of Pride have supported recognition of gender identity within the context of "sexual orientation" protection, even before the *Act* was enacted. Although the New Brunswick *Human Rights Act* explicitly protects 14 grounds, the New Brunswick Human Rights Commission notes that gender


118 *The Human Rights Code*, SM 2012, c 38, s 5, CCSM c H175, s 9(2)(g).


120 *Human Rights Act*, SNu 2003, c 12, s 7(1).

identity is "implicitly protected". It is uncertain whether this implicit protection is provided generally or under the another ground, because their statement incorporates the qualification at the end of their list of protected grounds following sexual orientation and sex. The Alberta Human Rights Commission notes that "gender" may protect discrimination based on being male, female or transgendered. The Yukon Human Rights Commission specifies that their trans protections would fall under "sex (gender)". The Saskatchewan Human Rights Commission indicates that trans discrimination claims would be formalized under the protected category of "sex" and or "disability". Furthermore, many of the commissions and tribunals explain that their decisions may be informed by decisions of other commissions or legal precedent from other jurisdictions. However, with such disparate ideas of how trans protections should be provided for and under such an assortment of different grounds, inconsistent commission decisions are likely to result even if there are similar fact situations.

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Provincial Human Rights Commissions themselves have lent their support for legislative amendments explicitly recognizing trans protections. Newfoundland and Labrador does not explicitly recognize any trans protections, though discrimination or harassment based on gender identity is protected under the enumerated ground of "sex". However, the Newfoundland and Labrador Human Rights Commission strongly supports the addition of gender identity into the list of prohibited grounds of discrimination in the Human Rights Act, and advised the government to that effect in 2009 when consultations were being held for the new human rights legislation.

In Prince Edward Island, although gender identity is not explicitly stated in the Human Rights Act under discriminated grounds, the Commission guidelines indicate that sex is to mean "sex or gender identity". Also, on July 22, 2013, the P.E.I. Human Rights Commissions chair Anne Nicholson indicated that the Commission is working to include gender expression and identity into the provincial human rights code.


Finally, case law interpreting these provincial human rights legislation may provide some trans discrimination legal recognition and help to influence the development of explicit legislative protections. Although such tribunal and court interpretations may acknowledge a need for explicit protections, legislatures are ultimately responsible for the enactment of these explicit provincial level protections. In British Columbia, there are no explicit trans protections in the Human Rights Code. Interpretation of the ground of "sex" provided some recognition of the discrimination faced by the male to female transsexual claimant in the Nixon case in 2005. In 2011, Spencer Chandra Herbert, an NDP Member of Legislative Assembly of B.C. introduced a member's Bill in support of adding gender identity and expression into the B.C. Human Rights Code, however it did not progress beyond its first reading.\textsuperscript{131} Quebec's Charter of Human Rights and Freedoms provide no explicit protections for gender identity in its recognized grounds.\textsuperscript{132} However, on June 26, 2013, a civil rights complaint arose which has the potential to advance the fight against gender identity discrimination in Quebec. Ms Tomee Sojouner filed a complaint of judicial bias, with Quebec's Conseil de la justice administrative, against a member of the Rental Board because of the board member's conduct.\textsuperscript{133} Tomee Sojouner, a black lesbian, appeared before the Rental Board in a case against her former landlord for not addressing toxic mold, water damage, and inappropriate conduct by her building superintendent. The presiding board member, Luce De Palma referred to her as a man 12 times during the 15 minute hearing, by calling her "il", "lui" and "monsieur Sojourner" even though Ms Sojourner, her representative,


\textsuperscript{132} Charter of human rights and freedoms, RSQ c C-12, c I.1.10.

\textsuperscript{133} Center for Research-Action on Race Relations (CRARR), Precedent-Setting Complaint of Race and Gender Identity Bias Filed Against Rental Board Judge, online: CRARR <http://www.crarr.org/?q=node/19535>.
and the landlord's representative reminded the board member that she is a woman. De Palma showed distinctly hostile, dismissive, and unprofessional attitudes towards Ms Sojouner by cutting her off, making minimal eye contact, and was visibly annoyed by her explanations.\textsuperscript{134} This may be the first gender identity discrimination complaint of this kind in Quebec, and could influence Quebec's \textit{Charter} arguments as well as the Senate's decision on Federal Bill C-279.

Federal and provincial human rights legislations establish a minimum level of protection and should be interpreted broadly, or even amended, for the protection of private actors when warranted.\textsuperscript{135} Justice L'Heureux-Dubé's concurrence in \textit{Corbiere v Canada} indicated that a factor one might consider for a new analogous grounds in the \textit{Charter} would be its protection under human rights legislation.\textsuperscript{136} Just as \textit{Charter} protections can have a downward influence on legislators and courts that certain individuals are in need of being legally recognized and protected; so too can federal and provincial legislatures signal upwards to the Supreme Court that such protections are being newly recognized and so should be considered in deciding upon new analogous grounds. Human Rights Commissions, members of government, and equality groups are continually pushing for explicit gender identity and gender expression protections in these provincial laws. These protections must also be homogenized so that trans protection across Canada is consistent. Hopefully the resulting explicit protections across all of Canada will better protect against trans discrimination in all facets of everyday life, and allow for the development

\textsuperscript{134} \textit{Ibid.}


\textsuperscript{136} \textit{Corbiere, supra} note 86 at para 60.
of trans specific litigation and legal arguments in courts and tribunals when discrimination occurs.

4.3 Trans Recognition in Litigation and Legal Arguments

Litigation and legal arguments that specifically focus on trans individuals will allow judges and tribunals to better recognize and protect trans individuals from discrimination, and help legislators realize why explicit protections are still necessary provincially, federally, and Constitutionally. Litigation and legal arguments as well as the resulting judgements and decisions are vital in addressing the human rights infringements of actual individuals in real life situations. As such, this level of protection is just as important and necessary as the legislative and Constitutional amendments proposed above.

Individual rights claimants rely on courts and tribunals to interpret and apply existing legislation to decide on their discrimination cases. Currently, the disparate grounds of legal protection for trans individuals in different jurisdictions across Canada hinder the development of a coherent body of specific trans legal arguments and decisions in tribunals and courts. Litigation of trans discrimination without explicit grounds of trans protection will result in making use of whatever arguments and jurisprudence are available no matter how strained; will fail to address the actual nature of the discrimination taking place; and will often fail to provide sufficient protection or remedy for the actual trans claimants. As mentioned in Part 3.3, in *Vancouver Rape Relief Society v Nixon*, the B.C. Court of Appeal upheld the right of Rape Relief, a volunteer feminist collective joined to end violence against women, to identify itself in such a way to exclude persons who lacked the life experience of being oppressed as women "from birth" from being
volunteer counselors. Although the court formally recognized this as an instance of sex discrimination, the exemption allowing the exclusion of those who lack the experience of being a woman from birth can be considered gender identity discrimination. The policy imposes a rigid and strict gender requirement that will specifically exclude trans individuals. The ruling formally recognizes this as a matter of sex discrimination and never addresses Ms Nixon’s right to be free from discrimination as a male to female transsexual. This decision calls into question the limits of equal treatment for individuals like Ms Nixon and more broadly the recognized legal status and human rights of trans individuals. How to legally address trans claimants as well as how to legally address how they have been discriminated against remains unclear despite some human rights tribunal cases having touched on the subject. Also, human rights tribunal cases rarely get seen in the superior courts because there is often no right of appeal from tribunal decisions and limited opportunities for judicial review. In failing to take up the Nixon appeal, the Supreme Court missed an important opportunity to develop a greater understanding of transgenderism as a legal entity, and leaves ambiguity as to the treatment of trans individuals in courts and how to explicitly address trans discrimination.

137 Boyle, "Group Self-Identification", supra note 78 at 488.
138 Mathen, supra note 81 at 295.
139 Montreuil, supra note 74; Kavanagh, supra note 74.
140 For example, in Ontario there is no right of appeal from a Human Rights Tribunal of Ontario decision and applications for judicial review are governed by the Rules of Civil Procedure (See The Human Rights Tribunal of Ontario, What can an applicant or respondent do if they disagree with the decision? (2010) online: HRTO <http://www.hrto.ca/hrto/?q=en/node/18>; Courts of Justice Act, RRO 1990, Reg 194).
The lack of explicit trans protections in provincial legislation means that in provincial human rights tribunals, trans claimants experiencing trans discrimination will formally be recognized as experiencing discrimination of a different nature. Even though the Supreme Court of Canada states that human rights legislation should be given a large and liberal interpretation, judges and tribunals do not have unlimited interpretive powers to strain definitions and alter them according to need. As was explained in Part 3, many of the explicitly protected categories that trans rights are currently protected under are insufficient and often fail to properly characterize and address the trans discrimination being litigated. In *Sheridan v Sanctuary Investments Ltd. (No. 3)*, Sheridan was refused use of a women's washroom in a bar, even though the gender clinic treating her provided a letter stating that she was required to live full-time as a woman for two years as a condition of her sex reassignment surgery.\(^{141}\) The B.C. Human Rights Tribunal found that there was discrimination and that Sheridan was entitled to use the women's washroom. Tribunal Member Humphreys noted that the law assumes that sex is bipolar and that an individual is either male or female.\(^{142}\) Humphreys indicated that it was because of the large and liberal interpretation of human rights mandated by the Supreme Court which led him to formally conclude that discrimination against a transsexual would constitute discrimination on the basis of sex.\(^{143}\) The language used by Humphreys suggests that trans legal recognition still must be compared to a dominant identity rather than being protected for their own sake.\(^{144}\) The lack of explicit protection in legislation means that litigation and legal arguments must still be pursued

\(^{141}\) *Sheridan, supra* note 68 at para 15.

\(^{142}\) *Ibid* at para 91.

\(^{143}\) *Ibid* at para 93.

\(^{144}\) Durnford, *supra* note 28 at 212.
under other grounds of protection. The inability to argue explicitly under a ground of trans discrimination means that a trans legal identity cannot be recognized and developed in these provincial human rights tribunals or appeal courts.

Just months before the amendments explicitly including gender identity and gender expression protection into the Ontario *Human Rights Code*, a case which could have been recognized as trans discrimination came before the Human Rights Tribunal of Ontario. The passage of *Toby's Act* amending the Ontario *Human Rights Code* to include gender identity and gender expression as a grounds for protection occurred on June 19th, 2012. The case *X.Y. v Ontario (Minister of Government and Consumer Services)* was decided on April 11, 2012.145 XY was a transgendered person applying for an order that the Minister's requirement, that she 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 contrary to the *Human Rights Code*. The requirement of surgery in order to change the birth certificate resulted in distinct and disadvantageous treatment of XY on the basis of her trans status. It was found discriminatory because it "exacerbates the situation of transgendered persons as a historically disadvantaged group, and thus perpetuates their disadvantage".146 The requirement of surgery was "substantively discriminatory because it perpetuates stereotypes about transgendered persons and their need to have surgery in order to

146 *Ibid* at para 15.
live in accordance with their gender identity”. The Minister was ordered to revise the criteria for changing sex designation on birth certificates to remove the discriminatory effect of the current system "on transgendered persons". This emphasis on gender identity discrimination can be found throughout the decision, but the ultimate conclusion of the tribunal was that this requirement was discriminatory on the basis of the explicitly recognized grounds of "sex and/or disability". The respondents in this case conceded that discrimination against a transgendered applicant would constitute discrimination on the basis of the explicitly prohibited grounds of sex and or disability under the Code, so the tribunal did not actually need to determine whether the applicant fell within either ground specifically. This decision therefore adds to the jurisprudence which slots trans discrimination under other explicitly recognized grounds out of convenience, instead of laying the foundation for future recognition of trans discrimination and trans rights.

Now that the Ontario Human Rights Code has been amended to recognize gender identity and gender expression, it is possible that XY could have received a decision that legally recognized this as an instance gender identity discrimination and commenced an understanding of how to sufficiently recognize and address trans claimants at the provincial tribunal level.

Similarly, the lack of explicit trans protections in federal legislation means that at the Canada Human Rights Tribunal (CHRT), trans claimants experiencing trans discrimination will formally be recognized as experiencing discrimination of a different nature. In Kavanagh v Canada (Attorney General) a male to female transsexual, who had been living as a woman, was convicted of second degree murder and incarcerated in a male federal prison despite the judge

147 Ibid.

148 Ibid at para 298.
recommending that she be placed in a female prison. Kavanagh claimed that by being denied her hormone treatments, denied her sex reassignment surgery, and being placed in a male prison by Correctional Services Canada (CSC), her dignity and freedoms as a transgendered person were infringed. The CHRT found that the CSC's policy, regarding placement of pre-operative transsexuals, was discriminatory against transsexuals because the CSC had failed to establish that it could not accommodate the complainant within the male prison population without incurring undue hardship. Also, the CSC's Health Services Policy absolutely prohibited sex reassignment surgery during incarceration, while no other medical procedure was subject to such a blanket prohibition. Whether sex reassignment surgery is an essential or an elective procedure was debated. However, an inmate who wanted to have any other type of elective medical treatment, such as tattoo removal, need only obtain a letter from their physician and pay for the procedure at their own expense. Even if the tribunal were to consider sex reassignment surgery as an elective surgery, the blanket prohibition on this procedure under s.31 meant that even a physician's note and funding at the inmate's own expense would be irrelevant. The CHRT found that both the CSC's policy on placement as well as its prohibition on sex reassignment surgery had a discriminatory effect on transsexual inmates. However, the CHRT formally recognized these instances of discrimination on the grounds of sex and disability. Throughout the decision there is extensive analysis of how the discrimination was directed only at transsexual inmates. Nevertheless, the CHRT simply states that "[t]here is no dispute that discrimination on the basis of Transsexualism constitutes sex discrimination as well as discrimination on the basis

\footnote{Kavanagh, supra note 74 at para 4.}

\footnote{Ibid at para 192.}

\footnote{Ibid at para 193.}
of disability" citing case law such as Sheridan v Sanctuary Investments Ltd. (No 3) in support, a case discussed above in this section.152 There is no further analysis into whether these are actually appropriate grounds, even though much of decision focused on the policy's discriminatory effect specifically against transsexuals. Discrimination in a case such as this would sufficiently fall under an explicitly recognized ground of gender identity, as proposed in Bill C-279, and would help to develop jurisprudence and legal arguments around this ground for the future litigation. Simply stating that trans discrimination constitutes sex and or disability discrimination, and basing such conclusions on other cases where trans discrimination was also insufficiently categorized, does a disservice to a community of invisible legal identities waiting to be recognized.

Not only has litigation involving trans discrimination been subsumed into other grounds of protection, but trans individuals involved in cases have sometimes been rendered legally invisible in final rulings.153 In R v Hornick, the court's decision focused only on the search of semi-naked females conducted by male police officers during a raid of a woman's bathhouse.154 The final judgement never makes reference to the words "lesbian," "queer," "homosexual," "transgender," or "transsexual" despite considerable discussion and testimony during the court proceedings about the presence of these individuals at the establishment.155 The individual

152 Ibid at para 135.


154 R v Hornick [2002] OJ no 1170 (QL) ON Ct J [Hornick].

155 Ibid at para 32; Lamble, supra note 153 at 127 (the term "trans" actually appears once in the ruling, but it has been suggested that the judge did not fully appreciate the implication of recognizing trans
bodies and sexualities present at the establishment and in the courtroom became "disembodied and desexualized legal subjects".\textsuperscript{156} The principle derived in this case was a legal ban on cross-gender searches, where men cannot strip search women, and women cannot strip search men.\textsuperscript{157} None of the individuals actually charged in the case were trans individuals, and so the presence of trans individuals might be inconsequential to the ruling.\textsuperscript{158} Nevertheless, application of this legal principle back to the facts of the case poses problems specifically because of the presence of trans patrons at the bathhouse.\textsuperscript{159} For example, male officers could not conduct the strip search as it would violate the rights of female-identified transgendered patrons and female officers could not conduct the strip search as it would violate the rights of male-identified transgender persons.\textsuperscript{160} Also, since both male to female trans women and female to male trans men were present, application of this ban proves difficult regardless of how one legally recognizes these individuals.\textsuperscript{161} Trans patrons at the bathhouse have the same rights to be free from discriminatory searches as the "women" who were actually recognized during the proceedings, but the judgement makes no reference to their rights. Such legal invisibility of identities as it is not "transgender" or "transsexuals" that was said, but was used only as an empty signifier lacking substantive meaning).

\textsuperscript{156} Lamble, \textit{supra} note 153 at 117.

\textsuperscript{157} \textit{Hornick, supra} note 154 at para 83.

\textsuperscript{158} Lamble, \textit{supra} note 153 at 124.

\textsuperscript{159} \textit{Ibid} at 113.

\textsuperscript{160} \textit{Ibid} at 124.

\textsuperscript{161} \textit{Ibid}.
trans individuals in litigation ignores the trans discrimination involved, and reinforces the notion that explicit legislation is not necessary.

Recognizing trans discrimination and trans specific legal arguments in tribunals and courts is vital in protecting trans claimants and the human rights infringements they face. Decisions and judgements reached as a result of legal arguments focused on trans discrimination should be able to reflect these arguments. If explicit legislative protections were recognized, then judgements and decisions could formally resemble the legal arguments that were premised on, and thus a coherent trans jurisprudence could finally be developed. However, a lack of explicit protection in legislation precludes that possibility, and so decisions and judgements continue to formally and insufficiently recognize trans discrimination under other grounds. Therefore, the continued recognition of trans individuals and trans discrimination in legal arguments and in litigation is essential in order to promote awareness of why explicit trans protections are still necessary in legislation provincially, federally, and Constitutionally.

5 Limitations of Explicit Recognition

Promoting the explicit recognition of trans discrimination and trans legal visibility is important in order to provide protection in law and in litigation for trans individuals. However, not all trans individuals actually find visibility desirable, as they may find it a failure to "pass" in one's self-identified gender.\(^\text{162}\) This may be especially true for those who have endured through years

\(^{162}\) Ibid at 116.
of policy requirements, psychological assessments, and medical procedures in order to fully transition into that gender identity. Being able to be recognized for one's self-identified gender and not for their sex from birth may be a relief to some trans individuals. Legal visibility may also lead to increased social stigma and criminalization.\textsuperscript{163} However, the point of explicit legal recognition in legislation and litigation is not to single out trans claimants who failed to "pass" and thus experienced discrimination, but to prevent trans discrimination from occurring at all.

Pragmatically it is easier to reinterpret existing protections than to add a new grounds of protection, as any change to legislation is seen as a more radical act. This is perhaps why so many attempts have been made to fit transgendered rights into other categories of protected rights. However, even with though the Supreme Court of Canada says that courts are to interpret human rights legislation broadly and expansively, there are limits to such interpretative ability and judicial activism. Required amendments should not be avoided because it is more complicated and arduous to do so. Amendments should be brought forth because they are necessary in preventing further instances discrimination.

The overall goal is substantive equality for all, but in order to do so those who experience discrimination under the current system must be protected and recognized explicitly, so that such discrimination can be brought to light and addressed. It has been noted that queer visibility in the legal domain has often been met with criticism, social stigma, or may facilitate assimilation

\textsuperscript{163} Ibid at 125.
of transgressive practices or the entrenchment of new normative hierarchies.\footnote{Ibid.} For example, the legal recognition of same sex marriage may allow those who wish to enter into such unions to be legitimized by society, while those who do not wish to get married might continue to go unrecognized. However, such stigmatizing and stereotyping are a result of a lack of social education and understanding. Visibility of one minority group should not diminish the respect and protection owed to other minority groups. The point of human rights legislation is to ensure that governments, organizations, and the population are educated and made aware that such discrimination exists, what constitutes this sort of discrimination, and to create environments where such discrimination does not take place at all.

Finally, explicit formal protection in legislation has its limits. In order to have substantive anti-discrimination protection there must also be a continued and active change in societal norms and practices. One such change is the Toronto District School Board implementing their guidelines for the accommodation of transgender and gender non-conforming students and staff. These guidelines indicate that students have a right to use washrooms according to their gender identity and not simply their biological sex.\footnote{Grant Bowers et al, \textit{TDSB Guidelines for the Accommodation of Transgender and Gender Non-Conforming Students and Staff} (30 November 2011), online: Toronto District School Board <http://www.tdsb.on.ca/_site/ViewItem.asp?siteid=10471&menuid=40696&pageid=34075>\footnote{Ibid.}.} The TDSB is committed to the idea that all students have a right to privacy and so TDSB schools must keep a students' transgender/non-conforming status confidential, official records should reflect a change in legal name or gender upon receipt of documentation that such legal name or gender has been changed pursuant to a court, and that transgender and gender non-conforming students have a right to be addressed by a name and
pronoun corresponding to their gender identity. \textsuperscript{166} Bottom up strategies such as these supplement formal legal protection, and foster an environment where discrimination is eliminated before legal redress in courts and tribunals are necessary.

6 Conclusion

Current guarantees of equality and the right to freedom from discrimination for all protects every single human being in theory. Theoretically, freedom from discrimination should not have to be qualified, since treating anyone differently than how any other human should have a right to be treated is grounds for protection. However, in practice such guarantees must be qualified. There are many instances of discrimination that in practice single out very specific groups. Such instances must be brought to public attention through explicit protection and recognition in law in order to educate the public and prevent the public from perpetuating such discrimination.

While some grounds of protection are explicitly recognized in law, attempts to include trans individuals within such grounds are insufficient at addressing true instances of trans discrimination. Although there are undoubtedly situations where trans individuals face some sexual orientation discrimination, disability discrimination, or sex discrimination, these situations are substantively different from being denied benefits, job opportunities, or access to resources because the policies or laws are written in such a way so as to exclude trans individuals completely. In order to begin developing a body of trans jurisprudence we need to have

\textsuperscript{166} Ibid.
legislation and legal arguments that reflect and recognize these individuals and these situations for what they really are. We do an injustice to those experiencing trans discrimination by trying to stretch grounds of protection that did not have them in mind upon their conception. These attempts do not allow for sufficient protection for individuals actually in need, nor do they help with the evolution of their political struggles. Without explicit protections for trans individuals, we fall back to a weak formal equality where we treat likes alike and try compare those whose rights have been infringed, instead of dealing with the actual discriminatory conditions of life that trans individuals face.  

Legislation and legal decisions in courts and tribunals determine how societies and governments understand categories of people, and thus affect recognition of a group and their entitlement to benefits, rights, and resources. Therefore laws and legal arguments must evolve, must be challenged, must redefine categories when possible, and must be changed when change is necessary. Systemic changes at multiple levels will allow explicit trans protections and trans recognition to be pervasive and mutually reinforcing. The proposed systemic changes include the potential recognition of a new analogous ground in the Charter for gender identity and gender expression; federal and provincial amendments to anti-discrimination and human rights laws recognizing gender identity and gender expression as explicitly protected grounds; and finally legal arguments which directly identify trans claimants and result in tribunal decisions and court judgements that explicitly recognize instances of trans discrimination. Development of a multi-level framework avoids the haphazard and often tenuous attempts at extending

168 Ibid at 694.
protections from other groups. Such a framework will enable development of trans specific jurisprudence, and allow the trans rights movement to mobilize politically and produce activism, so that trans individuals can finally get the opportunities and protections they deserve in Canada.
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