

Transgender Individuals: Emerging issues in Accommodation, Support, and Insurance

SPIAO 2018

Sarah Sweet

Tel: 416.367.6590

E-mail: ssweet@blg.com



Overview / Agenda

1. Context
2. Statutory Obligations
 - a) The *Human Rights Code* and a refresher on the Duty to Accommodate
3. Case Law Review
4. What's in the News
5. Emerging Issues
6. Best Practices

Definitions

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

Definitions

- ◆ **Gender Expression:** how a person publicly presents their gender. This can include behaviour and outward appearance such as dress, hair, make-up, body language and voice. A person's chosen name and pronoun are also common ways of expressing gender.

Definitions

- ◆ **Trans or Transgender:** An umbrella term referring to people with diverse gender identities and expressions that differ from stereotypical gender norms. It includes, but is not limited to, people who identify as transgender, a trans woman, a trans man, transsexual, or gender non-conforming, gender variant or gender queer.

Source: *Policy on preventing discrimination because of gender identity and gender expression* (Ontario Human Rights Commission, April 14, 2014)

Discrimination and Harassment of Transgender Individuals

- ◆ Trans youth are especially vulnerable to bullying and harassment by their peers.
- ◆ Social stereotypes about gender, and prejudice and fear towards trans people are often at the root of discrimination and harassment.
- ◆ Negative attitudes about a trans person's racial identity, family status or other grounds can combine or intersect to make things worse.

2011 Canadian Survey by the Egale Canada Human Rights Trust

- ◆ Trans youth are particularly at risk of harassment and discrimination.
- ◆ Over 3700 students participated.
- ◆ 26% identified as LGBTQ or questioning.
- ◆ 78% of trans students feel unsafe in their schools.

Bauer and Scheim, *Transgender People in Ontario, Canada: Statistics from the Trans PULSE Project to Inform Human Rights Policy*, 1 June 2015.

- ◆ A 2015 study provided the following statistics about “trans (transgender, transsexual or transitioned) people in the province of Ontario”:
 - 96% had heard that trans people were not normal;
 - 73% had been made fun of for being trans;
 - 20% had been physically or sexually assaulted for being trans;
 - 13% were fired for being trans, while another 15% had also been fired, but were not sure why; and
 - 10% of trans emergency room patients reported having care stopped or denied.

Ontario Human Rights Commission 2017 Survey

- ◆ Sample of 1,501 people age 18 and older.
- ◆ Participants identified sexual orientation as the second most common reason for discrimination, behind race or colour.
- ◆ Fewer than half of respondents were positive towards transgender people (46%).
- ◆ A majority supported allowing transgender students to use washrooms based on their lived identity (73%).

Ontario Human Rights Commission 2017 Survey

- ◆ Where discrimination happens:
 - 45% of respondents who experienced discrimination or harassment in the past five years say it happened at work;
 - 42% say it happened in a public place (i.e. outside the jurisdiction of the *Code*);
 - 16% in a shop or restaurant; and
 - 12% at school.

Gender Identity and Gender Expression

- ◆ Implicit or explicit protections in each province.
- ◆ Now in the list of characteristics of identifiable groups protected from hate propaganda in the *Criminal Code*.
- ◆ Discrimination and harassment because of gender identity and gender expression is against provincial human rights law.

Gender Identity and Gender Expression

- ◆ Every person should be treated with equal dignity and respect, without regard to gender identity and gender expression.
- ◆ This includes any person whose gender identity or expression is different, or is seen to be, different from their birth sex.
- ◆ The duty to accommodate may apply.

What is accommodation?

- ◆ Considered a fundamental and integral part of the right to equal treatment.
- ◆ Accommodation means making changes and/or adaptations to meet an individual's needs.
- ◆ It is an effort or arrangement short of undue hardship made to meet or assist an employee or individual in receipt of services who is classified by/on a prohibited ground of discrimination so as to ensure they can continue to participate fully in work or fully receive services.

Accommodation under the *Code*: One Rule Does Not Fit All

Accommodation under the *Code* focuses on:

- Prevention and removal of barriers.
- Appropriate accommodation that best ensures inclusiveness and equal opportunity.
- Respect for individual privacy, dignity and autonomy.
- Individual rather than formulaic approach.

Duties in the Accommodation Process

Duties of the Individual Requesting Accommodation:

- Advise of the need for accommodation.
- Make needs known to the best of his/her ability, preferably in writing, so that the person responsible for accommodation may make the requested accommodation.
- Answer questions or provide information regarding relevant restrictions or limitations.

Duties in the Accommodation Process

Duties of the Individual Requesting Accommodation

- Participate in discussions regarding possible accommodation solutions.
- Work with the accommodation provider on an ongoing basis to manage the accommodation process.

Duties in the Accommodation Process

Duties of an Entity providing Accommodation:

- Accept the request for accommodation in good faith, unless there are legitimate reasons for acting otherwise.
- Obtain expert opinion or advice where needed.
- Take an active role in ensuring that alternative approaches and possible accommodation solutions are investigated, and canvass various forms of possible accommodation and alternative solutions, as part of the duty to accommodate.

Duties in the Accommodation Process

Duties of an Entity providing Accommodation:

- Limit requests for information to what is reasonably required in order to be able to respond to the accommodation request.
- Grant accommodation requests in a timely manner, to the point of undue hardship, even when the request for accommodation does not use any specific formal language.
- Keep a record of the accommodation requests and the actions taken.

Accommodation and Undue Hardship

- ◆ Accommodation is required to the point of undue hardship.
- ◆ There is no universal standard to determine when undue hardship exists.
- ◆ Undue hardship includes:
 - Cost.
 - Outside Sources of Funding.
 - Health and Safety.

Accepting Schools Act – an Ontario Example

- ◆ In 2012, the *Accepting Schools Act* amended the *Education Act* to provide explicit protection for students from bullying because of gender identity and gender expression, among other grounds.
- ◆ School boards must conduct anonymous school climate surveys of students, staff and parents at least once every two years.
- ◆ Surveys must include questions on bullying/harassment related to gender identity and gender expression.

Supports for Students

- ◆ School boards must provide supports for all students who are affected by serious student incidents and inappropriate behaviour.
- ◆ Supports may be provided by employees of the board through board programs and resource personnel.
- ◆ Employees are expected to support students who wish to discuss issues of healthy relationships and gender identity.
- ◆ Provide information about professional supports.

PPM 119 – Issued on April 22, 2013

- ◆ School boards are required to develop and implement equity and inclusive education policies that address all forms of discrimination and harassment on the basis of *Code* protected grounds, including gender identity and gender expression.

PPM 119 (cont'd)

- ◆ A positive and inclusive school climate is one where all members of the school community feel safe, included, welcomed and accepted.
- ◆ The principles of equity and inclusive education support a whole-school approach to foster positive student behaviour.
- ◆ When relationships are founded on mutual respect, a culture of respect becomes the norm.

Respecting Transgender Individuals – What does the Law Say?

- ◆ Area is still developing in Canada.
 - *XY v. Ontario*, 2012 HRTO 726
 - *Salsman v. London Sales Arena Corp.*, 2014 HRTO 775
 - *Vanderputten v. Seydaco Packaging Corp.*, 2012 HRTO 1977
 - *McMahon v. Wilkinson*, 2015 HRTO 1019
 - *Lewis v. Sugar Daddys Nightclub*, 2016 HRTO 347
- ◆ We can also look south of the border for guidance on how courts are enforcing and interpreting the rights of transgender students.

XY v. Ontario, 2012 HRTO 726

◆ Facts:

- The old *Vital Statistics Act* required proof of sexual reassignment surgery before a change in one's sex designation would be made to their birth certificate.
- A transgender individual who had undergone sexual reassignment surgery brought an application, alleging the requirement was discriminatory.

XY v. Ontario, 2012 HRTO 726

◆ Findings:

- The requirement constituted distinct and disadvantageous treatment.
- The requirement was discriminatory against trans persons because it perpetuated disadvantage, prejudice and stereotyping.
- Specifically, the requirement perpetuated stereotypes about a transgendered persons' need to have surgery in order to live in accordance with their gender identity.

◆ Order:

- The Ministry was ordered to change its process for changing sex designations.

Salsman v. London Sales Arena Corp., 2014 HRTO 775

◆ Facts:

- Four applicants, three identifying as transgender.
- One of the applicants owned a market booth, and hired the other applicants to work at it. On the relevant day, all three of the other applicants attended at the booth to work.

Salsman v. London Sales Arena Corp., 2014 HRTO 775

◆ Facts:

- The market manager expressed his displeasure with the applicants tending to the booth to the booth owner, making comments that the applicants dressed “like prostitutes”, and stating things like “those people” and “it’s not normal”.
- The market owner gave a radio interview a few days later, making comments about the market being a “family market”, and referring to the applicants as “people like that”.

Salsman v. London Sales Arena Corp., 2014 HRTO 775

◆ Findings/Order:

- The comments were discriminatory.
- Two applicants awarded \$5,000, one applicant awarded \$10,000, and the booth owner was awarded \$20,000 for injury to dignity, feelings and self-respect.
- The respondents had to undergo training.

Vanderputten v. Seydaco Packaging Corp., 2012 HRTO 1977

◆ Facts:

- Employee worked in plant and had to wear a uniform.
- Employee was transitioning from male to female and requested that she be allowed to use the female change room.
- Her boss forced her to use the male change room until she “proved” she was a female. The employee experienced harassment and cruelty in the change room and was subsequently dismissed.

Vanderputten v. Seydaco Packaging Corp. 2012 HRTO 1977

◆ Findings/Order:

- Applicant was subject to a poisoned work environment.
- Respondent failed to investigate the applicant's allegations of harassment.
- “Insisting that the applicant be treated in the same manner as men until her transition was fully complete was discrimination.”

Vanderputten v. Seydaco Packaging Corp., 2012 HRTO 1977

◆ Findings/Order:

- “The insistence that a person be treated in accordance with the gender assigned at birth for all employment purposes is discrimination because it fails to treat that person in accordance with their lived gender identity.”
- The applicant’s gender identity was a factor in her termination. She was awarded \$21,000 in damages and lost wages.

McMahon v. Wilkinson, 2015 HRTO 1019

◆ Facts:

- Applicants were a same-sex couple, one of whom identified as a trans woman.
- Applicants were interested in renting an apartment from the respondent.
- Respondent refused to rent the apartment to the applicants as he did not want to make other tenants in the residence uncomfortable. Respondent offered them the basement unit where they would be less likely to be seen by the other tenants.

McMahon v. Wilkinson, 2015 HRTO 1019

◆ Findings/Order:

- Respondent had asked the trans woman applicant if she was trans and then requested her ID. The respondent's attitude towards renting the unit to the couple changed after this line of questioning.
- The applicant being a trans woman was a factor in the respondent not renting the unit.
- Each applicant was awarded \$2,500, which was the full amount claimed.

Lewis v. Sugar Daddys Nightclub, 2016 HRTO 347

◆ Facts:

- Applicant identified as a transgender neutral questioning transgender male. During the material time when he was at Sugar Daddys Nightclub he identified as male.
- Applicant went to use the men's washroom and was inside the washroom stall when a security guard forced open the stall door and dragged the applicant out.

Lewis v. Sugar Daddys Nightclub, 2016 HRTO 347

◆ Facts:

- Applicant showed the security guard his passport, which identified his legal name before his transition, but told the guard that using the men's washroom was his preference.
- Security guard made a number of derogatory comments towards the applicant and removed him from the nightclub.
- Applicant was assaulted by guards when he tried to re-enter the nightclub.

Lewis v. Sugar Daddys Nightclub, 2016 HRTO 347

◆ Findings/Order:

- Applicant awarded \$15,000, the full amount claimed, but Tribunal noted they would have awarded more.
- Respondent ordered to provide human rights training to its employees, management, and staff specifically on the issues of gender expression, gender identity and sexual orientation.

John Doe et al. v. Regional School Unit 26

- ◆ Maine Supreme Judicial Court.
- ◆ Facts:
 - Susan Doe is a transgender girl.
 - The principal became aware she was transgender in her third grade year.
 - Susan used the single stall girls' washroom.
 - Educational plan put in place during fourth grade year.

John Doe et al. v. Regional School Unit 26 *(cont'd)*

◆ Facts:

- Starting in grade five, she used the communal girls' washroom.
- Young male student began harassing her and following her into the washroom.
- The school revoked her ability to use the girls' washroom and required her to use the single-stall unisex staff washroom.

John Doe et al. v. Regional School Unit 26 (cont'd)

Decision: Was this discriminatory?

Why? / Why not?

John Doe et al. v. Regional School Unit 26 (cont'd)

Decision: Was this discriminatory?

YES!

John Doe et al. v. Regional School Unit 26 (cont'd)

Decision:

- ◆ The school strove to provide Susan with a supportive environment and were largely successful.
- ◆ Public scrutiny caused the school to reconsider its approach and reverse course.
- ◆ In keeping with the information provided to the school by Susan and her family, her therapists, and experts, the school determined she should use the girls' washroom, providing her with the same access to facilities as provided to other girls.

John Doe et al. v. Regional School Unit 26 (cont'd)

Decision:

“RSU 26’s later decision to ban Susan from the girls’ bathroom, based not on a determination that there had been some change in Susan’s status but on others’ complaints about the school’s well-considered decision, constituted discrimination based on Susan’s sexual orientation.”

John Doe et al. v. Regional School Unit 26 (cont'd)

Decision:

“She was treated differently from other students solely because of her status as a transgender girl. This type of discrimination is forbidden...”

The Result: The Superior Court’s summary judgment decision was vacated and the matter was sent back to the lower courts for a decision consistent with this ruling.

What's in the News

◆ Joshua Ferguson

- Ontario issued its first non-binary birth certificate.
- Ferguson petitioned the provincial government for a new birth certificate in order to change the document from male to non-binary, as Ferguson identifies as neither male nor female.
- Ontario now provides several options for gender on birth certificates. In Ferguson's case, gender is denoted by an "X", but petitioners can also have their gender removed altogether from the official document.
- Ontario issued its first gender-neutral driving licenses and health identification cards last year.

What's in the News

- ◆ PEI announces it will cover more gender-transitioning surgeries
 - Health and Wellness Minister Robert Mitchell recently announced that the province will expand coverage for gender-confirming surgeries for P.E.I. residents.
 - The announcement brings P.E.I. in line with what is available for gender-confirming surgeries in most other provinces.

What's in the News

- ◆ Rallies in Vancouver over Sex-Ed Curriculum
 - Rallies were held in Vancouver outside B.C. Teachers' Federation headquarters in support of and in opposition to the Sexual Orientation and Gender Identities 123 curriculum being taught in B.C. schools.
 - The program aims to educate students and teachers on issues regarding gender and sexuality in school children.
 - BCTF President made it clear the curriculum was in B.C. schools to stay.

Emerging Issues

- ◆ Transgender health coverage insurance
- ◆ Transitioning support
- ◆ Genderqueer and Non-binary Individuals

Best Practices for Respecting Transgender Individuals

- ◆ Review your rules, practices, policies and facilities, and make changes as necessary to remove any barriers and avoid negative effects on trans people. Policies and practices should be inclusive of everyone.
- ◆ Privacy is key. When engaging in the accommodation process, everyone involved should be cooperative and respectful of privacy. Only the necessary information should be exchanged and it must be kept confidential to the extent possible.

Best Practices for Respecting Transgender Individuals

- ◆ Think ahead and be pro-active, not reactive.
- ◆ What challenges might your organization and/or the trans individual face in the accommodation process? How can these be addressed or mitigated?

Best Practices for Respecting Transgender Individuals

- ◆ Work together. The accommodation process should involve the trans person and key players depending on the situation.
 - In a school setting, this may involve the student's parents, the principal, the student's teacher and, depending on the resources available at a given school, the school social worker, the school psychologist, and members of a gender-based violence prevention team.
 - If possible, experts or members of the transgender community who provide consultant services should be included.

Best Practices for Respecting Transgender Individuals

- ◆ Raise awareness. Train your employees familiarize them with gender identity and gender expression issues, as well as gender diversity.

Thank You

Questions?

To receive news and updates from the Firm, follow BLG on Twitter
Twitter@BLGLaw (twitter.com/BLGLaw).

Visit us online at [blg.com](https://www.blg.com)