HUMAN RIGHTS TRIBUNAL OF ONTARIO

B E T W E E N:

XY

Applicant

-and-

Her Majesty the Queen in Right of Ontario as Represented by the Minister of Government and Consumer Services

Respondent

-and-

Ontario Human Rights Commission

Intervenor

DECISION

Adjudicator: Sheri D. Price

Date: April 11, 2012

File Number: 2009-01326-I

Citation: 2012 HRTO 726

Indexed as: **XY v. Ontario (Government and Consumer Services)**

APPEARANCES

XY, Applicant	)	Susan Ursel, Counsel, and Samantha Scott, Student-at-Law
Her Majesty the Queen in Right of Ontario as represented by the Minister of Government and Consumer Services, Respondent	)	Sean Hanley and Darren Thorne, Counsel, and David Duggins, Student-at-Law
Ontario Human Rights Commission, Intervenor	)	Anthony Griffin, Counsel (written submissions only)

INTRODUCTION

[1] Since 1978, the *Vital Statistics Act,* R.S.O. 1990, c. V.4 ("the *VSA*") has provided that in order for a person to obtain a birth certificate with a sex designation other than the one assigned to him or her at birth, he or she must undergo "transsexual surgery" and provide the respondent with medical certificates from two doctors certifying that "transsexual surgery" was performed on the person and that as a result of the surgery, the sex designation on the person's registration of birth should be changed (s.36).

[2] Other than through s.36 of the *VSA*, a transgendered person cannot obtain an Ontario birth certificate bearing a sex designation that accords with his or her gender identity.

[3] The applicant identifies herself as a male-to-female transgendered person, a transgendered woman. The applicant alleges that, on February 4, 2008, she underwent a bilateral orchiectomy (i.e. removal of both testes) in order to allow her to obtain a change in sex designation on her birth certificate, which accorded with her female gender identity.

[4] The applicant later applied to the respondent with the requisite medical certificates for a change in sex designation on her birth registration (and correspondingly her birth certificate) pursuant to s.36 of the *VSA*. The applicant's request was granted by the respondent and on November 28, 2008, the respondent issued the applicant a birth certificate indicating that her sex was female.

[5] The applicant contends that the requirement that she have and certify that she had "transsexual surgery" in order to obtain a birth certificate which accorded with her gender identity infringed her right to equal treatment without discrimination on the basis of sex and/or disability with respect to services contrary to s.1 and s.11 of the *Code*. The argument that the respondent discriminated against her on the basis of disability, however, is advanced in the alternative with some reluctance on the applicant's part, because, notwithstanding that she has been diagnosed with Gender Identity Disorder

(by psychiatrist Dr. Chris McIntosh who testified at the hearing of this matter), the applicant does not regard her gender identity as a "disability". In the Application she filed with the Tribunal, the applicant also alleged that she had been discriminated against on the basis of sexual orientation. However, that allegation was not pursued at the hearing.

[6] The respondent concedes that discrimination against someone on the basis of his or her status as a transgendered person would constitute discrimination on the basis of sex and/or disability, contrary to the *Code.* However, the respondent disputes that it treated the applicant in a discriminatory manner.

[7] The respondent submits that in order to establish that she was discriminated against contrary to the *Code,* the applicant must prove that she was treated in a distinct manner that caused *her* a disadvantage as a transgendered person. The respondent submits that the applicant has not done this. According to the respondent, the evidence shows that the applicant had an orchiectomy in February 2008 for reasons unrelated to the requirements in s.36 of the *VSA*. When the applicant subsequently applied to the respondent for a change in sex designation on her birth registration, her request was granted. In the circumstances, the respondent submits that the applicant cannot show that she personally experienced any disadvantage in her dealings with the respondent, and thus cannot establish discrimination. The respondent describes this as its main argument on the Application and submits that the Application should be dismissed on this basis alone.

[8] The respondent further submits that the Application ought to be dismissed because the applicant has failed to establish that her right to substantive equality under the *Code* was infringed by showing that the requirements for changing sex designation perpetuate disadvantage, prejudice or stereotyping against transgendered persons. The respondent submits that its requirements for changing the sex designation on a birth registration advance a legitimate public policy objective, namely the objective of ensuring that registered vital event data is accurate and reliable. The respondent submits that the requirements for changing sex designation cannot be said to

perpetuate disadvantage, prejudice or stereotyping if they further valid government objectives.

[9] In the alternative, the respondent submits that s.36 of the *VSA* constitutes a "special program" designed to assist a disadvantaged group within the meaning of s.14 of the *Code*, namely, transgendered persons who have had "transsexual surgery" that alters their "anatomical sex structure" because they suffer from severe Gender Identity Disorder and require surgery as part of their treatment. The respondent submits that if s.36 of the *VSA* is a special program within the meaning of s.14 of the *Code*, it cannot be found to infringe upon the applicant's right to equal treatment with respect to services under the *Code*.

[10] In the further alternative, the respondent submits that its requirements for changing the sex designation on a birth registration are "reasonable and bona fide" within the meaning of s.11 of the *Code*, in that they constitute a form of reasonable accommodation of the needs of transgendered persons in relation to the birth registration system. In this regard, the respondent submits that it would cause the respondent undue hardship to change the sex designation on birth registrations and birth certificates without medical verification that "transsexual surgery" had been performed.

[11] The applicant submits that s.36 of the *VSA* ought not to be regarded as an accommodative measure within the meaning of s.11 of the *Code* because it directly discriminates against transgendered persons. The applicant further submits that the respondent has not discharged its onus of proving that it would cause undue hardship for the respondent to change the sex designation on transgendered persons' birth registrations and correspondingly their birth certificates without requiring "transsexual surgery" to have occurred. The applicant submits that the needs of transgendered persons could be accommodated through far less invasive and less harmful means than surgery. In support of this proposition, the applicant points out, and the respondent agrees, that since 2006, the Ontario Ministry of Transportation has allowed transgendered persons to change the sex designation on their drivers' licences, without

surgery, by submitting a letter from a doctor who has examined or treated the transgendered person that states the doctor's opinion that a change in the sex designation on the person's driver's licence is appropriate.

[12] The Ontario Human Rights Commission ("the Commission") intervened in this matter with respect to whether s. 36 of the *VSA* constitutes a "special program" within the meaning of s.14 of the *Code.* The Commission submits that s.36 of the *VSA* can be either a "special program" within the meaning of s.14 of the *Code* or an accommodative measure under s.11 of the *Code,* but not both. The Commission submits that s.36 of the *VSA* is properly regarded as a limited form of accommodation of transgendered persons in relation to the respondent's system of birth registration and certification under the *VSA* and not as a "special program" under s.14 of the *Code.* The Commission submits that even if s.36 of the *VSA* were construed as a "special program", s.14 would not serve to insulate the respondent from a *Code* challenge by the applicant, since she falls within the group of persons whom the "special program" was intended to benefit: *Ontario (Human Rights Commission) v. Ontario,* 1994 CanLII 1590 (ONCA), (1994), 19 O.R. (3d) 387 (C.A.) ("*Roberts*").

[13] The applicant adopts the Commission's submissions with respect to s.14 of the *Code*.

SUMMARY OF FINDINGS

[14] For the reasons set out below, I find that the requirement that Ontario birth certificates reflect the sex assigned at birth, unless a person has and certifies to the respondent that he or she has had "transsexual surgery" and that the sex designation on his or her birth registration should be changed as a result, resulted in distinct and disadvantageous treatment of the applicant on the basis of her status as a transgendered person; and/or that such requirement had a distinct and disadvantageous effect on the applicant on the basis of her status as a transgendered person, and therefore on the basis of the *Code*-protected grounds of sex and/or disability.

[15] I further find that the requirement that Ontario birth certificates reflect the sex assigned at birth unless a person has and certifies to the respondent that he or she has had "transsexual surgery" is substantively discriminatory because it exacerbates the situation of transgendered persons as a historically disadvantaged group, and thus perpetuates their disadvantage. In the alternative, the requirement that Ontario birth certificates reflect the sex assigned at birth unless a person has and certifies to the respondent that he or she has had "transsexual surgery" is substantively discriminatory because it perpetuates stereotypes about transgendered persons and their need to have surgery in order to live in accordance with their gender identity, among other things.

[16] I further find that the respondent has not established that the requirement that Ontario birth certificates reflect the sex assigned at birth unless a person has and certifies to the respondent that he or she has had "transsexual surgery" is "reasonable and bona fide" within the meaning of s.11(1)(a) of the *Code*, including by proving that it could not remove "transsexual surgery" as the prerequisite for a change in sex designation on a birth registration without incurring undue hardship.

[17] Nor has the respondent established that s.14 of the *Code* insulates it from the applicant's claim that she was discriminated against by the respondent.

[18] Accordingly, I find that the respondent has infringed the applicant's right to be free from discrimination with respect to services on the basis of sex and/or disability and make certain orders to ensure future compliance with the *Code* pursuant to the Tribunal's remedial authority under s.45.2(1).3 of the *Code*. This is not, however, an appropriate case in which to direct the respondent to prove monetary compensation to the applicant. Nor is the applicant entitled to the other remedies sought.

WITNESSES

[19] The applicant testified on her own behalf at the hearing in this matter. She also

called Dr. Dan Karasic, a psychiatrist with expertise in the treatment and care of transgendered persons, among other things, as an expert witness. The applicant's family doctor, Dr. Irene Jansz, and Dr. Chris McIntosh, a psychiatrist to whom she was referred by her family doctor, also testified. The respondent called the Ontario Deputy Registrar General and the Director of the Thunder Bay Production and Verification Services Branch, Ms. Judith Hartman, to testify on its behalf.

SCOPE OF APPLICATION

[20] At the hearing of the Application, the applicant led evidence as to certain instances of harassment and discrimination that she experienced as a transgendered person in the mid to late 1990's, some of which she attributed to the fact that she had to use government-issued identification (not her birth certificate) that exposed her as transgendered by indicating that she was male, even though she was presenting herself as female; and/or the fact that she was unable to obtain government-issued identification that was congruent with her gender identity.

[21] In response to questions from me about the scope of her claim against the respondent, the applicant clarified early on in the proceeding that, although she sought to adduce evidence of certain of her past life experiences as background to her discrimination complaint, she was not alleging that the respondent infringed her rights under the *Code* at any point prior to her decision to have surgery in 2008. The hearing proceeded on that basis. During the hearing, the respondent objected to any attempt by the applicant to hold it liable for discrimination or harassment that the applicant experienced at the hands of others and/or to hold the respondent liable for events or series of events that were not raised before the Tribunal in a timely way pursuant to s.34 of the *Code*. However, in light of the position taken by the applicant with respect to the limited scope of her discrimination claim, it was not necessary for me to determine the respondent's objections. There is no dispute and in any event it is clear that the applicant's decision to have surgery was part of a series of events, the last of which transpired within the one-year period preceding the filing of the Application.

BACKGROUND FACTS

Vital Events Registration in Ontario

[22] The respondent administers the *VSA*, and certain other legislation, through the Office of the Registrar General. Ontario's Registrar General is the Minister of Government Services. However, most of the Registrar General's duties under the *VSA* are delegated to the Deputy Registrar General, Judith Hartman. For the most part, Ms Hartman's evidence was not in dispute.

[23] As the Deputy Registrar General for Ontario, Ms Hartman is responsible for overseeing the Office of the Registrar General. She is also the Director of the respondent's Thunder Bay Production and Verification Services Branch and Ontario's representative to the Vital Statistics Council for Canada, an association of all of the Deputy Registrar Generals, or equivalents, throughout Canada, which develops national standards, shares policy work and addresses issues that impact vital statistics registration in jurisdictions across Canada.

Functions of the Office of the Registrar General

[24] Ms Hartman testified that the Office of the Registrar General performs three basic functions.

[25] First, it is required to register all of the vital events that happen in Ontario. Specifically, the Office of the Registrar General is statutorily required to maintain a uniform system of registration of vital events in Ontario, which include births, marriages, deaths, still-births, adoptions and changes of name (s.2 of the *VSA*). Ms Hartman testified that maintaining a uniform system of registration means ensuring that all of the entries into a given register are consistent, complete and accurate so that each record in the register contains the same data as every other record in the register.

[26] Second, Ms Hartman testified that the Office of the Registrar General is required to provide proof of registration, or certificates, to individuals who need them. Ms

Hartman testified that certificates contain information extracted from the registration of the vital event and are proof that the vital event occurred and of the information contained in the certificate.

[27] Third, Ms Hartman testified that the Office of the Registrar General compiles vital statistics for the Province of Ontario. Specifically, it draws data out of the registrations, aggregates it, "cleans" it (by identifying any unusual outliers, which might be indicative of a technical error or something of that sort) and then provides it to different requesters, mainly researchers from inside and outside government, so that they can conduct research and analysis for different purposes, primarily public policy decision-making purposes. Like other Canadian provinces and territories, Ontario's Office of the Registrar General also provides vital statistics data to Statistics Canada, which compiles vital statistics data on a national level.

Relationship between Birth Certificates and Personal Identification

[28] Ms Hartman testified that when vital event registration began in Ontario in the 1800's, the government did not provide people with proof of registration (i.e. certificates). However, as society evolved and government and other organizations began to develop many benefit programs, birth certificates gained prominence as a way for such "downstream users" to uniquely identify individuals in a reliable way and preserve the integrity of their programs.

[29] However, Ms Hartman pointed out that there are important distinctions between birth certificates and forms of personal identification that can be used to confirm the identity of the bearer. Ms Hartman testified that while the birth certificate contains information about a vital event, namely a birth (such as the name of the person born, the date and location of his or her birth, and the person's sex), it is not possible to determine whether a person presenting a birth certificate is the person named on the certificate merely by looking at the document. By contrast, forms of personal identification such as driver's licences and passports contain biometric markers such as

photographs and signatures, which can be used to confirm that the document in question pertains to a particular individual.

[30] Although Ms Hartman was at pains to explain that that the primary purpose of vital events registration is to collect data about events that happen to people and not to provide identification (the respondent submits that downstream users rely on the birth certificate as the basis for issuing forms of personal identification, such as drivers' licences and passports, not at the respondent's behest, but on their own initiative), Ms Hartman acknowledged that vital event data is a basis for "defining and recording individual identity". Ms Hartman also testified that in addition to collecting vital event information so that we can learn about our society, we register vital event data because we recognize that as a child grows, s/he will require proof of registration (i.e. a birth certificate) in order to obtain health insurance, go to school, participate in sports, obtain a driver's licence, etc. Ms Hartman testified that because downstream organizations use the information on the birth certificate as the basis for access to services and benefits they provide, the birth certificate is often referred to as a "foundation" document.

Accuracy and Reliability of Vital Event Data

[31] Ms Hartman testified that accuracy and reliability are the key principles underlying the registration of vital event data. Ms Hartman testified that accuracy is achieved in the vital event registration system by requiring data about vital events to be recorded soon after the vital event has taken place, in recognition of the fact that people will be less likely to forget or become confused about the details surrounding the vital event if they record them soon after the event. Ms Hartman testified that reliability in the vital event registration system is achieved by having vital event data corroborated by an independent third party.

[32] For example, Ms Hartman testified that, within a few weeks of a birth, the parents of the child (or just the mother, if no father is indicated) are required to send the Office of the Registrar General a "Statement of Live Birth" containing specific pieces of information about the birth. The physician or midwife attending the birth is separately

required to send the Office of the Registrar General a “Notice of Live Birth” with details about the birth. If the information contained in the Statement of Live Birth is corroborated by (i.e. matches) the information contained in the Notice of Live Birth, then the birth is entered into the birth register. Once corroborated, the Statement of Live Birth constitutes the birth registration. A long-form birth certificate is a certified true copy of the birth registration. The more familiar short-form birth certificate, also called a “wallet” birth certificate, contains an extraction of some but not all of the data contained in the birth registration.

[33] Ms Hartman testified that the accuracy and reliability of data entered into the vital events registration system is important because the data is relied upon as the basis for research, which is in turn used to make fundamental public policy and planning decisions about our society. For example, Ms Hartman testified that population data is derived from birth, death and migration data, which in turn is used to calculate transfer payments to the province from the federal government, which in turn can be used to build infrastructure such as roads and hospitals. In addition, Ms Hartman testified that the insurance industry uses vital statistics information to calculate standard mortality and morbidity rates, which determine our insurance rates. Ms Hartman also testified that researchers use vital event data to gauge the effectiveness of certain medical treatments and to determine whether they will be made more broadly available to the general public.

[34] Ms Hartman testified that the accuracy and reliability of data on birth registrations is also important because of the many benefits that can flow from birth registration, the many “downstream” things that a person can do with information from the registration. Ms Hartman testified that many organizations, including various branches of the provincial and federal governments, various school boards, banks, and amateur sporting organizations rely on the accuracy and reliability of information in the birth registration as the basis for determining eligibility for the services or benefits they provide. Ms Hartman testified that, among other things, birth certificates are required to obtain a driver’s licence, social insurance number, passport, and health insurance; to register for school, to apply for Registered Education Savings Plan government grants,

to register with some amateur sports organizations, and in relation to certain immigration and estate matters.

[35] As noted above, Ms Hartman testified that the respondent does not require "downstream" organizations to rely on registered vital event data in administering their programs. Rather, such organizations choose to do so as a matter of their own policies because it saves them from having to develop their own systems for gathering and verifying the required information. Illustrating the reliance of at least some downstream users on the vital statistics registration system, Ms Hartman testified that the Vital Statistics Council of Canada receives and considers petitions from downstream organizations to make changes to the vital event registration system so that it better serves their purposes.

Amendments to Vital Event Data

[36] Ms Hartman testified that once data is entered into a vital event register, such as the birth register, it is never removed or deleted. However, Ms Hartman testified that any vital event data can be amended with satisfactory evidence that the amending information is accurate and reliable. Ms Hartman testified that amendments to vital event information are made on the face of the registration in such a way that the original information can be seen on the registration of birth (and thus on the long-form birth certificate) and continues to be available to researchers. (Parentheses are put around the original information on the registration and the corrected information is entered next to it.) Ms Hartman testified that this also applies to changes in sex designation on birth registrations made pursuant to s.36 of the *VSA*.

[37] Ms Hartman testified that requests to amend vital event data to correct errors on vital event registrations are dealt with under s.34 of the *VSA*. Ms Hartman testified that transgendered persons are not able to use s.34 of the *VSA* to change the sex designation on their birth registrations. Rather, they must comply with the requirements in s.36 of the *VSA*.

Change in Sex Designation pursuant to s.36 of the VSA

[38] Over the five-year period preceding the hearing in this matter, Ms Hartman testified that the Office of the Registrar General processed an average of approximately 40 requests for change of sex designation on a birth registration per year.

[39] Ms Hartman testified that five things are required pursuant to s.36 of the *VSA* in order to change the sex designation on a birth registration and birth certificate: an application from the person who wants his/her sex designation changed; a certificate from the physician who performed "transsexual surgery" on the applicant confirming that "transsexual surgery" has been performed and that the sex designation on the applicant's birth registration should be changed; a certificate from a second physician licensed to practice in Ontario certifying that s/he has examined the applicant, that "transsexual surgery" was performed upon the applicant, and that the sex designation on the applicant's birth registration should be changed; any birth certificates the applicant may have showing the old sex designation; and a fee. Ms Hartman testified that a request to change sex designation on a birth registration must also be accompanied by a request for a birth certificate showing the changed sex designation.

[40] Ms Hartman testified that she does not know why "transsexual surgery" was selected as the prerequisite for changing sex designation on a birth registration. Nor does her office have any position on the purpose underlying the requirement for "transsexual surgery" in order to change sex designation on a birth registration.

The Applicant

[41] The applicant testified that she was born with male genitalia. Accordingly, the registration of the applicant's birth that the Office of the Registrar General entered into Ontario's birth register indicated that the applicant's sex was "male".

[42] The applicant testified that she knew she was "different" as early as age 5, if not younger. However, she was afraid to identify herself as a girl. She testified that her birth family felt threatened by any attempts she made to behave as female during her

childhood years and that she was raised as a male. The applicant testified that, especially in her teenage years, she did everything she could to be male, even though she always identified as female. The applicant testified that, during her childhood, she felt jealous of other people who got to be their own gender. She described growing up as “traumatic”.

[43] In the fall of 1995, at the age of 19, the applicant left home to go to university in another town. She decided that she was going to live full-time as a woman, even though her family had told her that if she “changed her gender”, she might as well “disappear”. The applicant had no contact with her family for at least three of the four years of her university career.

[44] The applicant’s university experiences were not without hardship. The applicant testified, for example, that when she told the people at the boarding house where she planned to stay that she was going to live as a woman, they told her that she would “get AIDS and die within a year.” The applicant left as a result and ended up in a shelter.

[45] The applicant also encountered problems in the academic sphere. The applicant enrolled in the university’s nursing program. However, when the Dean of the faculty found out that the applicant was transgendered, he told her that he would not support her transition or accommodate her in terms of dealing with patients or work placements. The applicant testified that the Dean pressured her to switch to a Bachelor of Science degree instead of continuing in the nursing program, which she did because she did not see any other option. The applicant testified that the Dean told her that she could come back to nursing in a few years after she had “transition[ed] further”.

[46] Otherwise, the applicant testified that she had the same rights as everyone else during her university years in the sense that she was able to live her gender on campus without having it challenged. The applicant put this down to the fact that her student identification card did not have a sex designation on it, which would identify the applicant as male.

[47] In the fall of 1995, during her first year at university, the applicant legally changed her name to a “female” name through the Office of the Registrar General. At the same time, the applicant asked the Office of the Registrar General whether she could have the sex designation on her birth certificate changed to “female”. The applicant testified that the Office of the Registrar General told her that such a change could not be made unless the applicant had “transsexual surgery”.

[48] The applicant testified that although she did her best in university to “stay on her feet”, she battled depression and anxiety and could not focus on school because there was too much “residual pain”. The applicant testified that she got a lot of “F’s” because she was unable to concentrate on her studies. She never graduated from university.

[49] The applicant testified that after her university days came to an end, in the spring of 1999, she tried to figure out how she would cope in the “real world” – presenting herself as a woman on the one hand, but having to show government-issued identification that told everyone that she was male, on the other. The applicant testified that she knew it would be difficult to navigate the world outside campus with “ambiguous” identification, that is, identification that bore her “female” name but still had a male sex designation. She testified that she thought she would “die” if she tried to get a job and an apartment in the real world without identification to back up her female identity. The applicant testified that she decided instead that she would just live on a bicycle and get a tent because she figured she would “last longer” that way. The applicant testified that she came up with a kind of “suicidal fantasy” to bike up to the Arctic to see the ocean and she set off to do that.

[50] At one point during her journey, in August or September 1999, the applicant testified that a person with whom she was hitching a ride drove off with everything the applicant owned. The applicant testified that with nothing and nowhere to go, she had to return home to her mother and a community where she was known as male “and nothing more than that”. During her testimony, the applicant identified this as the point at which she lost her freedom. The applicant testified that her mother was embarrassed of her and tried to hide her from the community because she did not want people to

know that the applicant was transgendered. The applicant testified that she could not live like that, “cooped up like a chicken”. She testified that she started working as a male “as a form of compromise” and because she needed to earn money to support herself and pay her bills. The applicant testified that she did not feel that she had any choice but to start working as a man, because she had no way, legally, to work as a woman as long as her identification indicated that she was male. The applicant testified that she only felt safe working as a man. She testified that she feared that if she were to try to live and work as a woman, her I.D. “might catch up” to her. She testified that she was “paranoid” about her I.D. and felt “hunted down”.

[51] In the fall of 1999, the applicant legally changed her name back to the one she had been given at birth. The applicant testified that she changed her name back because it was an ongoing discussion “if not battle” between her and her mother and because she could not think of any other way that she could be successfully employed without her history “haunting her”. The applicant testified that although she presented herself publicly as a man, she continued to identify as female and to live as a woman in her private life. The applicant testified that her life during this period consisted of nothing but working and hiding at home.

[52] The applicant testified that she continued living in her mother’s community for a year to a year and a half and then moved to Toronto where she started to work as a bicycle courier. Then, in 2002, the applicant started to apprentice in a trade. The applicant became a fully licensed tradesperson in May 2007, at which point she moved to Alberta for work.

[53] The applicant testified that, although over the years she did her best to present herself publicly as a man, because she felt she had to, she was “living a lie” and not being herself. The applicant testified that she did not know how to make sense of herself or her life and that she had no stability. The applicant testified that, during this “incredibly difficult” period of her life, she did not have a social life and did not interact with the world.

[54] The applicant testified that in or around December 2007, she was working as a tradesperson in Alberta when a very homophobic apprentice who had been harassing her and calling her “gay” poked her in the face with a tool and ripped some paperwork out of her hands. The applicant testified that she broke the tool defending herself and that both she and the apprentice were fired as a result of the incident.

[55] The applicant testified that for years she had planned to transition to her felt gender and after the “tool incident”, she proceeded with her plan. The applicant testified that she knew for certain that when she transitioned to her gender, she did not want to live in a “no man’s land” where she had no identification to back up the fact that she was female. The applicant testified that she felt that people would not accept her as a woman if she did not have I.D. that said she was female. She testified that such I.D. was the foundation she needed to live and work as a woman without discrimination or harassment.

[56] The applicant testified that she had known since 1995 that she needed to have “transsexual surgery” in order to change the sex designation on her birth certificate. The applicant testified that she started researching on the internet, looking for anywhere that she could obtain such a surgery. The applicant testified that she also made telephone inquiries of a number of surgeons across North America to see what kind of surgeries they performed and which ones she might be able to obtain without meeting the World Professional Association for Transgender Health’s (“WPATH”) *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* (the “Standards of Care”). (Dr. Karasic testified that before performing genital surgery on a person, especially vaginoplasty or phalloplasty, most surgeons will require the person to have met the Standards of Care, by having had two mental health evaluations, been on hormones for a year and lived consistently in his or her new gender role for one year before having surgery. Dr. Karasic testified that most surgeons require adherence to the Standards of Care because it is considered to be good clinical practice and shields doctors from malpractice claims. Dr. Karasic testified, however, that adherence to the Standards of Care is entirely voluntary and not required in any legal sense. It should be noted that, in his April 4, 2008 psychiatric evaluation of the applicant, Dr. McIntosh

stated that the applicant's years of living as a woman during university would satisfy the Standards of Care criteria for real-life experience.)

[57] The applicant testified that in response to her inquiries, she received a call back from Dr. Kimmel. The applicant testified that Dr. Kimmel told her over the phone in late January 2008 that he could do a transsexual surgery for her that would allow her to get her I.D. changed, namely an orchiectomy, and that he had helped other transgendered people from Ontario change their I.D.

[58] The applicant testified that she decided to go ahead with the orchiectomy with Dr. Kimmel in late January or early February 2008. The applicant travelled to the United States and, after an in-person consultation with Dr. Kimmel on February 3, 2008, underwent a bilateral orchiectomy on February 4, 2008.

[59] Following the surgery, Dr. Kimmel wrote the applicant a February 4, 2008 letter in which he certified that he had performed a bilateral orchiectomy on the applicant. In that letter, Dr. Kimmel refers to the applicant by her then legal "male" name and also by the applicant's previous "female" name, the name to which she would legally revert in September 2008. Dr. Kimmel's February 4, 2008 letter "to whom it may concern" also states:

> This letter is written with the intention of certifying that she should be regarded as female from this date as far as any legal documents including drivers' license, social security card, passport, voting papers, or any other similar legal procedures.

[60] Dr. Kimmel's letter was notarized on February 7, 2008, and mailed to the applicant at some point after that. The applicant testified that it took "months" for the letter to arrive.

[61] At the hearing, the applicant testified that although she was "happy" that she had the orchiectomy because it allowed her to move on with her life as a woman, the decision to have surgery was not without trauma. The applicant testified that she was

unable to sleep for days after having the orchiectomy and felt very agitated. The applicant also testified that she felt very angry that surgery had been required in order to obtain a change in sex designation on her birth registration.

[62] The applicant also testified that she did not tell anyone that she had had an orchiectomy for quite a while after the surgery, for fear of being labeled mentally unstable. The applicant did, however, tell her family doctor, Dr. Jansz, that she had had an orchiectomy right after she got back from the United States. Dr. Jansz removed the applicant's sutures and treated the surgical wound left by the orchiectomy.

[63] In or around July 2008, the applicant applied to the Office of the Registrar General to change her name back to the "female" name she had had from 1995 to 1999 when she living as a woman. In a letter to the Office of the Registrar General that accompanied her Change of Name Application, the applicant attempted to have the Office of the Registrar General change the sex designation on her birth certificate by writing that she was "now legally considered a female" and attaching a copy of Dr. Kimmel's February 4, 2008 letter.

[64] The respondent processed the applicant's Change of Name Application and on September 8, 2008, issued the applicant a birth certificate reflecting the requested name change. However, the respondent did not change the sex designation on the applicant's birth certificate, no doubt because the applicant had not complied with the respondent's requirements for change of sex designation on a birth registration, pursuant to s.36 of the *VSA.* The sex designation on the birth certificate issued to the applicant in September 2008 was "male".

[65] The documentary evidence indicates that, on September 15, 2008, the applicant spoke to the Office of the Registrar General by telephone about the fact that the sex designation on her birth certificate had not been changed in accordance with her request. Although the evidence on this point was somewhat unclear, it appears that the Office of the Registrar General sent the applicant the proper forms to apply to change the sex designation on her birth registration as a result of this call.

[66] Meanwhile, after receiving her new birth certificate in September 2008 (i.e. the one with the “female” name but the male sex designation), the applicant applied to have the name on her Ontario driver’s licence and OHIP card changed to her new “female” name. A temporary Ontario driver’s licence and an OHIP card bearing the applicant’s female name – but a male sex designation – were issued to the applicant on September 23, 2008.

[67] The applicant testified that she started living and working in her female gender “full-time” in or around September 2008. The applicant testified that she did not intend to start working in her female gender until she had received I.D. indicating that she was female, but she was going through a lot of emotions at that time and she just started going to work as a woman.

[68] However, the applicant testified that she was “scared” going to work as a woman. She testified that one co-worker in particular made death threats against her. The applicant testified that she normally would not “bring any issues to anybody” but when it came to death threats, she felt compelled to do something about it. The applicant testified that she brought the fact that she had received death threats to the attention of the union steward and the general foreman in her workplace, hoping that they would take steps to rectify the matter, but they just laughed at her and ignored her complaint. The applicant testified that the steward and the foreman also warned her not to go to the police because if she did, she would never be able to find work again. To make matters worse, the applicant testified that the steward and foreman insisted on referring to her by her old “male” name. The applicant testified that she had asked that people at work refer to her by a short form of her female name which also happens to be a gender-neutral first name. The applicant testified that the steward and the foreman refused to do that and told her that the only name they would honour was the “male” name on the “dispatch slip” under which the applicant had started to work at the company, months earlier.

[69] The applicant was laid off from her job in September 2008. She testified that, based on her seniority, she felt that she ought not to have been included in the group of

workers who were laid off at that time, but she decided not to grieve because she did not want to "rock the boat"; she wanted to be able to get work through the union in the future.

[70] At some point on or before September 23, 2008, the applicant received the proper forms to apply for a change in the sex designation on her birth registration from the respondent, including the two medical certificates required pursuant to s.36(2) of the *VSA*. Dr. Kimmel completed his certificate on October 2, 2008, certifying that he had performed "transsexual surgery" on the applicant and that the sex designation on the applicant's birth registration ought to be changed. The applicant's family doctor, Dr. Jansz, completed the other requisite medical certificate on October 15, 2008. Dr. Jansz testified that she was initially unsure as to what would qualify as "transsexual surgery" so she telephoned the Office of the Registrar General to check. Dr. Jansz testified that an employee at the Office of the Registrar General clarified for her that an orchiectomy combined with the applicant's "living and looking like a woman" would satisfy the respondent's requirements for a change in sex designation. She completed the medical certificate accordingly.

[71] It should be noted that Ms Hartman testified that employees of the Office of the Registrar General are not supposed to advise doctors on what surgeries qualify for changing sex designation. She testified that this is a matter left entirely to the discretion of the doctors.

[72] The applicant, who was present during Dr. Jansz's call to the Office of the Registrar General, testified that she felt angry about the respondent's certification process, and specifically, the fact that her family doctor was the person "hovering over her" to determine if the applicant's gender was "real" based on her genitals. The applicant testified that she felt insulted and degraded by the experience of having the validity of her gender judged based on her genitals.

[73] The applicant submitted her completed Application for a Change in Sex Designation to the Office of the Registrar General in or around late October 2008,

together with a request for an amended birth certificate, which must accompany such an Application.

[74] The Office of the Registrar General returned the applicant's Application to her, unprocessed, on November 5, 2008 on the stated basis that the applicant had not sent her long-form birth certificate in with her Application. The Office of the Registrar General requires all previously issued birth certificates to be returned to it before it will process an amendment to an Ontario birth registration. As it happened, the applicant had erroneously indicated in her October 2008 Application for Change of Sex Designation and/or accompanying request for a birth certificate that she was in possession of a long-form birth certificate. After her Application was returned to her, the applicant corrected it to reflect the fact that she had never been in possession of a long-form birth certificate and resubmitted it to the respondent in November 2008.

[75] The applicant's Application for a Change in Sex Designation on her Birth Registration was processed by the respondent on November 18, 2008, and on November 28, 2008, the respondent issued the applicant a birth certificate indicating that her sex was "female".

[76] The applicant testified that after she received the birth certificate on December 3, 2008, she applied to have the sex designation on her Ontario driver's licence and OHIP card changed to "female". The applicant obtained a temporary Ontario driver's licence indicating that her sex was "female" on December 3, 2008. An OHIP card with a female sex designation was also issued to the applicant on December 3, 2008.

[77] Although, as noted above, the applicant could have applied to change the sex designation on her Ontario driver's licence without submitting a birth certificate indicating that she was "female", the applicant's uncontradicted and unchallenged testimony was that she was not aware of that until after she had undergone surgery and after she used her "female" birth certificate to apply for a change in sex designation on her driver's licence on December 3, 2008.

LEGISLATIVE PROVISIONS

Human Rights Code

[78] Section 1 of the *Code* provides a guarantee of equal treatment with respect to services without discrimination on specified grounds, including sex and disability:

> 1. Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or disability.

[79] Section 11 of the *Code* provides that "adverse effect" discrimination constitutes an infringement of the right to equal treatment without discrimination, subject to the "reasonable and bona fide" defence in s.11(1)(a) and other defences in the *Code* (s.11(1)(b):

> 11. (1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,
>
> (a) the requirement, qualification or factor is reasonable and bona fide in the circumstances; or
>
> (b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right.
>
> (2) The Tribunal or a court shall not find that a requirement, qualification or factor is reasonable and bona fide in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

[80] Section 14 provides a defence to discrimination under the *Code* and is relied upon by the respondent in this case.

> 14. (1) A right under Part I is not infringed by the implementation of a

> special program designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity or that is likely to contribute to the elimination of the infringement of rights under Part I.

[81] Other relevant provisions of the *Code* include the preamble, which emphasizes the importance of recognizing the "inherent dignity ... of all members of the human family" and s. 9, which provides that "[n]o person shall infringe or do, directly or indirectly, anything that infringes a right under this Part".

[82] Section 47(1) makes the *Code* binding on the Crown. Subsection 47(2) gives the *Code* primacy over other Acts. However, that primacy is subject to the government's right to essentially "opt out" of the *Code* (*Ontario (Disability Support Program) v. Tranchemontagne*, 2010 ONCA 593 ("*Tranchemontagne*"), at para. 40), by enacting legislation or promulgating a regulation that specifically provides that such legislation or regulation is to apply despite the provisions of the *Code*. There is no such provision in this case.

Vital Statistics Act

[83] Section 36 of the *VSA* provides as follows:

> CHANGES RESULTING FROM TRANSSEXUAL SURGERY
>
> 36(1) Where the anatomical sex structure of a person is changed to a sex other than that which appears on the registration of birth, the person may apply to the Registrar General to have the designation of sex on the registration of birth changed so that the designation will be consistent with the results of the transsexual surgery.
>
> (2) An application made under subsection (1) shall be accompanied by,
>
> (a) a certificate signed by a medical practitioner legally qualified to practise medicine in the jurisdiction in which the transsexual surgery was performed upon the applicant, certifying that,
>
> (i) he or she performed transsexual surgery on the applicant, and

(ii) as a result of the transsexual surgery, the designation of sex of the applicant should be changed on the registration of birth of the applicant;

(b) a certificate of a medical practitioner who did not perform the transsexual surgery but who is qualified and licensed to practise medicine in Canada certifying that,

(i) he or she has examined the applicant,

(ii) the results of the examination substantiate that transsexual surgery was performed upon the applicant, and

(iii) as a result of the transsexual surgery, the description of the sex of the applicant should be changed on the registration of birth of the applicant; and

(c) evidence satisfactory to the Registrar General as to the identity of the applicant.

(3) Where it is not possible to obtain the medical certificate referred to in clause (2) (a) or (b), the applicant shall submit such medical evidence of the transsexual surgery as the Registrar General considers necessary.

(4) The Registrar General shall, upon application made to him or her in accordance with this section, cause a notation to be made on the birth registration of the applicant so that the registration is consistent with the results of the surgery.

…

(6) Every birth certificate issued after the making of a notation under this section shall be issued as if the original registration of birth had been made showing the designation of sex as changed under this section.

[84] Section 49 of Regulation 1094 under the *VSA*, R.R.O. 1990 ("Regulation 1094"), provides that applications for change of sex designation pursuant to s.36 of the *VSA*, as well as the medical certificates required pursuant to s.36(2)(a) and (b) of the *VSA*, shall be in the form approved by the Registrar General.

WHETHER TREATMENT "WITH RESPECT TO SERVICES"

[85] In this case, the respondent does not appear to dispute the applicant's position that the provision of a birth certificate to persons born in Ontario pursuant to the provisions of the *VSA* constitutes a "service" within the meaning of s.1 of the *Code.* In

any event, I am satisfied that the provision of a birth certificate pursuant to the *VSA* is a "service" within the meaning of the *Code*.

[86] In *Braithwaite v. Ontario (Attorney General)*, 2007 CanLII 56481 (Div. Ct.), at para. 39-40, the Ontario Divisional Court upheld the Tribunal's decision that:

> …"service" must mean something which is of benefit that is provided by one person to another or to the public. *Braithwaite v. Ontario (Attorney General)*, 2005 HRTO 31 (CanLII) at para. 22.

[87] The respondent's undisputed evidence in this case establishes that Ontario birth certificates may be used to gain access to many benefits and services. They may be used as foundational documents to obtain, among other things, drivers' licences, health insurance, Social Insurance Numbers and Canadian passports. They may also be used to register for school and certain sport teams. In these circumstances, it is clear that when the respondent provides birth certificates pursuant to the *VSA*, it provides something of benefit to a person or to the public, and therefore provides a "service" within the meaning of s.1 of the *Code*.

WHETHER TRANSGENDERED PERSONS FALL WITHIN A PROHIBITED GROUND OF DISCRIMINATION UNDER *CODE*

[88] As the applicant points out, discrimination against transgendered persons has long been regarded as discrimination on the basis of disability, sex or both: *Hogan v. Ontario (Health and Long-Term Care*), 2006 HRTO 32 (Gender Identity Disorder found to be "disability"); *Vancouver Rape Relief v. BC Human Rights*, 2000 BCSC 889, at para. 59, as cited in *Hayes v. Barker*, [2005] BCHRTD No. 590, at para. 31-32 (sex); *MacDonald v. Downtown Health Club for Women*, 2009 HRTO 1043 (sex); *Kavanagh v. Canada (Attorney General)*, [2001] C.H.R.D. No. 21, at para. 135 (sex and disability); *Sheridan v. Sanctuary Investments Ltd. (c.o.b. B.J.'s Lounge)*, [1999] BCHRTD No. 43, at para. 97 and 110 (sex and disability).

[89] In this case, the respondent expressly concedes that discrimination against the applicant as a transgendered person would constitute discrimination on the basis of sex

and/or disability and therefore discrimination on the basis of one or more prohibited grounds under the *Code*. The respondent submits, and I agree, that, in light of the respondent's concession, I need not determine whether the applicant falls within one or the other or both of the protected grounds of sex and/or disability under the *Code*.

[90] The real issue between the parties in this case is whether the respondent discriminated against the applicant as a transgendered person. That is the issue to which I now turn.

WHETHER RESPONDENT DISCRIMINATED AGAINST THE APPLICANT

Analytical Framework

[91] The courts have held that the *Code* and the *Canadian Charter of Rights and Freedoms, Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11* ("the *Charter*"), share a common objective and should be interpreted in a congruent manner. Thus, the discrimination analysis developed under s.15(1) of the *Charter* applies to *Code* challenges to legislation and government policy: *Braithwaite*, above, at para. 47.

[92] In keeping with this, the Ontario Court of Appeal in *Tranchemontagne*, above, at para. 86-91, held that the test for determining whether there has been discrimination under s. 1 of the *Code* (and the one that is therefore applicable in this case) is the two-part test articulated in *R. v. Kapp*, 2008 SCC 41 ("*Kapp*"):

1. Does the law create a distinction based on a prohibited ground?

2. Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

[93] The first part of the test in *Kapp* may be satisfied by an applicant showing that she has been subject to not only distinct but also disadvantageous treatment under the law in question; or by establishing that the law has had a distinct and disadvantageous impact on her on the basis of a prohibited ground of discrimination under the *Code*:

Withler v. Canada (Attorney General), 2011 SCC 12, [2011] 1 S.C.R. 396, at para. 31. Specifically, in order to meet the first step of the *Kapp* test, an applicant must do more than establish that the law creates a mere distinction on the basis of a prohibited ground. She must establish that the law creates a distinction on the basis of a prohibited ground that creates a disadvantage for her in the sense of withholding benefits from her that are available to others or imposing burdens, obligations or restrictions on her that are not imposed on others: *Tranchemontagne*, above, at para. 73-79.

[94] The applicant must also show disadvantage at the second step of the *Kapp* test. At that stage of the inquiry, the applicant must show that the distinction in question creates disadvantage by perpetuating disadvantage, prejudice or stereotyping. In most instances, in the human rights context, an inference of stereotyping or of perpetuating disadvantage or prejudice will generally arise based on the evidence establishing that there is a distinction based on a prohibited ground that creates a disadvantage in the sense of withholding a benefit available to others or imposing a burden not imposed on others (i.e. step one of *Kapp*): *Tranchemontagne*, above, at para. 90; *Hendershott v. Ontario (Community and Social Services),* 2011 HRTO 482, at para. 39-55; *Ivancicevic v. Ontario (Consumer Services)*, 2011 HRTO 1714, at para. 175-178. However, some cases will call for a more nuanced inquiry to properly assess whether a distinction based on a prohibited ground that creates a disadvantage actually engages the right to equal treatment under the *Code* in a substantive sense: *Tranchemontagne*, above, at para. 91.

[95] Once a *prima facie* case of discrimination has been made out by satisfying both steps of the *Kapp* test, the respondent may still avoid liability under the *Code* if it can prove a statutory defence, such as the defence in s.11(1)(a) or s.14 of the *Code*: *Tranchemontagne*, above, at para. 109.

[96] In order to avail of the defence in s.11(1)(a) of the *Code*, the respondent must prove that the "requirement, qualification or factor" which has disadvantaged the applicant is "reasonable and bona fide", including by establishing that the needs of the

group of which the applicant is a member could not have been accommodated without undue hardship: *Entrop v. Imperial Oil Limited,* 2000 CanLII 16800 (ON CA); *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.,* 1999 CanLII 652 (SCC) *("Meiorin")*; and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, 1999 CanLII 646, [1999] 3 S.C.R. 868 ("*Grismer*"). The defence under s.11(1)(a) is available to the respondent to answer *prima facie* cases of adverse effect discrimination and all but clear-cut cases of direct discrimination: *Entrop*, above, at para. 80.

[97] In certain circumstances, a respondent may also successfully defend against a claim of discrimination by demonstrating that the alleged discriminatory treatment arises as a result of a "special program" aimed at helping disadvantaged groups improve their situation within the meaning of s.14(1) of the *Code*.

[98] With this analytical framework in mind, I now turn to the case before me.

Step One: Whether Law Creates a Distinction Based on a Prohibited Ground that Creates a Disadvantage

[99] In this case, the applicant argues that she was treated in a distinct and disadvantageous manner by the respondent on the basis of her status as a transgendered person when it required her, pursuant to s.36 of the *VSA*, to undergo "transsexual surgery" and then to have two doctors certify that she had done so in order to obtain a birth certificate that accorded with her gender identity.

[100] In the alternative, the applicant argues that the *VSA* requirement that Ontario birth certificates reflect the sex assigned at birth, unless and until a person meets the surgical and certification requirements for changing sex designation on a birth registration pursuant to the *VSA*, had a distinct and disadvantageous effect on her as a transgendered person.

[101] I consider each of these arguments in turn, below.

Whether application of surgical and certification requirements pursuant to s.36 of VSA resulted in distinct and disadvantageous treatment of the applicant

[102] The applicant submits that the *VSA* provides for the distinct treatment of transgendered persons as compared to non-transgendered persons. Specifically, whereas a non-transgendered person may readily obtain a birth certificate with a sex designation that conforms to his or her lived and felt gender identity, a transgendered person who wishes to obtain the same benefit is subject to the surgical and certification requirements in s.36 of the *VSA*. The applicant submits that the distinct treatment of transgendered persons pursuant to s.36 of the *VSA* created a disadvantage for her in that it imposed a burden on her first to have, and then to certify that she had had, "transsexual surgery" in order to obtain the benefit of an "accurate" birth certificate (i.e. one that accorded with her gender identity), a burden not carried by non-transgendered persons. This, in essence, is the applicant's claim that the application of s.36 of the *VSA* to her by the respondent constituted direct discrimination against her as a transgendered person, contrary to s.1 of the *Code*.

[103] There appears to be no dispute, and, in any event, it is obvious on the face of the legislation, that s.36 of the *VSA* provides for the distinct treatment of transgendered persons by requiring them to have "transsexual surgery" and then to certify that they have done so in order to obtain a birth certificate with a changed sex designation.

[104] Nor does there appear to be any dispute that the applicant herself was treated in a distinct manner on the basis of her status as a transgendered person insofar as she was specifically required to fulfill the respondent's requirements pursuant to s.36 of the *VSA* before the respondent would issue her a birth certificate with a female sex designation. This is apparent from the fact that the applicant was unsuccessful when she attempted to change the sex designation on her birth certificate to "female" in July 2008 by merely sending the respondent a letter from her surgeon confirming that he had performed a bilateral orchiectomy on the applicant and asking that her birth certificate be changed to reflect that she ought to be legally regarded as female. Consistent with the respondent's submission and Ms Hartman's evidence that transgendered persons may only change the sex designation on their birth certificates through s.36 of the *VSA*,

the respondent did not process the applicant's request for a change in sex designation until she complied with the respondent's specific requirements pursuant to s.36 of the *VSA* in or around October or November 2008.

[105] The real issue at this stage of the inquiry, and the one that gave rise to the main factual dispute between the parties, is whether the distinct treatment of the applicant pursuant to s.36 of the *VSA* created disadvantage for her.

[106] The applicant contends that the only reason she underwent a bilateral orchiectomy on February 4, 2008 was so that she could fulfill the respondent's requirements pursuant to s.36 of the *VSA* and obtain a birth certificate indicating that she was female. The applicant submits the respondent's requirements thus compelled her to undergo a highly invasive and irreversible surgical procedure which scarred her and rendered her sterile (unlike non-transgendered persons who need not have any kind of surgery in order to obtain an "accurate" birth certificate). The applicant submits that this clearly amounted to disadvantage within the meaning of step one of the *Kapp* test.

[107] The applicant further submits that having to certify to the respondent that she had had surgery in order to have her gender recognized constituted distinct and disadvantageous treatment of her as transgendered person within the meaning of step one of the *Kapp* test.

[108] For its part, the respondent contends that the applicant underwent surgery entirely for her own reasons, specifically to aid in her male-to-female gender transition, and not so that she could obtain a birth certificate indicating that she was female. In particular, the respondent submits that the applicant had an orchiectomy so that she could avoid taking anti-androgen medications and achieve the feminizing effects of the female hormones she was taking at lower doses. (According to the evidence of Drs. Jansz and Karasic, anti-androgens are medications that suppress testosterone in a person born with male sex organs. They are commonly taken by transgendered women in conjunction with female hormones to help them achieve a more feminine-looking

appearance. It is not in dispute that a transgendered woman who has had an orchiectomy does not need to take anti-androgens because the orchiectomy stops her body from producing testosterone.)

[109] The respondent submits that the applicant cannot show that she was disadvantaged by the surgical requirement for changing sex designation if she had surgery for her own reasons, entirely unrelated to the respondent's requirements. If she cannot show that the distinct treatment of transgendered persons pursuant to the *VSA* caused her any disadvantage, then the applicant cannot meet the first step of the test in *Kapp.* As noted above, the respondent describes this as its main argument in this case and submits that the Application ought to be dismissed on this basis.

Requirement that applicant certify that she had had "transsexual surgery" was distinct and disadvantageous treatment whatever the applicant's reasons for surgery

[110] Even if, as the respondent submits, the applicant had surgery for reasons entirely unrelated to the respondent's requirements for changing sex designation, I find that the applicant was still subject to distinct treatment as a transgendered person when she was required to have two doctors certify to the respondent that she had had "transsexual surgery" and that the sex designation on her birth registration should be changed as a result, pursuant to s.36(2) of the *VSA*. The applicant's evidence about her experience of the certification process establishes that such distinct treatment was also disadvantageous.

[111] The applicant testified that she felt angry that she was required by the respondent to have her family doctor certify, pursuant to s.36(2)(b) of the *VSA*, that the applicant had had "transsexual surgery" and that the sex designation on her birth certificate should be changed to "female" as a result. The applicant testified that it was degrading to have her doctor determine whether her gender was "real" based on the manner in which her genitals had been surgically altered. The applicant testified that she felt undermined and violated by the whole certification process, which she described as "ugly". The thrust of the applicant's testimony was that she felt that it was disrespectful, insulting and unfair to require transgendered persons, such as herself, to

prove that they had had surgery in order to obtain a birth certificate that was congruent with their lived and felt gender. The applicant's testimony on these points was clear and compelling, thoroughly plausible, and consistent with the overall evidence. I accept it as credible.

[112] The respondent disputes that it was demeaning for the applicant to have to get her family doctor to complete the certificate required by the respondent pursuant to s.36(2) of the *VSA*. In this regard, the respondent points out that the applicant's family doctor did not have to subject the applicant to a physical examination specifically so that she could confirm that the applicant had had "transsexual surgery" and that her sex designation ought to be changed as a result. This is because, prior to completing the medical certificate required by the respondent pursuant to s.36(2)(b) of the *VSA*, Dr. Jansz had already examined and treated the surgical wound left by the applicant's orchiectomy.

[113] As should be clear from the above-noted evidence, however, the applicant does not contend that she was demeaned by a physical examination by Dr. Jansz. The applicant's argument that she was treated in a distinct manner that created disadvantage for her as a transgendered person rests on her evidence, which I accept, that she was demeaned by the fact that it fell to Dr. Jansz to determine whether the applicant's gender would be recognized as valid based on the manner in which her body had been altered by "transsexual surgery".

[114] I hasten to add that my finding that the requirement that the applicant have two doctors certify that she had had "transsexual surgery" in order to change the sex designation on her birth registration constituted distinct and disadvantageous treatment of the applicant as a transgendered person is not based on the fact that the applicant had to go through *any* kind of certification process in order to change the sex designation on her birth registration. The respondent argues, and I agree, that the need for corroboration is a generally applicable vital statistics principle that applies any time a person seeks to amend registered vital event data. My finding that the applicant was disadvantaged in the certification process is based on what the applicant had to have

certified – namely that the applicant's sex designation should be changed as a result of "transsexual surgery".

[115] Specifically, for the reasons set out below, I find that making "transsexual surgery" a prerequisite for obtaining a change in sex designation is discriminatory against transgendered persons because it perpetuates the disadvantage, prejudice and stereotyping experienced by them. It follows that requiring the applicant as a transgendered person to *certify* that she had had "transsexual surgery" in order to obtain a change in sex designation that accorded with her gender identity was discriminatory, whatever the reasons for surgery. The applicant's evidence about her experience of the certification process is consistent with this finding.

[116] Accordingly, I find that the applicant was subject to distinct and disadvantageous treatment on the basis of her status as a transgendered person, and therefore on the basis of sex and/or disability, when she was required to have her doctor certify that she had undergone "transsexual surgery" as a condition for obtaining a change in sex designation on her birth registration. On this basis alone, the applicant has met step one of the test in *Kapp*.

Surgical requirement for changing sex designation on a birth registration pursuant to s.36 of the VSA also distinct and disadvantageous treatment of the applicant because it was part of reason applicant had surgery

[117] In addition, in the circumstances of this case, I also find that the applicant experienced distinct and disadvantageous treatment on the basis of her status as a transgendered person at the time she had an orchiectomy in February 2008. This is because I am satisfied on a balance of probabilities that the applicant's decision to have an orchiectomy in February 2008 was compelled in *part* by the respondent's surgical requirement for changing sex designation on a birth registration pursuant to s.36 of the *VSA*.

[118] I say "part" of what compelled the applicant to have surgery because I agree with the respondent that, contrary to the applicant's assertion, the evidence establishes on a

balance of probabilities that the applicant's desire to avoid taking anti-androgens also factored into her decision to have an orchiectomy.

[119] In particular, the uncontradicted and unchallenged evidence of the applicant's family doctor, Dr. Jansz, was that the applicant told her on either January 25 or 29, 2008, days before she travelled to the United States to have the orchiectomy, that she "want[ed] an orchiectomy" and that she thought it would be "safer" for her than taking anti-androgens. At the same appointment, Dr. Jansz and the applicant discussed the fact that an orchiectomy would stop the applicant's body from producing testosterone, resulting in a "less masculinizing effect".

[120] In addition, Dr. McIntosh, the psychiatrist who assessed the applicant just two months after she had had an orchiectomy, records in his April 4, 2008 consultation report that the applicant had a bilateral orchiectomy "because of the difficulty she had with the anti-androgen medication." Although it is not clear whether this information was provided to Dr. McIntosh by the applicant herself or in her family doctor's referral note, the applicant acknowledged that she did tell Dr. McIntosh that she had to stop taking anti-androgens during her university years because they made her sick. The applicant also testified that she felt "very strongly" about transitioning to her female gender as naturally as possible and with as little reliance on hormones and medications as possible.

[121] To the extent that the applicant urges me to find that she did not have an orchiectomy to avoid taking anti-androgens because she did not actually need anti-androgens to suppress testosterone "due to hypothalamic suppression" or otherwise, I agree with the respondent that the applicant lacked the requisite expertise to give this evidence and that it is inadmissible. Alternatively, the applicant's evidence that doctors advised her during her university years that she did not require anti-androgens was hearsay and therefore inherently unreliable. I am not prepared to give it any weight in the circumstances.

[122] The above evidence establishes on a balance of probabilities that the applicant

preferred not to have to take anti-androgens as she transitioned to her felt gender; and that the fact that an orchiectomy would eliminate the need for the applicant to take anti-androgens played a role in her decision to have a bilateral orchiectomy in February 2008. However, the fact that a desire to avoid anti-androgens was one reason the applicant decided to have an orchiectomy does not mean that it was her *only* reason, as the respondent contends. Indeed, and although my rejection of the applicant's evidence that she had surgery for the exclusive purpose of "becoming legal in [her] gender" causes me to approach the balance of her evidence with some caution, the preponderance of the evidence establishes that the applicant's desire to comply with the respondent's requirement for "transsexual surgery" and thereby obtain a change in sex designation on her birth certificate was also a significant factor in the applicant's decision to have an orchiectomy. Moreover, this is the real issue for me in determining whether the applicant experienced any disadvantage as a result of the respondent's requirement for "transsexual surgery" as a prerequisite for changing the sex designation on her birth registration.

[123] The thrust of the applicant's evidence was that she had surgery to satisfy the respondent's requirements pursuant to s.36 of the *VSA* because she felt a compelling need to have all of her identification, including her birth certificate, identify her as female so that she could "live her gender". The applicant testified that she felt "congruent" identification documents which uniformly identified her as female were necessary in order to give her the foundation she needed to live as a woman, without harassment and discrimination. The applicant testified that she felt that her gender would not be taken seriously if she was presenting herself to the world as a woman and then having to show identification indicating that she was male. The applicant likened having to present identification with a male sex designation on it while living as a woman to being "forced to tell people you're not what you are." She testified, "You don't get to tell people who you are. Your I.D. says who you are." The applicant testified that she had surgery because she was "never going to give anybody an excuse to undermine" her again based on who her I.D. said she was. The applicant testified that she felt a deep and compelling need to have official documentation that "backed up" her gender so that

she could feel secure and confident living as a woman. She further testified that a desire to obtain such documentation through s.36 of the *VSA* is what led to her decision to have an orchiectomy. Her evidence on these points was clear and compelling, rich in detail, internally consistent, and thoroughly plausible, when plausibility is assessed, as it ought to be, according to what was reasonable for the applicant as a transgendered person "in that place and in those conditions": *Faryna v. Chorney*, [1952] 2 D.L.R. 354 (B.C.C.A.).

[124] The applicant testified that she feared that presenting herself as a woman and then showing identification indicating that she was male would open her up to the possibility of assaults and discrimination, particularly in the employment and housing contexts. The applicant testified that this fear was grounded in certain experiences in her past when the applicant, while living as a woman, was threatened with death and assaulted after showing identification bearing a male sex designation.

[125] The respondent does not appear to challenge the applicant's evidence that she experienced harassment and/or discrimination in the past because of her status as a transgendered person. Moreover, the respondent expressly stated during the hearing that it did not doubt the applicant's sincerity when she testified that she *believed* that her past experiences of discrimination and harassment as a transgendered person were linked to her having shown her "male" I.D. while living as a woman. However, the respondent attempted to make much of the fact that the applicant could not prove that her I.D. – and certainly not her birth certificate – was the reason she had been identified as transgendered. However, I do not think much, if anything, turns on that.

[126] Whether the applicant was *actually* identified in the past as transgendered and discriminated against because of her I.D. is irrelevant. What is relevant is whether the applicant genuinely believed, based on past experience or otherwise, that identification which said she was "male" could identify her as transgendered and thereby expose her to discrimination and/or harassment. This is relevant because it goes to the issue whether it was therefore important *to the applicant* to have a birth certificate and other identity documents that uniformly identified her as female. This in turn helps me to

assess whether the applicant had surgery in whole or in part so that she could fulfill the respondent's requirement for "transsexual surgery" in order to change the sex designation on her birth registration.

[127] I have no difficulty accepting the applicant's evidence that she feared that identifying herself as transgendered (which is exactly what she would be doing if she was presenting herself publicly as a woman and showing identification that said she was "male") could expose her to discrimination and even possible violence. In my view, that proposition is not at all controversial and is well supported by the expert evidence of Dr. Karasic, in particular (discussed below). It makes perfect sense to me that the applicant would have wanted identification that said she was female as she transitioned to her felt gender of female. This, in turn, bolsters the applicant's evidence that a desire to obtain a birth certificate with a "female" sex designation motivated her decision to have an orchiectomy.

[128] The respondent submits that the fact that the applicant testified that she was "happy" that she had had the orchiectomy, and told her doctors so, after the fact, militates against a finding that she felt compelled to have surgery in order to obtain the change in sex designation on her birth registration. However, I do not agree. Given the circumstances in which the applicant, as a transgendered person, found herself during the relevant time frame, I have no trouble accepting the applicant's explanation that she was happy that she had had the surgery because it allowed her to obtain official documentation that "backed up" her gender identity and to move on with her life as a woman. I also accept the applicant's evidence that even though she was "happy" she had an orchiectomy for these reasons, that did not mean that her decision to have surgery was "without trauma" or that she was not angry that surgery was a prerequisite for her to change the sex designation on her birth registration. The applicant's evidence on these points was clear and compelling, internally consistent and consistent with the preponderance of the evidence, and I accept it as credible.

[129] The respondent also submits that I ought to reject the applicant's evidence that she had surgery so that she could meet the respondent's requirements for changing the

sex designation on her birth registration given that the applicant did not attempt to obtain a change in sex designation on her birth registration until late July 2008, nearly six months after she had surgery. I note however that the applicant was not cross-examined as to why she did not attempt to change the sex designation on her birth registration earlier than she did. In the circumstances, I am not prepared to reject the applicant's evidence that she underwent an orchiectomy to comply with the respondent's requirements for changing sex designation merely because the applicant did not apply to change the sex designation on her birth registration until July 2008.

[130] My finding that the applicant had an orchiectomy at least in part (and in significant part, in my view) to satisfy the respondent's requirements for a change in sex designation on her birth registration is consistent with and further bolstered by the applicant's uncontradicted and unchallenged evidence that, at the time that she was deciding whether to have an orchiectomy with Dr. Kimmel, she took a number of steps to confirm that such surgery would allow her to change the sex designation on her identification.

[131] For example, the applicant specifically confirmed with Dr. Kimmell that the surgery he would do would allow her to change her I.D. In addition, the applicant read some personal testimonials on the internet from other transgendered people claiming that they had been able to obtain change their identification after having Dr. Kimmel perform an orchiectomy. The respondent objected to this evidence on the basis of hearsay. However, I do not accept the evidence for a hearsay purpose – namely, to establish that Dr. Kimmel did help other transgendered people from Ontario change the sex designation on their identity documents – but as evidence of the applicant's state of mind at the time she was deciding whether to have surgery.

[132] Another key piece of evidence that is consistent with and supports the applicant's testimony that she had surgery in order to change the sex designation on her birth certificate and other identification is the letter that Dr. Kimmel wrote on February 4, 2008, and had notarized on February 7, 2008. That letter, on its face, was written for the express purpose of "certifying that [the applicant] should be regarded as female from

this date as far as any legal documents including drivers' license, social security card, passport, voting papers, or any other similar legal procedures". To my mind, the fact that, on the very day that the applicant had surgery, the applicant obtained a letter from Dr. Kimmel, the specific purpose of which was to help her change the sex designation on her identification, goes a long way towards bolstering the applicant's evidence that a desire to change her "identification" by meeting the respondent's requirement for "transsexual surgery" motivated the applicant to have surgery on February 4, 2008.

[133] At this juncture, I should note that although the respondent maintains that the birth certificate is not a form of personal identification, it is abundantly clear that the applicant certainly regarded her birth certificate as a piece of "identification". It is also worth pointing out that the "identification" the applicant sought to change after having surgery, with Dr. Kimmel's February 4, 2008 letter, was her birth certificate. After the applicant succeeded in changing the sex designation on her birth certificate to female, by complying with the respondent's requirements pursuant to s.36 of the *VSA*, she used her changed birth certificate to have the sex designations on her driver's licence and her OHIP card amended.

[134] Having found that the applicant underwent surgery at least in part to obtain a birth certificate with a female sex designation, it follows that the respondent's surgical requirement for changing sex designation constituted distinct and disadvantageous treatment of the applicant on the basis of sex and/or disability.

[135] In coming to this conclusion, I agree with the applicant that, while the fact that the applicant had mixed reasons for surgery may be very relevant if and when it comes time to assess the degree of harm the applicant experienced, and thus the remedy to which she may be entitled, the fact that the applicant had mixed reasons for surgery is not a basis upon which the respondent may avoid liability under the *Code* altogether. On the contrary, as long as the requirement for "transsexual surgery" as a prerequisite for changing sex designation on her birth registration constrained and/or exerted any pressure on the applicant's decision to undergo an inherently invasive and risky surgical procedure (and I have found it did), this is a sufficient basis upon which to conclude that

the applicant was disadvantaged by the respondent's requirement for "transsexual surgery" pursuant to s.36 of the *VSA*. Moreover, the disadvantage experienced by the applicant was clearly linked to her status as a transgendered person and thus to the protected grounds of sex and/or disability. This is because the applicant as a transgendered person was obliged to have surgery in order to obtain a benefit, namely a birth certificate with a sex designation that matched her gender identity, whereas non-transgendered persons are not subject to any such obligation or burden. That may not be the intent of the legislation but that is the effect; and it is with the effect of legislation with which we need to be primarily concerned: *Tranchemontagne*, above, at para. 75-79.

[136] Finally, I wish to address the fact that, at the hearing, the respondent referred a number of times to the fact that when the applicant applied for a change in sex designation on her birth registration, after having had "transsexual surgery", the respondent promptly issued the applicant the amended birth certificate that she requested. To be clear, however, the fact that the applicant "got what she asked for" does not enter into the liability analysis in this case (although it certainly could, in an appropriate case, be relevant to remedy). The question at this stage is whether the respondent's requirement that the applicant undergo "transsexual surgery" in order to obtain a change in sex designation on her birth registration was discriminatory on the basis of sex and/or disability. Whether or not the applicant complied with the respondent's requirements has no bearing on whether the requirements themselves were discriminatory to begin with.

[137] In sum, the applicant has met her burden of showing that the application of the respondent's surgical and certification requirements pursuant to s.36 of the *VSA* resulted in distinct and disadvantageous treatment of the applicant on the basis of her status as a transgendered person, and therefore on the basis of sex and/or disability. The applicant has thus met step one of the *Kapp* test.

[138] As to whether such treatment was discriminatory in a substantive sense, that depends on whether it perpetuates disadvantage, prejudice, or stereotyping against

transgendered persons within the meaning of the second step of the test in *Kapp*. I address this below after considering the alternative argument that the legislative scheme for issuing birth certificates under the *VSA* had a distinct and disadvantageous effect on the applicant as a transgendered person.

Requirement that birth certificates reflect sex assigned at birth, unless a person has and certifies she has had "transsexual surgery", has a distinct and disadvantageous effect on transgendered persons

[139] Although the applicant's main argument is that she was *treated* by the respondent in a distinct and disadvantageous manner pursuant to s.36 of the *VSA*, the applicant argues in the alternative that hers may also be regarded as a case of discriminatory effect. The applicant submits that the *VSA* requirement that her birth certificate reflect the sex assigned to her at birth, unless and until she complied with the requirements in s.36 of the *VSA*, had the effect of withholding a benefit from her that was available to others, namely an "accurate birth certificate" (i.e. one that accorded with her gender identity), unless and until she took the extraordinary step of surgically altering her body and certifying that she had done so. The applicant argues that the legislative scheme thus had a distinct and disadvantageous effect on her as a transgendered person.

[140] The Supreme Court of Canada addressed the concept of adverse effect discrimination in *Ontario (Human Rights Commission) v Simpsons-Sears Ltd*., [1985] 2 S.C.R. 536 ("*Simpsons-Sears*"), at para. 18:

> A distinction must be made between what I would describe as direct discrimination and the concept already referred to as adverse effect discrimination in connection with employment. Direct discrimination occurs in this connection where an employer adopts a practice or rule which on its face discriminates on a prohibited ground. For example, "No Catholics or no women or no blacks employed here." There is, of course, no disagreement in the case at bar that direct discrimination of that nature would contravene the Act. On the other hand, there is the concept of adverse effect discrimination. It arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group

> of employees in that it imposes, because of some *special characteristic* of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force. (emphasis added)

[141] The applicant argues, and I agree, that the provision of a birth certificate is a service which is generally available to the population born in Ontario. Persons who are born in Ontario may apply to the respondent for a birth certificate which reflects, among other things, the sex designation recorded on their registration of birth (s.43(1)(d) of *VSA*). There is no dispute between the parties that the sex designation recorded on the registration of birth is based on whether the infant has male or female genitalia, as observed at birth by the parent(s) and the physician or midwife attending the birth (and leaving aside those cases of ambiguous or "undetermined" genitalia, which is not the case before me).

[142] The applicant submits that when a member of the non-transgendered majority applies to the respondent for a birth certificate, he or she can expect to receive a birth certificate with an accurate sex designation, in the sense that it accords with his or her gender identity. This is to be contrasted with the applicant's experience as a transgendered woman. The applicant submits that although she has always considered herself female, she received and could only receive a birth certificate from the respondent indicating that she was male, unless and until she complied fully with the respondent's requirements pursuant to s.36 of the *VSA*. In this way, the applicant submits that the service in question, i.e. provision of a birth certificate, was available to her on a distinct or differential basis as compared to others who are not transgendered. The applicant also takes the position that that the unavailability of a birth certificate that accords with gender identity (unless and until the surgical and certification requirements for change of sex designation have been met) has an adverse effect on transgendered persons such as herself, because without appropriate I.D. that verifies a transgendered person's gender, people do not respect it.

[143] The applicant's position is supported by the *Commission's Policy on Discrimination and Harassment because of Gender Identity*, which describes the

legislative scheme for issuing birth certificates under the *VSA* as an example of constructive (i.e. adverse effect) discrimination against transgendered persons:

> The *Vital Statistics Act* requires that all birth certificates in the province identify individuals as male or female. This requirement is neutral on its face since it requires all people to be identified as male or female. However, for an individual whose gender identity does not conform to the designation on his or her birth certificate, this may have an adverse impact. The person who shows this identification or relies on it to obtain a permit or official document may be refused because the service provider observes an inconsistency between the way the person presents him/herself and the designation on the birth certificate.

[144] As an intervenor in this case, the Commission takes a position consistent with the one advanced in the above-noted Policy.

[145] In my view, the *VSA*'s requirement that the sex designation on a birth certificate reflect the person's genitalia as observed at birth clearly affects transgendered persons differently than non-transgendered persons because of the "special characteristics" of transgendered persons. Obviously, non-transgendered persons may readily obtain a birth certificate with a sex designation that is congruent with their gender identity or their sense of "who they are" just by virtue of the fact that they are not transgendered. A transgendered person, on the other hand, by definition, has a gender identity which is incongruent with the sex assigned at birth. Accordingly, I find that the legislative scheme for issuing birth certificates under the *VSA* has a differential impact on transgendered persons.

[146] The legislative scheme also has a disadvantageous impact on transgendered persons in a couple of ways. First, I have no doubt that it would be distressing for anyone to possess a government document which says that officially s/he is not the gender s/he feels herself to be and the gender in which s/he presents herself to the world. In this sense, I have no trouble accepting the applicant's submission that having a birth certificate which is consonant with one's gender identity is a benefit available to non-transgendered persons under the *VSA* which is not available to transgendered

persons (at least not in the normal course and not without extraordinary measures being taken on their part).

[147] In addition, a transgendered person is at a comparative disadvantage when he or she has occasion to use a birth certificate which does not accord with his or her gender identity. As noted above, birth certificates are regularly used as foundational documents to obtain other forms of identification, such as driver's licences, passports, Social Insurance Numbers, and OHIP cards. The respondent's witness also testified that Ontario birth certificates are sometimes required by banks, schools, sports associations and others in order to gain access to services which they provide. When, in accessing any of these services or benefits, a transgendered person is required to produce (or has occasion to produce) an official government document which states that the person's gender is something other than their expressed gender, this will inevitably affect how the person's gender is perceived (i.e. whether he is "really" a man or whether she is "really" a woman) and opens the door for others to question the validity of the person's expressed gender identity.

[148] A non-transgendered woman can confidently produce a birth certificate when she is required to do so (or when it would be convenient to do so) without having to contend with a sex designation that is incongruent with her lived experience. Her gender identity accords with the sex assigned at birth and is not open to question or challenge. For a transgendered woman, however, this simple act is fraught with risk. Will she be perceived differently as a result of producing a birth certificate that shows that "officially" she is a different gender from the one in which she presents? Will her gender identity be questioned or challenged by the person viewing her birth certificate? Will she even perhaps be subject to ridicule or humiliation as a result of producing a government-issued document that states that she is a different gender than the one in which she presents herself? Whereas non-transgendered persons can blithely produce their birth certificates without any such fears or risks, this is the sort of disadvantage experienced by transgendered persons every time they are required to produce or have occasion to produce a birth certificate bearing the sex assigned at birth, as opposed to their lived and felt gender identity.

[149] Nor is there any doubt that the applicant herself was differentially and disadvantageously impacted by the ordinary requirement under the *VSA* that birth certificates reflect the sex assigned at the time of birth, and during the one-year period prior to the filing of the Application on February 4, 2009.

[150] Until early December 2008, when the applicant was finally successful in obtaining a birth certificate with a female sex designation, the applicant had a birth certificate which stated that she was "male" notwithstanding the fact that the applicant self-identified as female and at least from September 2008 had a "female" name and was living as a woman. Thus, for all of the reasons set out above, during the period from September 2008 to early December 2008, the facially neutral requirement under the *VSA* that birth certificates (generally) reflect the sex assigned at birth clearly affected the applicant as a transgendered person in a distinct and disadvantageous manner, as compared to those who are not transgendered and whose gender identity is therefore congruent with the sex designation on their birth certificates.

[151] The respondent disputes that the applicant experienced any disadvantage as a result of having a birth certificate that was incongruent with her gender identity. The respondent submits that from approximately 1999 to September 2008, the applicant's "male" identification was consistent with her then lived and outwardly presented male gender. The respondent also disputes that the applicant experienced any disadvantage as a result of having a birth certificate with a "male" sex designation during the period of time that she was living as a woman, because, on the applicant's own evidence, she never showed anyone her "male" birth certificate while living as a woman. In my view, however, the fact that the applicant did not show anyone her "male" birth certificate while she was living as a woman does not mean that she did not experience any disadvantage as a result of having a birth certificate indicating that she was "male". The applicant's evidence, which I accept as credible, is that she did not use her birth certificate during this period of time specifically because doing so would undermine her gender. In my view, the applicant's reluctance to use her "male" birth certificate while living as a woman because she feared it would expose her as transgendered is a burden she carried that others did not, by reason of a personal characteristic which falls

within a prohibited ground (*Withler*, above, at para. 62) and therefore constitutes a disadvantage within the meaning of the first step of the *Kapp* test.

[152] In addition, there is ample evidence, which I have already accepted as credible, that a birth certificate that accorded with her gender identity was regarded as a benefit by the applicant and reasonably so. This benefit, though readily available to non-transgendered others, was withheld from the applicant until she met the respondent's requirements for change in sex designation pursuant to s.36 of the *VSA* in early December 2008. This is a further basis upon which to find that the *VSA* requirement that birth certificates reflect the sex assigned at birth had a distinct and disadvantageous effect on the applicant as a transgendered person within the meaning of step one of the *Kapp* test.

[153] Accordingly, the applicant has established that the provisions of the *VSA* had a distinct and disadvantageous effect on her as a transgendered person, and therefore on the basis of sex and/or disability, in satisfaction of step one of the test in *Kapp.* In coming to this conclusion, I am not unmindful of the fact that s.36 of the *VSA* provides a mechanism by which transgendered persons *may* obtain a birth certificate with a sex designation that accords with their gender identity. In my view, however, that does not change the fact that the *status quo* (i.e. birth certificates that reflect the sex assigned at birth) affects transgendered persons in a differential and adverse manner as compared to non-transgendered persons.

[154] I now turn to the issue whether the requirement that Ontario birth certificates reflect the sex assigned at birth unless a person meets the requirements for changing sex designation pursuant to s.36 of the *VSA* is substantively discriminatory against transgendered persons in the sense that it perpetuates disadvantage, prejudice and/or stereotyping within the meaning of step two of the *Kapp* test.

Step Two: Whether Distinction Perpetuates Prejudice and Stereotyping

[155] In order to establish that she has been discriminated against within the meaning

of the *Code*, the applicant must also establish that the distinction created by the law (in the differential treatment and/or differential impact sense) is substantively discriminatory in the sense that it perpetuates disadvantage, prejudice or stereotyping against transgendered persons. (*Tranchemontagne*, above, at para. 83-84)

[156] In determining whether there has been substantive discrimination within the meaning of the second step of the *Kapp* test, the focus is on the experience of the applicant and the impact of the differential treatment on him or her. Placing the focus on the claimant's perspective and experience gives effect to the strong remedial purpose underlying human rights legislation such as the *Code*: *Tranchemontagne,* above, at para. 79. As the Supreme Court stated in *Withler*, above, at para. 37:

> Whether the s. 15 analysis focuses on perpetuating disadvantage or stereotyping, the analysis involves looking at the circumstances of members of the group and the negative impact of the law on them. The analysis is contextual, not formalistic, grounded in the actual situation of the group and the potential of the impugned law to worsen their situation.

[157] In *Withler,* above, at para. 35-36*,* the Supreme Court of Canada explained that there are two ways in which claimants may show that the law has a substantively discriminatory impact in terms of prejudicing or stereotyping:

> The first way that substantive inequality, or discrimination, may be established is by showing that the impugned law, in purpose or effect, perpetuates prejudice and disadvantage to members of a group on the basis of personal characteristics within s. 15(1). Perpetuation of disadvantage typically occurs when the law treats a historically disadvantaged group in a way that exacerbates the situation of the group. Thus judges have noted that historic disadvantage is often linked to s. 15 discrimination. In *R. v. Turpin*, [1989] 1 S.C.R. 1296, for example, Wilson J. identified the purposes of s. 15 as "remedying or preventing discrimination against groups suffering social, political and legal disadvantage in our society" (p. 1333). See also *Haig v. Canada (Chief Electoral Officer)*, [1993] 2 S.C.R. 995, at pp. 1043-44; *Andrews*, at pp. 151-53, per Wilson J.; *Law*, at paras. 40-51.
>
> The second way that substantive inequality may be established is by showing that the disadvantage imposed by the law is based on a stereotype that does not correspond to the actual circumstances and characteristics of the claimant or claimant group…

I consider each of these, in turn, below.

Perpetuation of disadvantage

[158] The first way in which an applicant can establish that her right to substantive equality has been infringed is by showing that the impugned law perpetuates disadvantage by treating a historically disadvantaged group in a way that exacerbates the situation of the group.

[159] In *Tranchemontagne*, above, the Ontario Court of Appeal stated that, in the human rights context, it is frequently unnecessary to conduct a detailed analysis under step two of the *Kapp* test. This is because, "in most cases" under the *Code*, an inference of stereotyping or perpetuating disadvantage or prejudice will generally arise once the applicant has shown a distinction based on a prohibited ground that creates a disadvantage in the sense of withholding a benefit available to others or imposing a burden not imposed on others. *Tranchemontagne*, above, at para. 90; *Hendershott,* above*,* at paras. 45-55; *Ivancicevic*, above, at paras. 161 and 175.

[160] In my view, the Court of Appeal's decision in *Tranchemontagne* reflects the fact that human rights legislation such as the *Code* has as its primary purpose the protection of those who have been historically disadvantaged on the basis of the grounds enumerated in the *Code*. When legislation treats or affects members of a historically disadvantaged group in a distinct and disadvantageous manner precisely because of their membership in that group, it often follows that the impugned legislation perpetuates disadvantage of the group within the meaning of the second step of the *Kapp* test. This is what I take from the Court of Appeal's finding that step two of the *Kapp* test ought not to be treated as a free-standing requirement in cases under the *Code*: *Tranchemontagne*, above, at para. 95.

[161] However, the Court of Appeal also stated that, in some instances, a more nuanced inquiry may be necessary to properly assess whether a distinction based on a prohibited ground infringes the right to substantive equality under the *Code (Tranchemontagne*, above, at para. 91). The aim of such an inquiry is to separate out

those cases which, though involving a distinction which creates a disadvantage on the basis of a prohibited ground, nonetheless lack a "convincing human rights dimension": *Granovsky v. Canada (Minister of Employment and Immigration)*, 2000 SCC 28, [2000] 1 S.C.R. 703 at para. 70; *Hendershott*, above, at paras. 49-51, often because the affected group has not been subject to historic disadvantage: *Hendershott*, above, at para. 50 and cases cited therein.

[162] I have already found that the respondent's scheme for issuing birth certificates based on the sex assigned at birth pursuant to the *VSA* had a distinct and disadvantageous impact on the applicant as a transgendered person and/or that the respondent's requirement that the applicant have and certify that she had had "transsexual surgery" in order to change the sex designation on her birth registration constituted distinct and disadvantageous treatment as a transgendered person, which is really just the flip side of the same coin. In my view, in this case, as in "most cases" that arise in the human rights context, an inference that the impugned legislation and/or the application thereof perpetuates disadvantage against transgendered people properly arises based on the same evidence that establishes that the applicant was treated and/or affected in a distinct manner as a transgendered person that created a disadvantage for her by withholding a benefit from her that was available to others or imposing a burden on her that was not imposed on others.

[163] Having said that, at the risk of repetition, and assuming, without finding, that this is a case that requires a more nuanced inquiry, I am satisfied that the applicant has met the second step of the test in *Kapp* by showing that the scheme for issuing birth certificates pursuant to the *VSA* perpetuates disadvantage against transgendered persons by exacerbating the situation of this historically disadvantaged group. Indeed, I do not think there can be any doubt about this, when the focus is placed on the experience and perspective of transgendered persons, as the law says it ought to be. *Tranchemontagne*, above at para. 79; *Withler,* above, at paras. 37-40.

[164] The applicant argues that transgendered persons are a historically disadvantaged group, and I agree. In my view, it is beyond debate that transgendered

persons such as the applicant are a historically disadvantaged group who face extreme social stigma and prejudice in our society. This is a notorious fact and it is appropriate for the Tribunal to take notice of it. Indeed, I have already done so at an earlier stage of this proceeding: *XY v. Ontario (Government and Consumer Services)*, 2010 HRTO 1906, at para. 10.

[165] If I did have any doubt about the disadvantaged position of transgendered persons in our society (which I did not), it would have been removed by Dr. Karasic's uncontradicted and unchallenged testimony about some of the difficulties facing transgendered persons. Specifically, Dr. Karasic testified that transgendered persons as a group tend to face very high rates of verbal harassment and physical assault and are sometimes even murdered because of their transgendered status. Dr. Karasic also testified that it is very difficult for transgendered persons to find employment, that there are very high rates of unemployment among transgendered people generally, and that many transgendered people are fired once they are exposed in the workplace as being transgendered. He testified that he himself has had "many" highly skilled and college-educated transgendered patients with very promising professional careers who were unable to find employment upon transitioning to their felt gender, sometimes ending up in homeless shelters. In addition, Dr. Karasic testified that suicide attempts and substance-related disorders are commonly associated with gender identity disorders. During his testimony, Dr. Karasic referred a couple of times to the ridicule which transgendered persons often experience. He testified that the fear of being ridiculed tends to limit transgendered persons' outside activity. Dr. Karasic described the social stigma attached to being transgendered as "pretty severe".

[166] The disadvantaged position of transgendered persons in our society has also been recognized by the Ontario Human Rights Commission in its *Policy on Discrimination and Harassment because of Gender Identity*, which was put before me by the applicant in this case and which I am required to consider pursuant to s.45.5(2) of the *Code*. In its *Policy*, the Commission posits that that "there are, arguably, few groups in our society today who are as disadvantaged and disenfranchised as transgenderists and transsexuals". The Commission's *Policy* goes on to state that

transgendered persons tend to be “feared and hated” in our society and that there is hostility toward their very existence. The Commission also observes that transgendered persons, as a group, tend to experience a variety of problems, including discrimination in the workplace, harassment, denial of services, violence, high suicide rates, substance abuse and poverty. See also *Hogan*, above, at paras. 263, 329-331, and 402-410, where Vice-chair Hendricks, writing in a partial dissent, relied on evidence before her in that case, including expert evidence, to conclude that transsexuals were a “discrete and insular minority” who routinely suffer from prejudice and negative stereotyping, including “transphobia,” and “transbashing,” a targeted form of physical assault.

[167] I hasten to add that the respondent does not dispute that transgendered persons face disadvantage in our society. Indeed, the respondent has undertaken at least one initiative in an attempt to address some of the problems faced by of transgendered persons in Ontario. Specifically, the Deputy Registrar General, Judith Hartman, testified that the regulations under the *Change of Name Act,* R.S.O. 1990, c. C.7, that govern name changes in Ontario were amended in 2007 in order to allow transgendered persons to request that their name changes not be published in the Ontario Gazette. Ms Hartman testified that, ordinarily, as part of a formal name change in Ontario, every applicant’s old name and new name is published in the Gazette, which can easily be searched online. Ms Hartman testified that the decision to amend the regulations came out of discussions with “stakeholders” who expressed concern to the Office of the Registrar General that publishing transgendered persons’ name changes (commonly, to a name typically associated with their felt and lived gender) could expose them as being transgendered and thereby put them at a greater risk of physical and other forms of violence. Ms Hartman testified that the government was sufficiently concerned about the personal safety of transgendered persons that it decided to amend the regulations to allow for the non-publication of transgendered persons’ names. (Specifically, the amendment was made by the Lieutenant Governor in Council on the recommendation of Cabinet.) Significantly, Ms Hartman testified that the only other group of persons whose names changes are not published in the Gazette are those whose name changes the Attorney General has indicated are confidential (i.e. name changes

pursuant to a witness protection program).

[168] Finally, I note that the applicant's uncontradicted and unchallenged testimony in this case demonstrates that she had many of the harsh experiences typically experienced by transgendered people in our society. In this regard, the applicant testified that, over the years, and among other things, she has been threatened with violence, physically assaulted, rejected by her family (at least for a time), ridiculed in public and harassed in her workplace – all because she was transgendered.

[169] It is abundantly clear that transgendered persons have been and continue to be the subject of stigma and prejudice in our society. The real question is whether the distinct manner in which they are treated pursuant to and/or affected by the application of the *VSA* has the potential to worsen their situation. If so, the applicant will have made out a *prima facie* case of substantive discrimination under the *Code (Withler*, above, at para. 34; *Tranchemontagne, above*, at paras. 80-84) subject to the respondent's proof of a statutory defence. For many of the same reasons already articulated above, I find that the legislative scheme for issuing birth certificates under the *VSA* does have the potential to exacerbate the already difficult situation of transgendered persons.

[170] Under the *VSA,* transgendered persons cannot obtain a birth certificate that accords with their gender identity unless they take the extraordinary step of surgically altering their bodies and then certifying to the government that they have done so. This means that transgendered persons who do not wish to or are unable to have surgery – or who simply have not yet had surgery – cannot obtain a birth certificate that is consonant with their gender identity. This exacerbates the situation of transgendered persons in a number of ways.

[171] First, giving transgendered persons an official government document with a sex designation which is dissonant with their gender identity conveys the message that their gender identity in and of itself is not valid. This message, in turn, is the very same message that lies at the root of the stigma and prejudice against transgendered

persons. As the applicant stated during her testimony, this official government document tells the transgendered person, “You are not who you say you are.” This might not be the aim of the law. As the applicant points out, however, it is the effect of the law on transgendered persons who receive birth certificates with sex designations that are not aligned with their own sense of who they are. Moreover, I find that this has the potential to worsen a transgendered person’s situation even if the message is not conveyed to anyone other than the transgendered person him or herself. As the Supreme Court stated in *Gosselin v. Québec (Attorney General),* 2002 SCC 84, [2002] 4 S.C.R. 429 at para. 122, substantive equality can be infringed “even if the ‘message’ is conveyed only to the claimant”. It need not be a message sent to the community at large.

[172] Having said that, I do think that the legislative scheme conveys the message to the community at large that a transgendered person’s gender identity is not “legitimate” in and of itself. Section 36 of the *VSA* in particular perpetuates disadvantage and prejudice against transgendered persons because it gives force to the prejudicial notion that transgendered people are not entitled to have their gender recognized unless they surgically alter their bodies. The message conveyed is that a transgendered person’s gender identity only becomes valid and deserving of recognition if she surgically alters her body through “transsexual surgery”. This reinforces the prejudicial view in society that, unless and until a transgendered person has “transsexual surgery”, we as a society are entitled to disregard their felt and expressed gender identity and treat them as if they are “really” the sex assigned at birth. After all, if the law says that a transgendered woman is not “female” until she has had and proved that she has had “transsexual surgery”, how can we expect more from citizens at large? In this way, the legislative requirement for “transsexual surgery” in s.36 of the *VSA* promotes the view that transgendered persons who, for whatever reason, do not have surgery are less deserving of respect, in sense that they are less deserving of having their gender identity respected; and thus reinforces the notion at the very core of the prejudice against transgendered persons in our society.

[173] Apart from the message conveyed by the legislation to transgendered persons

themselves and society at large, there are also practical ways in which the legislation exacerbates the already disadvantaged position of transgendered persons in our society.

[174] First, the *VSA* exacerbates the already disadvantaged position of transgendered persons in a practical way when they are required to present or have occasion to present a birth certificate that does not accord with their lived gender identity. It seems to me that this will inevitably affect how the person's gender is perceived by the person with whom they are interacting and may open the door for others to question the validity of the transgendered person's expressed gender identity. In the worst case scenarios, being "outed" by the birth certificate as "transgendered" could expose the person to some of the more blatant forms of harassment, discrimination, and abuse which is all-too-commonly experienced by transgendered persons in our society.

[175] In addition, given that the birth certificate is commonly required as a foundational document to gain access to the benefits and services of a variety of downstream users, it seems logical to conclude that possessing a birth certificate that could expose one as transgendered, if it were required to be produced, could be a source of anxiety, even if it never ends up being produced. This is supported by Dr. Karasic's testimony that the risk that they will meet with violence or other forms of mistreatment if they are "outed" as transgendered instills fear in many transgendered persons. See also *Nixon v. Vancouver Rape Relief Society*, 2002 BCHRT 1, rev'd but not on this point, 2003 BCSC 1936, rev'd in part 2005 BCCA 601, where the British Columbia Human Rights Tribunal accepted expert sociological evidence that even when transgendered persons are able to "pass", that is to live in the role of their gender identity without raising fears or concerns, many live with the constant fear of discovery. The anxiety and/or fear that they might be exposed as transgendered by using a birth certificate based on birth sex and which does not accord with their lived gender identity - and suffer negative consequences as a result - is another way in which transgendered people are negatively affected by the legislative scheme for issuing birth certificates pursuant to the *VSA*.

[176] Finally, the applicant submits, and I agree, that the surgical requirement in s.36 of the *VSA* perpetuates disadvantage among transgendered persons because it requires them to undergo inherently painful, invasive, and risky surgical procedures in order to obtain birth certificates that accord with their gender identity (recognizing that some transgendered persons wish to have surgery and regard it as beneficial). It seems obvious that the surgical requirement in s. 36 of the *VSA,* with all that surgery necessarily entails, impedes the ability of transgendered persons to obtain official government documentation that will help them to have their gender identity recognized and respected in society and therefore makes their already difficult situation worse. Looked at from another angle, the *VSA* exacerbates the situation of this historically disadvantaged group because it requires them to undergo inherently painful, invasive, and risky procedures that they may not otherwise wish to undertake in order to avoid the negative consequences that flow from having a birth certificate which says that, officially, they are not the gender they feel themselves to be and present to the world.

[177] The respondent argues that the availability of an Ontario driver's licence that reflects the transgendered person's gender identity diminishes any harm that might otherwise flow from the birth certificate. In this regard, and as noted above, the parties agree that, since 2006, the Ontario Ministry of Transportation has had a mechanism in place by which a transgendered person may obtain a change in sex designation on his or her driver's licence that accords with his or her gender identity without having any form of surgery. (He or she must provide a letter from his or her doctor stating that in the doctor's opinion, a change in the sex designation on the person's driver's licence is appropriate.) The respondent contends that transgendered persons can largely avoid the negative consequences that might otherwise flow from using the birth certificate by simply using their driver's licences to identify themselves. The respondent points out that the birth certificate is not a form of personal identification in any event, in the sense that it cannot be presented to confirm the identity of the bearer.

[178] I agree with the respondent that the availability of the driver's licence could be an important consideration at the remedy stage of the analysis if and when it comes time to determine the extent of the harm suffered by the applicant. I do not, however, see it as

having much relevance at this, the liability stage of the analysis. The fact that other government ministries provide personal identification that accords with gender identity might serve to lessen the harm that flows from having a birth certificate that does not, but it does not eliminate it entirely; and therefore cannot serve to completely absolve the respondent from liability under the *Code*. As Dr. Karasic testified, a transgendered person whose identity documents are not uniformly congruent with his or her lived gender identity is at risk of being exposed as transgendered and/or lives with the fear of exposure. The applicant testified that she herself felt that she needed to have all of her documents identify her as "female" in order to feel safe. In addition, I agree with the applicant that she is legally entitled to access all of the services of this respondent, including the service of providing a birth certificate, without discrimination. The fact that she may access a different service from a different respondent without discrimination (or even, for that matter, a different service from the same respondent) does not detract from that right. It is important to bear in mind that in determining liability under the *Code*, the question is whether the applicant has experienced any disadvantage on the basis of a protected ground, not how much. (See, for example, *Commission scolaire régionale de Chambly v. Bergevin*, [1994] 2 SCR 525, where the Supreme Court of Canada held that a *de minimis* test does not apply to evaluations of liability under human rights legislation.)

[179] At any rate, there is no dispute that the driver's licence and the birth certificate serve different purposes and are not equivalent documents. The respondent's own evidence establishes that a number of downstream users specifically require that birth certificates, and not driver's licences, be provided as the foundation upon which people may access their services. For example, the Canadian passport office will not accept a driver's license as a foundational document to obtain a Canadian passport.

[180] As noted above, the applicant may establish that the respondent infringed her right to substantive equality by showing either that the impugned law perpetuates disadvantage by worsening the situation of transgendered persons; or by showing that it perpetuates stereotypes about transgendered persons. She need not do both.

[181] For all of the above reasons, I am satisfied that the legislative requirement in the *VSA* that birth certificates reflect the sex assigned at birth, combined with the legislative requirements for changing sex designation in s.36 of the *VSA,* perpetuate disadvantage against transgendered persons by exacerbating the situation of this historically disadvantaged group. The applicant has thus met the second step of the test in *Kapp*. Accordingly, I find that the applicant has made out a *prima facie* case under the *Code* that respondent discriminated against her on the basis of sex and/or disability with respect to services, contrary to s.1 of the *Code*, subject only to the respondent's ability to prove a statutory defence (addressed below).

[182] It is therefore not strictly necessary for me to consider whether the respondent's distinct and disadvantageous treatment of transgendered persons pursuant to the *VSA* also infringes substantive equality by perpetuating stereotypes about transgendered persons. However, since the issue was argued before me, I will address it.

Perpetuation of stereotypes

[183] As noted above, the second way that substantive inequality may be established is by showing that the distinct treatment under and/or distinct impact of the law imposes disadvantage on the basis of a stereotype that does not correspond to the actual circumstances and characteristics of the claimant or claimant group. *Withler,* above, at para. 36.

[184] Discerning whether treatment is based on an individual's actual characteristics or circumstances as opposed to assumed or attributed ones has long been key to determining whether distinct treatment on the basis of a prohibited ground is discriminatory in a substantive sense. As McIntyre J. observed in the Supreme Court's landmark decision in *Andrews v. Law Society of British Columbia,* [1989] 1 S.C.R. 143, at pp. 174-175:

> Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

[185] Elaborating on this concept, the Supreme Court in *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4, [2007] 1 S.C.R. 161, at paras. 48-49, emphasized that the essence of discrimination is in the arbitrariness of its negative impact:

> At the heart of these definitions [of discrimination] is the understanding that a workplace practice, standard, or requirement cannot disadvantage an individual by attributing stereotypical or arbitrary characteristics. The goal of preventing discriminatory barriers is inclusion. It is achieved by preventing the exclusion of individuals from opportunities and amenities that are based not on their actual abilities, but on attributed ones. The essence of discrimination is in the arbitrariness of its negative impact, that is, the arbitrariness of the barriers imposed, whether intentionally or unwittingly.
>
> … It is the link between that group membership and the arbitrariness of the disadvantaging criterion or conduct, either on its face or in its impact that triggers the possibility of a remedy. And it is the claimant who bears this threshold burden.

[186] The concepts of arbitrariness and stereotyping figure prominently in the applicant's arguments under step two of the *Kapp* test.

[187] While acknowledging that s.36 of the *VSA* may have been a well-intended attempt to address some of the challenges faced by transgendered persons at the time it was enacted in the late 1970s, the applicant contends that making changes in sex designation on birth registrations contingent upon "transsexual surgery" having taken place perpetuates the notion of transgendered women as "women trapped in men's bodies" and that they need to make their bodies "female" through surgery in order to "be" their felt gender. The applicant submits that this is a stereotypical and outdated idea about transgendered people, which is not based on their actual characteristics and circumstances. In support of her argument, the applicant called expert evidence that established that the majority of transgendered persons do not have "transsexual surgery", because they either do not want it, or because they do not need it, in order to live in their felt genders.

[188] The respondent denies that making changes in sex designation contingent upon

"transsexual surgery" having taken place reflects a stereotypical idea that all transgendered persons want or need or seek to have surgery as a way of dealing with their gender identity. Indeed, the respondent submits that the sex designation on the birth certificate has nothing to do with gender identity. Rather, the respondent submits that the sex designation of "male" or "female" on the birth registration merely describes the "anatomical sex structure" of a person. In support of this argument, the respondent points out that what is recorded on the registration of birth is not the child's gender identity (which is not even capable of being ascertained at the time of birth), but the child's anatomical sex (i.e. whether the child has male or female genitalia) as observed at birth.

[189] In accordance with this view, the respondent submits that s.36 of the *VSA* was not intended to help transgendered persons in general obtain a birth certificate that is consistent with their gender identity, but rather to provide a mechanism by which those transgendered persons who change their "sex" through surgery may obtain a birth certificate that reflects their new sex.

[190] At this juncture, it is important, I think, to clarify the nature of the relationship that is said by the respondent to exist between "transsexual surgery" and "sex". The respondent does not argue that "transsexual surgery" is justified as some kind of litmus test by which the respondent may ensure that only those who are truly committed to living in their felt gender (as demonstrated by their willingness to undergo surgery) may obtain a change in sex designation on their birth registration. Rather, the respondent argues that "transsexual surgery" is legitimately required and indeed necessary to obtain a change in sex designation because "transsexual surgery" is the thing that changes a male person into a female one (or vice versa). The respondent submits that when it changes a person's sex designation from "male" to "female" following surgery, it is therefore merely recording an objective fact, which has been confirmed by two doctors.

[191] Following this logic, the respondent submits that making a change in sex designation contingent upon transsexual surgery is not treatment based on arbitrarily

attributed characteristics or stereotypical assumptions, but on the transgendered persons' actual characteristics. Treatment that is based on actual characteristics – as opposed to assumed or arbitrarily attributed ones – does not perpetuate stereotypes and is not discriminatory, submits the respondent.

[192] Thus, two competing theories emerge about the nature of the respondent's requirement for "transsexual surgery". On the one hand, the applicant contends that the respondent's requirement for "transsexual surgery" is an arbitrarily imposed obstacle, which transgendered persons must overcome in order to obtain a birth certificate that reflects a broader notion of sex, which includes gender identity. On the other side of the argument, the respondent submits that making a change in sex designation contingent upon "transsexual surgery" having taken place is based on transgendered persons' actual characteristics and therefore legitimate because surgery is what changes the person's sex in the first place.

[193] At first blush, the respondent's argument that "sex" on the birth registration must refer to anatomical sex because that is all that can be recorded at the time of birth, and that changes to "sex" on a birth registration must therefore reflect anatomical changes, has a certain amount of appeal. Ultimately, however, the fact that the sex that is originally designated at birth is based on one's anatomy does not necessarily tell us whether a change to that sex designation later in life is descriptive of a change in anatomical sex, and therefore arguably based on actual characteristics, or whether it reflects the person's gender identity.

[194] The fact of the matter is that the vast majority of people born in Ontario are not transgendered. This means that their anatomical sex as observed at birth happens to coincide with their sense of whether they are male or female (i.e. gender identity). Since for the vast majority of people, there is no incongruence between their anatomy and their gender identity, looking to their circumstances does not shed much light one way or the other on whether a sex designation that is changed by the respondent following "transsexual surgery" is meant to signify a new anatomical sex (i.e. this person is anatomically male or female) or a broader notion of sex, which incorporates gender

identity (i.e. this person is a man or a woman).

[195] Nor, in my view, is the fact that s.36(1) of the *VSA* states that a person may apply to the respondent to have the sex designation on his or her birth registration changed "where the anatomical sex structure of a person is changed to a sex other than that which appears on the registration of birth" dispositive of this issue. Irrespective of the wording of the legislation itself, the issue for me at this stage of the inquiry is whether the manner in which s.36 of the *VSA* is applied by the respondent perpetuates stereotypes about transgendered persons. This is because the issue is whether the distinct and disadvantageous manner in which the applicant was treated by the respondent when it required her to certify that she had had "transsexual surgery" in order to change the sex designation on her birth registration was discriminatory in a substantive sense.

[196] Based on the evidence before me and taking all of the relevant circumstances into account, I cannot agree with the respondent that when it changes a person's sex designation from "male" to "female" or vice versa following "transsexual surgery", it is merely recording the objectively verifiable fact that the person's anatomical sex has been changed through surgery. On the contrary, I agree with the applicant that the manner in which s.36 of the *VSA* is applied by the respondent allows transgendered persons to change their birth certificates so that the sex designation reflects a broader notion of sex which includes gender identity.

[197] There is no dispute that the applicant's sex is female. The respondent has changed her birth registration and issued her a birth certificate confirming that her sex is female. However, as the applicant herself points out, she is not biologically, genetically or anatomically female by virtue of having had an orchiectomy. Her testes were removed but she still has a penis and she does not have any female genitalia or what might appear to be female genitalia. The respondent is aware of all this and yet does not for a moment suggest that the applicant has not fulfilled its requirements for a change in sex designation on her birth registration or that her "female" birth certificate ought not to have been issued. On the contrary, the respondent agrees that the

applicant met the requirements to have the sex designation on her birth registration changed to “female”.

[198] In fact, at one point during the hearing, the respondent expressly agreed that the applicant’s having had an orchiectomy in February 2008 satisfied the requirement for “transsexual surgery”. Although the respondent later clarified that this was because the applicant’s doctors accepted the applicant’s orchiectomy as having satisfied the requirement for “transsexual surgery”, and not because the respondent itself found it to suffice, there was no suggestion that the doctors ought not to have certified that the applicant had had “transsexual surgery” when they completed the forms prescribed by the respondent pursuant to Regulation 1094 under the *VSA*. In addition, in countering the applicant’s argument that the respondent’s requirement for “transsexual surgery” is impermissibly vague, the respondent goes so far as to state that the applicant “*knew*” that an orchiectomy would qualify her for a change in sex designation on her birth registration. In this regard, the respondent also points to Dr. Karasic’s testimony that an orchiectomy would qualify as “transsexual surgery” and Dr. Jansz’s evidence that, when she called the Office of the Registrar General in October 2008 to determine whether the applicant met the respondent’s requirements for a change in sex designation, she was told that an orchiectomy would meet the respondent’s requirements if the applicant was also living in her felt gender.

[199] All of this establishes that the applicant met the respondent’s requirement for “transsexual surgery” by having an orchiectomy. In my view, this undermines the respondent’s position that when it changed the sex designation on the applicant’s birth registration following her “transsexual surgery”, it was merely recording an objectively verifiable fact that the applicant’s anatomical sex had changed to “female”. On the contrary, the fact that the respondent allows someone to change the sex designation on her birth registration to “female” even though she is not biologically female and her anatomy does not appear female suggests that the change in sex designation is about changing the birth certificate to accord with something other than mere anatomical sex, namely a broader notion of sex which includes gender identity.

[200] The fact that the surgery that the applicant had is more commonly performed on non-transgendered men than on transgendered women bolsters this finding. At the hearing, Dr. Karasic testified that the vast majority of orchiectomies are performed on non-transgendered men as a form of cancer treatment. This evidence was consistent with that of Dr. Jansz. If a non-transgendered man had an orchiectomy in order to treat cancer, obviously no one would ever suggest that his "sex" had changed, for the purposes of his birth registration or otherwise. In fact, at the hearing, the respondent expressed the hope that if such a man did seek to change his sex designation for ulterior motives, no doctor would complete the requisite certificates that "transsexual surgery" had taken place and that a change in sex designation should be made as a result of the surgery. This tells me that whether a person who has had a particular surgery is entitled to change the sex designation on his or her birth registration does not depend on some objectively verifiable fact about the surgery itself, as much as it depends on the *gender identity* of the person having the surgery. This also points to the conclusion that the "male" and "female" designations on the birth registration – at least in the context of changes to those designations following "transsexual surgery" – signify a broader notion of sex that includes gender identity and are not merely descriptive of anatomy.

[201] This conclusion is also supported by the fact that when a person seeks to change the sex designation on her registration of birth, the respondent requires her to do more than have her doctors certify that she has had "transsexual surgery". She must also have her doctors certify that her sex designation "should" be changed as a result of the surgery, pursuant to s.36(2)(a)(ii) and s.36(2)(b)(iii) of the *VSA*. I agree with the applicant that this is essentially a requirement that the applicant submit medical certificates confirming that her gender identity is consistent with the desired change in sex designation. Indeed, the respondent acknowledges that gender identity may be part of what goes into the doctor's assessment as to whether the change in sex designation "should" be made when completing his/her medical certificate. To my mind, this is another indication that when the respondent changes a person's sex designation following certification of "transsexual surgery", it is changing the birth registration so that

it reflects a broader notion of sex that includes gender identity and not merely recording objectively verifiable changes to physical attributes (i.e. anatomical sex), as the respondent contends.

[202] On this point, I would also note that although the respondent argues that it is not possible to register a broader notion of sex that might include gender identity, based on the above, it is apparent to me that not only is it possible, but the respondent is already doing it.

[203] For all of these reasons, I am persuaded that when the respondent changes a person's sex designation following certification of "transsexual surgery", it is altering the birth registration and correspondingly the birth certificate so that it accords with a definition of sex that incorporates the person's gender identity and not merely his or her anatomical or biological sex.

[204] With that in mind, I now return to the issue whether the requirement that transgendered persons certify that they have had "transsexual surgery" in order to obtain a change in sex designation on their birth registrations perpetuates stereotypes about transgendered persons or is based on their actual characteristics, as the respondent contends.

[205] The respondent submits that making a change in sex designation contingent on a person having had "transsexual surgery" cannot be said to perpetuate stereotypes if surgery is what actually changed the person's "sex". The fact of the matter, however, is that "transsexual surgery" does not change a person's sex in a genetic or biological sense. Moreover, as we have seen above, "transsexual surgery" does not have to make a person appear to be a member of the opposite sex in order to satisfy the respondent's requirements for a change in sex designation on a birth registration. There is certainly no suggestion (nor any evidence upon which I might find) that surgery, a physical process, alters "sex" when defined to include gender identity, which, I have found, is what "sex" means in the context of changes to sex designation by the respondent pursuant to s.36 of the *VSA*. Nor is there any other basis upon which I might conclude

that making changes to sex designation on the birth registration contingent upon a person having had "transsexual surgery" is treatment based on the actual characteristics of transgendered persons.

[206] The respondent's argument, dealt with below, that "transsexual surgery" changes a person's sex by "legislative fiat" is simply not an argument that the respondent's requirement for "transsexual surgery" is based on the actual characteristics of transgendered persons. In fact, what the respondent does is *attribute* a change in sex to persons who have had "transsexual surgery". In order for me to conclude that the respondent's requirement for "transsexual surgery" as a prerequisite for change in sex designation constitutes treatment based on transgendered person's actual characteristics, I would have to find that "transsexual surgery" as required by the respondent changes the sex of the person having it in some real, objective way. As discussed above, the evidence does not establish this.

[207] On the contrary, the evidence establishes and I am persuaded that the manner in which the respondent administers s.36 of the *VSA* requires transgendered people to surgically alter their bodies in order to obtain a benefit that does not necessarily have anything to do with the manner in which their bodies had been surgically altered. In my view, this is precisely the sort of arbitrarily imposed barrier or "disadvantaging criterion" which the Supreme Court in *McGill* described as the "essence of discrimination".

[208] This finding is bolstered by the fact that the respondent has no standards regarding what qualifies as "transsexual surgery".

[209] Ms Hartman testified that the respondent itself does not have any view as to what kinds of surgical procedures qualify a person for a change in sex designation pursuant to s.36 of the *VSA*. Instead, the respondent leaves it up to the doctors completing the medical certificates required by the respondent pursuant to s.36(2) of the *VSA* to determine if a procedure "in their minds" meets the definition of "transsexual surgery". This is so even though Ms Hartman testified that she does not know if medical practitioners have any definition of "transsexual surgery". Ms Hartman testified

that it does not matter to the Office of the Registrar General what kinds of surgeries doctors are certifying as "transsexual surgery" as long as the doctors are comfortable saying that "transsexual surgery" has happened. If they do so, the Office of the Registrar General does not "look underneath" the certification. The extent to which this is so was underlined by Ms Hartman's testimony that she could not say whether electrolysis (i.e. hair removal) would qualify as "transsexual surgery" under the *VSA*; and that if a doctor were to certify that someone had had "transsexual surgery", based only on the person having had electrolysis, the Office of the Registrar General would register the change in sex designation, provided everything else was in order.

[210] To my mind, all of this serves to further undermine the respondent's argument that its requirement for "transsexual surgery" as a prerequisite for changing sex designation on a birth registration is based on the actual characteristics of transgendered persons. I do not see how the respondent can argue that making a change in sex designation contingent on "transsexual surgery" having taken place is basing the change on the person's actual characteristics if the respondent cannot say, even in general terms, how the person's actual characteristics are supposed to be changed by surgery.

[211] Moreover, I agree with the applicant that making changes in sex designation contingent upon "transsexual surgery" having taken place perpetuates certain stereotypical ideas about the relationship between transgendered persons' gender identity and surgery. However, I see the matter a little differently than the applicant.

[212] The applicant argues that one of the stereotypical notions that is perpetuated by the respondent's requirement for "transsexual surgery" is that all transgendered persons want to have surgery. I am not so sure that such a stereotype actually exists, nor do I have any basis to conclude that the requirements for changing sex designation are based on assumptions about what any or all transgendered persons "want". Having said that, I do agree with the applicant that the surgical requirement for changing sex designation perpetuates the stereotypical notion that transgendered persons "need" to have surgery in the sense that they need to have it in order to have their gender

recognized by the respondent. Put another way, s.36 of the *VSA* is based on the stereotypical belief that transgendered persons can only "be" their gender by having surgery; and that surgery somehow changes them from male to female, or vice versa. Along the same lines, s.36 gives force to the stereotypical idea that a transgendered woman who has had surgery, for example, is more "female" than a transgendered woman who has not.

[213] In my view, there is no basis in reality or in transgendered persons' actual circumstances for the stereotypical idea that a transgendered person walks into the surgeon's office "male", for example, and comes out "female". The applicant in this case was not "male" until the moment she had her testes removed on February 4, 2008, at which point she "became" female. The respondent deemed the applicant's sex to have changed through "transsexual surgery". However, this was based on the significance the respondent attributed to the applicant's surgery, not the surgery's *actual* significance.

[214] In reality, the majority of transgendered persons do not have surgery and yet are able to live in the sex associated with their gender identity. Dr. Karasic's evidence establishes this. The fact that transgendered persons do not need to have surgery in order to live in their felt gender further illustrates that the respondent's requirements for changing sex designation on a birth registration are not based on the "individual merits and capacities" of transgendered persons but on assumed and attributed characteristics.

[215] For these reasons, I am persuaded that the respondent's requirement for "transsexual surgery" in order to change sex designation on a birth registration is based not on transgendered persons' actual characteristics but on assumptions about them and what they must do in order to "be" their gender. Accordingly, I find that the respondent's requirement for "transsexual surgery" in order to change sex designation on a birth registration perpetuates stereotypes about transgendered persons. This is another reason for my finding that the requirement that Ontario birth certificates reflect the sex assigned at birth unless a person has and certifies that she has had

"transsexual surgery" is substantively discriminatory against transgendered persons within the meaning of the second step of the test in *Kapp*.

[216] The respondent has made certain other arguments against a finding of substantive discrimination that I wish to address before considering whether the respondent has proved a statutory defence under the *Code*.

[217] First, the respondent argues that making "transsexual surgery" a prerequisite for obtaining a change in sex designation promotes accurate and reliable vital event data and that this "goes a long way" towards refuting the applicant's claim of substantive discrimination. The respondent submits that it cannot be found to be discriminating against transgendered persons if its surgical requirement furthers a valid government policy (i.e. maintaining accurate and reliable vital event data). In support of this argument, the respondent relies on the Supreme Court of Canada's decision in *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567. In that case, the Supreme Court of Canada found that requiring all drivers in the province of Alberta to have a driver's licence with a photograph infringed the Hutterian Brethren's right to religious freedom in s.2(a) of the *Charter* (the Hutterian Brethren could not be willingly photographed because of their religious beliefs), but was justified as a reasonable limit on religious freedom under s.1. In very brief reasons, the court also found that the universal photo requirement did not discriminate against the Hutterian Brethren on the basis of religion contrary to s.15 of the *Charter.*

[218] I do not think that the *Hutterian Brethren* decision does much to assist the respondent in this case. In *Hutterian Brethren*, the respondent proved in evidence that there was a need for a universal photo requirement and that any exemption from that requirement on religious grounds or otherwise would significantly compromise the government's policy objectives. By contrast, and as discussed further below, the respondent in this case has not established in evidence that its requirement for "transsexual surgery" in order to change sex designation on birth registration is necessary in order to achieve a valid government objective, namely the accuracy and reliability of vital event data. Even if it had, I agree with the applicant that a finding that

the surgical requirement furthered a valid government objective would not be a basis, in and of itself, for finding that it is not discriminatory. Conceivably, a requirement could further a valid government objective and still discriminate; in fact, the respondent expressly acknowledged at the hearing that these things are not mutually exclusive. Moreover, in *Tranchemontagne,* above, at paras. 154-157, the Ontario Court of Appeal held that the fact that the government may be able to provide a basis for a given policy choice is not determinative of whether the law has a discriminatory effect that is prohibited by the *Code*. Finally, I note that in *Hutterian Brethren*, above, at para. 108, the Supreme Court found that the universal photo requirement arose out of a neutral and rationally defensible policy choice and not out of demeaning stereotypes. The Court did not conclude that the law was not based on demeaning stereotypes *because* it promoted a valid government objective, which is the reasoning urged upon me by the respondent.

[219] The respondent also submits that the applicant's substantive discrimination claim fails because it rests on Dr. Karasic's expert evidence relating to emergent standards of care for the diagnosis and treatment of gender identity disorder. The respondent submits that, by contrast, its requirements for changing sex designation on a birth registration reflect current medical thinking about the care and treatment of transgendered persons, and specifically that transgendered persons with "severe" Gender Identity Disorder require surgery for medical reasons. The respondent submits that the criteria for change of sex designation should not be found to be discriminatory because they are consistent with current, as opposed to emerging, medical standards.

[220] One problem with the respondent's argument is that my findings in this case are not based on those parts of Dr. Karasic's testimony pertaining to anticipated changes to the WPATH Standards of Care for the treatment and care of transgendered persons or the gender identity disorder diagnostic criteria in the *Diagnostic and Statistical Manual of Mental Disorders (*DSM-IV-TR, soon to be DSM-V). To the extent that my findings rest on Dr. Karasic's evidence, they rest on his unchallenged and uncontradicted evidence about transgendered persons' current actual circumstances, namely that transgendered persons do not need surgery to live in their gender, that most

transgendered persons do not have surgery, and that surgery is not the “hallmark” of gender identity. This evidence has nothing to do with the anticipated changes in the medical treatment and care of transgendered persons.

[221] Nor is there any merit to the respondent’s submission that the requirements for changing sex designation reflect current (or other) medical thinking about the treatment and care of transgendered persons and ought not therefore to be found to be discriminatory. While the respondent asserts that the legislation is intended to benefit those transgendered persons with “severe” Gender Identity Disorder who medically require surgery, there is nothing in the legislation or the manner in which it is applied by the respondent to support such a conclusion. Moreover, there is nothing in the WPATH Standards of Care or the DSM criteria to support the suggestion that making changes in sex designation on a birth registration contingent upon a person having had surgery reflects current medical standards for the treatment and care of transgendered persons. On the contrary, WPATH, the internationally recognized authority in transgender health that developed the Standards of Care, issued a press release in June 2010 urging governments and other authoritative bodies to eliminate surgical and sterilization requirements as a condition of identity recognition (i.e. change of sex designation) on identity documents “in the interest of the health and well-being” of transgendered persons.

[222] For all of the reasons set out above, I find that the applicant has made out a *prima facie* case of discrimination under the *Code* pursuant to the two-part test in *Kapp*, subject to the respondent’s ability to prove a statutory defence under the *Code*.

[223] Before considering whether the respondent has proved a defence under s.11(1)(a) or s.14(1) of the *Code*, I wish to deal briefly certain other arguments advanced by the applicant in support of her claim that the respondent infringed her rights under the *Code*.

Other arguments advanced by the applicant

[224] The applicant argues that the requirement for "transsexual surgery" is so vague that it constitutes further discrimination against transgendered persons. In support of this proposition, the applicant points out that the terms "transsexual surgery", "anatomical sex structure" and "sex" are not defined in the *VSA* or by the respondent. Nor are such terms defined by the medical profession, submits the applicant. In the result, the applicant submits that transgendered persons are basically required to "guess" what sorts of surgeries will entitle them to a change in sex designation on their birth registrations. The applicant submits that requiring transgendered persons to "guess" how to surgically alter their bodies in order to access a government service constitutes further discrimination against transgendered persons, including the applicant.

[225] The respondent disputes the applicant's suggestion that the requirement for "transsexual surgery" to change sex designation is "vague". The respondent also argues, and I agree, that even if the alleged vagueness of the surgical requirement could cause a problem for some transgendered person someday, there is no evidence that it caused a problem for the applicant in this case. When she testified in this matter, the applicant never indicated that she was at all uncertain as to whether an orchiectomy would qualify as "transsexual surgery". On the contrary, and as noted above, the respondent submits that the applicant "knew" that an orchiectomy would qualify as "transsexual surgery" and it did qualify. Thus, even if the requirements for changing sex designation on a birth registration are vague, there is no basis upon which I might find that such vagueness disadvantaged the applicant in this case. In the absence of evidence of disadvantage, this aspect of the applicant's discrimination claim must be dismissed.

[226] I must similarly reject the argument that the respondent discriminated against the applicant by requiring her to have and certify that she had had "transsexual surgery" in order to change the sex designation on her birth registration, instead of allowing her to correct the "error" on her birth registration pursuant to s.34 of the *VSA*. The applicant

argues that, whereas “other people” may correct errors on their birth registrations pursuant to s.34 of the *VSA* by producing “evidence satisfactory” to the Registrar General, transgendered persons are subject to “additional and severe” requirements pursuant to s.36 of the *VSA* (i.e. surgery and proof thereof) to correct the “error” in their sex designations.

[227] This argument cannot succeed in the case at hand. Although another applicant in another case might conceivably be able to establish that the sex designation assigned to him/her at birth was an “error” (Ms Hartman was not prepared to rule out the possibility), I agree with the respondent that there was no evidence in this case that an “error ha[d] been made” within the meaning of s.34 of the *VSA* when a male sex designation was originally recorded on the applicant’s birth registration. In my view, it is not open to me to find that the respondent treated the applicant in a differential manner on the basis of her status as a transgendered person with respect to the correction of an “error” on her birth registration in the absence of evidence that an “error” was made on the applicant’s birth registration. This aspect of the applicant’s claim is dismissed accordingly.

[228] Finally, to the extent that she argues that the respondent infringed her rights under the *Code* by failing to adequately inform her of its procedures for making a change to the sex designation on her birth registration, I cannot accept the applicant’s claim. The applicant submits that she was unable to obtain timely and coherent information about the Office of the Registrar General’s policies, practices, and procedures regarding changing the sex designation on a birth certificate; and that, as a result, she had to make changes to her birth certificate twice in one year – first, in September 2008, when she succeeded in changing the name on her birth certificate but not the sex designation; and, second, in late November 2008, when the sex designation on her birth registration was changed by the respondent.

[229] In my view, there is insufficient evidence to conclude that the applicant’s attempts to change the sex designation on her birth registration were hampered by any failure on the part of the Office of the Registrar General to adequately respond to the applicant’s

attempts to obtain information. The applicant's allegations in this regard rest on her evidence that she wrote "at least" two letters to the Office of the Registrar General attempting to obtain information about changing the sex designation on her birth registration, which letters went unanswered; and a third letter threatening legal action, which finally got results. However, the applicant was unable to produce copies of any such letters at the hearing. Nor did the respondent have them in its files.

[230] In any event, even if the applicant had established that the Office of the Registrar General failed to respond adequately to her requests for information about changing the sex designation on her birth registration, there is no evidence that would allow me to conclude that such treatment was linked to the applicant's status as a transgendered person. In the absence of such evidence, it is not open to the Tribunal to find that the respondent's failure to adequately inform the applicant of its procedures infringed her rights under the *Code.* This aspect of the applicant's claim is dismissed accordingly.

Whether Surgical Requirement Reasonable and Bona Fide within meaning of s.11 of *Code*

[231] As noted above, the applicant has made out a *prima facie* case of discrimination under the *Code* by establishing that the requirement that transgendered persons have "transsexual surgery" in order to obtain a change in sex designation on their birth certificates that accords with their felt and lived gender treats transgendered persons in a discriminatory manner on the basis of sex and/or disability and/or that it has a discriminatory impact on them on the basis of sex and/or disability. However, that does not end the matter.

[232] Once the applicant has made out a *prima facie* case of discrimination, the respondent may avoid liability under the *Code* if it successfully establishes that the *prima facie* discriminatory requirement for "transsexual surgery" is "reasonable and bona fide" within the meaning of s.11 of the *Code*, including by showing that it cannot accommodate transgendered persons by removing the discriminatory barrier or requirement (in this case, the requirement that transgendered persons may only obtain

a birth certificate that accords with their gender identity by having and certifying that they have had "transsexual surgery") without incurring undue hardship: *Commission scolaire régionale de Chambly v. Bergevin,* 1994 CanLII 102 (SCC), [1994] 2 S.C.R. 525 ("Chambly"), at p. 546, as cited in *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, at para. 121; *Wozenilek v. Guelph (City)*, 2010 HRTO 1652.

[233] The concept of "undue hardship" implies that some level of hardship is acceptable; unless that hardship imposes an undue or unreasonable burden, it yields to the need to accommodate: *Eldridge v. British Columbia (Attorney General)*, 1997 CanLII 327, [1997] 3 S.C.R. 624, at para. 79; *Council of Canadians with Disabilities*, above, at para. 122.

[234] If a respondent cannot establish that there is a *bona fide* justification for the retention of a discriminatory requirement or barrier by proving that accommodation would impose undue hardship on it, the requirement or barrier must be removed: *Council of Canadians with Disabilities*, above, at para. 121.

[235] The applicant submits that the defence in s.11 of the *Code* is available to the respondent to refute her claim of adverse effect discrimination under s.11 of the *Code*, but not her claim that requiring "transsexual surgery" in order to change the sex designation on their birth certificates constitutes a form of direct discrimination against transgendered persons contrary to s.1 of the *Code*. I do not agree. As the respondent submits, and as should be evident from the above analysis, this is not a case that may be "neatly characterized" as a case of direct discrimination. Accordingly, the defence in s.11(1)(a) of the *Code* is available to the respondent as a defence against the applicant's claim that the requirement that Ontario birth certificates reflect the sex assigned at birth unless a person has and certifies that she has had "transsexual surgery" discriminates against transgendered persons, whether that claim is characterized as one of direct or adverse effect discrimination: *Entrop v. Imperial Oil Limited*, above, at paras. 77 and 80.

[236] In order to establish that a *prima facie* discriminatory requirement, qualification or

factor is reasonable and bona fide within the meaning of s.11 of the *Code,* the respondent bears the onus of proving three things:

> (1) it adopted the requirement for a purpose or goal that is rationally connected to the function being performed;
>
> (2) it adopted the requirement in good faith, in the belief that it is necessary to the fulfilment of the purpose or goal; and
>
> (3) the requirement is reasonably necessary to accomplish its purpose or goal, in the sense that the respondent cannot accommodate persons with the characteristics of the claimant without incurring undue hardship.
>
> *Entrop,* above, at para. 77 citing *Meiorin*, above, at para. 54; and *Grismer,* above, at para. 20.

[237] The respondent did not specifically address the first two steps of the *Meiorin* test in its submissions; its argument under s.11 of the *Code* focused on whether the respondent would incur undue hardship if it were to accommodate transgendered persons by allowing them to change the sex designation on their birth registrations and correspondingly their birth certificates without surgery (i.e. the third step of the *Meiorin* test).

[238] In any event, in the circumstances of this case, it is not necessary for me to determine whether the respondent has met the first two requirements of the three-step test in *Meiorin*, because the respondent has failed to prove that its "transsexual surgery" requirement for a change in sex designation is reasonably necessary to accomplish the respondent's purpose or goal, in the sense that it cannot accommodate transgendered persons by removing the surgical requirement without incurring undue hardship.

[239] The respondent submits that changing the sex designation on birth registrations and birth certificates without medical verification that "transsexual surgery" has occurred would cause the respondent undue hardship because it would undermine the respondent's goal of ensuring the accuracy and reliability of registered vital event data, namely, the changed sex designation on a birth registration. The respondent submits that its "transsexual surgery" requirement furthers the government objective of ensuring

that registered vital event data is accurate and reliable because whether surgery has taken place is an objectively verifiable fact, which is capable of being corroborated by witnesses who see it happen (i.e. the doctors who complete the requisite medical certificates); unlike gender identity which the respondent submits is less amenable to independent corroboration.

[240] I accept that the accuracy and reliability of registered vital event data is important because of the data's use in statistical research and also because downstream users rely on the data as a foundation for providing access to the benefits and services they offer. However, the respondent has not established that allowing transgendered persons to change the sex designation on their birth registrations and birth certificates without surgery would make vital event data less accurate and reliable than it is under the current system, let alone to the point of imposing undue hardship on the respondent.

[241] The fundamental problem with the respondent's argument that removing the surgical requirement for change in sex designation would undermine the accuracy and reliability of registered vital event data is that it presupposes a direct correlation between surgery and sex that has not been established in evidence. I agree that whether surgery has been performed is an objective fact that lends itself to independent corroboration. I also accept Ms Hartman's testimony that independent corroboration of vital event data helps to ensure that such data is accurate and reliable. The difficulty I have with the respondent's argument is that whether someone has had "transsexual surgery" is not a piece of vital event data on the birth registration. The person's sex is. It seems to me, then, that the surgical requirement for change of sex designation can only enhance the accuracy and reliability of vital event data if independent corroboration that someone has had "transsexual surgery" is also corroborative of the person's sex.

[242] This in fact is what the respondent argues. Specifically, the respondent submits that surgery is what changes a person's sex -- not in a genetic or biological sense – but in a legal one. According to the respondent, because the legislature has designated "transsexual surgery" as the threshold for change in sex designation, independent corroboration that a person has had "transsexual surgery" is reliable evidence that the

person's sex has changed.

[243] This argument cannot succeed. In order for me to find that independent corroboration that surgery has occurred enhances the accuracy and reliability of data on the person's sex, the respondent would have to establish in evidence that something about the fact that someone has met the respondent's requirement for "transsexual surgery" allows it to conclude with greater certainty whether the person is male or female, objectively speaking. There is no such evidence in this case.

[244] The only evidence called by the respondent in support of the proposition that registered vital event data would be less accurate and reliable under a system that allowed sex designations to be changed without surgery in comparison with the current system came from Ms Hartman. Ms Hartman testified that she "believed" that the reliability of data contained in the birth registration would be affected if sex designation could be changed without surgery, on the basis of a guarantor's information. Ms Hartman also testified that she "thought" that the reliability of data on the birth registration would be affected if sex designation could be changed on the basis of a doctor's confirmation, although to a lesser extent than under a guarantor system. Ms Hartman also testified that the reliability of information in the birth registration would be affected if individuals could "self-elect" their sex designation. However, there is no suggestion that the duty to accommodate the needs of transgendered persons obliges the respondent to go that far. Indeed, and as the applicant acknowledges, requiring transgendered persons to have their gender identity corroborated is consistent with the generally applicable requirement that all registered vital event data be corroborated, including when there are corrections or changes to vital event data. As Ms Hartman testified, the Office of the Registrar General does not register any vital event data on the basis of any one person's word.

[245] Ms Hartman testified that her concerns about the reliability of vital event data that could be changed on the basis of a doctor's confirmation of gender identity, without surgery, lay in the fact that "without the basis of an agreed-upon definition you would get different physicians exercising that in different ways" and that it would be "almost

discretionary". Ms Hartman testified that, by contrast, a physician who is confirming that surgery has occurred, under the current system, is corroborating "a fact as opposed to something subjective". Ms Hartman testified that, from a records perspective, gender identity was "less concrete" than surgery and suggested it might be difficult to have one's gender identity independently corroborated.

[246] The applicant argues, and I agree, that Ms Hartman's evidence does not provide a sufficient basis for finding that changing the sex designation on birth registrations and birth certificates without medical verification that "transsexual surgery" has occurred would cause the respondent undue hardship. There are a number of reasons for this.

[247] First, Ms Hartman's thinking that the surgical requirement enhances the reliability of vital event data on sex rests on the assumption that a doctor who is confirming that a person's sex designation should be changed because "transsexual surgery" has occurred is certifying "a fact as opposed to something subjective". As discussed above, this assumption is not borne out in the absence of evidence establishing that the fact that someone has had "transsexual surgery" is objective proof that his or her sex has changed.

[248] In any event, the fact of the matter is that proof of "transsexual surgery" is not accepted by the respondent as sufficient proof that a person's sex has changed under the current system. Two doctors must also certify that the person's sex designation "should" be changed as a result of the surgery. This effectively requires doctors to exercise their judgment as to whether a change in sex designation is appropriate as a result of a particular surgery having been performed. I agree with the applicant that the present system for changing sex designation thus already includes the sort of "subjective" element that Ms Hartman thinks may lead to less reliable data on sex under a non-surgical system for changing sex designation. Accordingly, I cannot conclude that the current system is more reliable than a non-surgical system would be because the current system is based only on objective facts and not on anything subjective. That is simply not the case.

[249] In addition, I agree with the applicant that, generally speaking, Ms Hartman's evidence that the reliability of vital event data would be affected by the removal of the surgical requirement for change of sex designation was impressionistic and speculative in nature and therefore not the sort of cogent evidence necessary to establish that the respondent would incur undue hardship if it were to change sex designation without requiring surgery: *Pantoliano v. Metropolitan Condominium Corporation No. 570*, 2011 HRTO 738, at para. 99; *Ontario (Human Rights Commission) v. Etobicoke (Borough)*, 1982 CanLII 15 (SCC), [1982] 1 S.C.R. 202, 132 D.L.R. (3d) 14 (S.C.C.), at para. 21, *Council of Canadians with Disabilities v. VIA Rail Canada Inc*., above, at para. 226; and *McDonald v. Mid-Huron Roofing*, 2009 HRTO 1306, at para. 36.

[250] For example, Ms Hartman's suggestion that it would be difficult to corroborate gender identity was highly impressionistic and speculative, unsupported by any other evidence (i.e. such as evidence from doctors as to whether it would in fact be difficult for them to corroborate gender identity), and contradicted by the fact that the current system effectively already requires doctors to corroborate gender identity in order to register a change in sex designation.

[251] Similarly, Ms Hartman was obviously speculating when she testified that changing sex designation without surgery would be less reliable than under the current system if it were done without standard definitions or criteria for confirming gender identity. There is no reason to conclude that physicians operating under a system with no surgical requirement would have to corroborate gender identity in the absence of any definitions or guidelines. It seems to me that it would be open to the respondent to establish criteria for the corroboration of gender identity, just as it has developed criteria around the registration of other vital event data. To be fair, Ms Hartman acknowledged this possibility during her testimony. She testified that making a defined class of professional people, such as physicians who are subject to a Code of practice and held to a certain standard, responsible for applying an appropriate standard definition or set of criteria for corroborating gender identity would "ad[d] to the reliability" of vital event data on sex. In my view, this fact alone goes a long way towards undermining the respondent's position that removing the surgical requirement for change of sex

designation would impose undue hardship on it.

[252] In addition, the respondent has not proved that allowing transgendered persons to change the sex designation on their birth registrations without surgery would negatively affect users of vital event data such that I might conclude that removing the surgical requirement would impose undue hardship on the respondent.

[253] Indeed, the respondent has not proved that removing the surgical requirement for change in sex designation would have any impact on the accuracy and reliability of registered vital event data for what it describes as the main purpose of collecting and registering vital event data, namely research. There is no dispute that sex is a data element commonly used in statistical research. Ms Hartman testified that in her experience every research-related request for vital event data includes a request for information on sex. However, as Ms Hartman confirmed during her testimony, researchers always have the option of specifying whether they want the data set to contain registrants' sex at birth or sex at the time of the request. Thus, if it is important for a researcher to know how many biological males and how many biological females are in a given data set, that information continues to be available. This is in keeping with the principle that although vital event data may be changed, it is never deleted, including when sex on a birth registration is changed. In the circumstances, I do not see how removing the surgical requirement for change in sex designation could have any negative impact on research, and certainly not to the point of imposing undue hardship on the respondent.

[254] As for those downstream users who choose to rely upon the respondent's vital event data as the basis for granting access to their own benefits and services, the respondent has not presented any evidence or arguments that such parties would be negatively affected by allowing transgendered persons to change the sex designation on their birth certificates without having to have surgery; and certainly not to the point of imposing undue hardship on the respondent. In light of this fact, it is not necessary for me to address the applicant's argument that the interests of third parties, such as downstream users who choose to rely on the respondent's vital event data of their own

accord, are not properly considered in determining whether removal of the surgical requirement would cause undue hardship for the respondent.

[255] Finally, to the extent that the respondent suggests that the surgical requirement for changing sex designation ought to be maintained because it harmonizes with other vital event jurisdictions in Canada and elsewhere, I do not agree that this is a relevant consideration. In my view, the laws in other jurisdictions cannot be the basis for finding that a requirement that is otherwise discriminatory under the *Code* is justified. In any event, Ms Hartman testified that it is not unusual for vital event registration policies to evolve over time, across jurisdictions, and that "in real life" vital event jurisdictions do not have identical requirements at all times. Consistent with that, the evidence in this case establishes that surgery is not universally required in order to change sex designation on a birth registration in all vital event jurisdictions to which Ontario compares itself. In this regard, Ms Hartman testified that the United Kingdom allows transgendered persons to change the sex designation on their birth registrations without surgery. In addition, Dr. Karasic testified that, in or around June 2010, the federal government of the United States eliminated the surgical requirement to change gender on passports and birth certificates for United States citizens born abroad.

[256] In sum, the respondent has not established that it cannot accommodate transgendered persons by removing the requirement for "transsexual surgery" for change of sex designation without incurring undue hardship. The respondent has therefore failed to establish that its requirement that transgendered persons certify that they have had "transsexual surgery" in order to obtain a change in sex designation on their birth registrations is "reasonable and bona fide" within the meaning of s.11 of the *Code*. Since the respondent has not established a *bona fide* justification for the retention of the otherwise discriminatory requirement, it follows that such requirement must be removed. This is further addressed in the remedy section, below.

Whether s.14 of the *Code* Insulates Respondent from Applicant's Discrimination Claim

[257] The respondent submits that s.14 of the *Code* provides a complete defence to

the applicant's discrimination claim. Specifically, the respondent argues that the process outlined in s.36 of the *VSA* and in the related provisions of Regulation 1094 constitute a "special program" within the meaning of s.14 of the *Code* in that s.36 of the *VSA* is designed to accommodate the needs of members of a disadvantaged group, namely those persons who have been determined by qualified medical practitioners to suffer from severe Gender Identity Disorder and to require sex reassignment surgery as part of their treatment.

[258] As noted above, the Commission submits that s.36 of the *VSA* can be either a "special program" within the meaning of s.14 of the *Code* or an accommodative measure under s.11 of the *Code*, but not both. The Commission submits that s.36 of the *VSA* is properly regarded as a "limited" form of accommodation of transgendered persons in relation to the respondent's system of birth registration and certification under the *VSA* and not as a "special program" under s.14 of the *Code*.

[259] The Commission submits that even if s.36 of the *VSA* were construed as a "special program", s.14 would not serve to insulate the respondent from a *Code* challenge by the applicant, since she falls within the group of persons whom the "special program" was intended to benefit.

[260] The applicant adopts the Commission's submissions with respect to s.14 of the *Code*.

[261] In *Roberts,* above*,* the Ontario Court of Appeal addressed whether s.14 of the *Code* precluded a 71-year-old complainant who was legally blind from challenging his exclusion from the visual aids category of the Ministry of Health's Assistive Devices Program as discriminatory on the basis of age (the program was not available to persons over the age of 30).

[262] Interpreting s.14 within the context of the purpose of the *Code* as a whole and with regard to the objects sought to be attained by the legislation, Justice Weiler (Houlden J.A., concurring) held that s.14(1) of the *Code* has a dual purpose: the

exemption of affirmative action programs from review and the promotion of substantive equality. Thus, the exclusion of an individual from a program designed to respond to needs that the individual does *not* have, does not constitute reviewable discrimination. By contrast, in order to rely upon s.14 of the *Code* to defend itself from a claim that a special program discriminates against a person whose *Code*-related needs do fall within the purpose of the special program, a respondent must establish that there is a logical or rational basis for the discriminatory limitation on the program. As Houlden, J.A. stated at p.31:

> In order to interpret s.14(1) in a manner that removes discrimination and achieves equality for disadvantaged persons and groups, a special program must be passed for one of the objects set out in [s.14(1)], and in addition, there must, in my judgment, be a rational or logical basis for the discrimination. If there is not, the program is not protected by s.14(1).

And Weiler, J.A., at p. 14:

> Special programs aimed at assisting a disadvantaged individual or group should be designed so that restrictions within that program are rationally connected to the program. Otherwise, the provider of the program will be promoting the very inequality and unfairness it seeks to alleviate.

[263] In *Roberts*, the majority found that excluding the complainant from the Assistive Devices Program was discriminatory on the basis of age; and that such discrimination was not reasonably related to the scheme of the special program. Specifically, the respondent did not establish that younger persons with visual impairments, who benefited from the program, were at a comparatively greater disadvantage than older persons with visual impairments. The exemptive purpose of s.14(1) of the *Code* was thus not invoked and the Ministry of Health could not rely on the defence in s.14(1) to shield itself from the complainant's discrimination claim.

[264] Applying the above reasoning to the facts of the case at hand, I find that the exemptive purpose of s.14 of the *Code* is not invoked in this case and does not serve to insulate the respondent from the applicant's claim that the application of s.36 of the *VSA* to her resulted in substantive discrimination against her as a transgendered person.

[265] Assuming without finding that s.36 of the *VSA* could be construed as a "special program" within the meaning of s.14 of the *Code,* the respondent has not established any rational or logical basis for discriminatorily restricting the benefit available under the "special program" (i.e. change in sex designation on a birth registration such that it accords with gender identity) to those transgendered persons who have had "transsexual surgery". There is no evidence, for example, that transgendered persons who have had "transsexual surgery" have a greater need for a birth certificate that accords with their lived and felt gender than transgendered persons who have not had such surgery. In this case, for example, the applicant's need for a change in sex designation on her birth certificate – one that would accord with her felt and lived female gender and allow her to establish her life as a woman – arose out of the applicant's status as a transgendered person, not out of the fact that the applicant had surgery. The respondent submits that limiting the "special program" in s.36 of the *VSA* to those persons who have had "transsexual surgery" maintains the legislative objective of promoting accurate and reliable vital event registration through independent corroboration of those events. However, as discussed at length above, the evidence and arguments have not borne this out as a rational or logical basis for restricting the availability of changed sex designation on birth registrations to those transgendered persons who have had "transsexual surgery". The respondent's inability to establish a logical or rational basis for discriminatorily limiting the benefit available pursuant to s.36 of the *VSA* to those persons who have had "transsexual surgery" means that the respondent cannot avail itself of s.14(1) of the *Code* to shield itself from the applicant's discrimination claim.

[266] Indeed, even if I had found that there was a rational basis for restricting the benefit available under s.36 to those transgendered persons who have had "transsexual surgery" and that the "special program" in s.36 of the *VSA* was therefore exempt from challenge by persons who fell outside that group, I do not see how that would insulate the respondent from the applicant's claim that requiring her to have surgery in order to attain the benefit in question was substantively discriminatory on the basis of sex and/or disability. Since the applicant in this case had "transsexual surgery", she clearly falls

within the group of persons whose needs s.36 was designed to meet and did meet, albeit in what I have found to have been a substantively discriminatory manner. The exemptive purpose of s.14(1) of the *Code*, which shields affirmative action programs from challenges by persons whose needs the program was not designed to meet, is thus not invoked on the facts of this case: *Roberts,* above, at p. 21 per Weiler J.A. This conclusion is in keeping with Houlden J.A.'s finding that s.14 does not operate so as to preclude the review of discriminatory aspects of otherwise equality-promoting special programs by beneficiaries of such programs: *Roberts,* above, at p. 29.

[267] Finally, there is no basis upon which I might accept the respondent's argument that s.36 of the *VSA* (and the related provisions in Regulation 1094) is a "special program" designed to benefit transgendered persons who require surgery for medical reasons because they have severe Gender Identity Disorder. There is no evidence to support a finding that s.36 of the *VSA* was designed to benefit only those transgendered persons who require surgery for medical reasons because they have severe Gender Identity Disorder. There is nothing in the legislation that limits a change in sex designation on a birth registration to transgendered persons who have been diagnosed as having severe Gender Identity Disorder and who have undergone "transsexual surgery" out of medical necessity. Nor does the respondent administer s.36 of the *VSA* in that manner. The respondent does not require transgendered persons or their doctors to certify that they belong to a group of transgendered persons for whom "transsexual surgery" is medically necessary – because they have "severe" Gender Identity Disorder or otherwise – in order to change their sex designation pursuant to s.36 of the *VSA*. Clearly, the respondent cannot establish that s.36 of the *VSA* is a "special program" designed to benefit only those for whom surgery is a medical necessity because they have severe Gender Identity Disorder in the absence of any steps to ensure that the beneficiaries of the program fall within such group.

[268] For all of the above reasons, even if s.36 of the *VSA* could be regarded as a "special program" within the meaning of s.14 of the *Code*, I find that the respondent is not able to rely upon the defence afforded by s.14 of the *Code* to shield itself from the applicant's claim that the application of s.36 of the *VSA* to her resulted in substantive

discrimination on the basis of sex and/or disability.

REMEDY

[269] By way of remedy, the applicant seeks monetary compensation, an apology from the respondent, and a public interest remedy with respect to the future requirements for changing sex designation on registrations of birth.

[270] Section 45.2 of the *Code* establishes the Tribunal's remedial authority in this matter:

> s.45.2 (1) On an application under section 34, the Tribunal may make one or more of the following orders if the Tribunal determines that a party to the application has infringed a right under Part I of another party to the application:
>
> 1. An order directing the party who infringed the right to pay monetary compensation to the party whose right was infringed for loss arising out of the infringement, including compensation for injury to dignity, feelings and self-respect.
>
> 2. An order directing the party who infringed the right to make restitution to the party whose right was infringed, other than through monetary compensation, for loss arising out of the infringement, including restitution for injury to dignity, feelings and self-respect.
>
> 3. An order directing any party to the application to do anything that, in the opinion of the Tribunal, the party ought to do to promote compliance with this Act.
>
> (2) For greater certainty, an order under paragraph 3 of subsection (1),
>
> (a) May direct a person to do anything with respect to future practices; and
>
> (b) May be made even if no order under that paragraph was requested.

Monetary Compensation

[271] The applicant asks the Tribunal to order the respondent to provide her with "general damages" to compensate her for the loss of her right to be free from

discrimination and to compensate her for intangible losses incurred as a result of the injury to her dignity, feelings and self-respect as a result of the discrimination she experienced.

[272] The applicant also seeks out-of-pocket expenses to cover the cost of disbursements incurred with respect to the hearing, and particularly disbursements incurred as a result of bringing Dr. Karasic from California to testify. Although in the Application she filed with the Tribunal, the applicant also claimed "special damages" to compensate her for financial losses she allegedly incurred as a result of the infringement of her rights under the *Code*, this claim was not pursued at the hearing (nor did the applicant lead any evidence upon which I might conclude that she suffered such losses or quantify them).

Damages for Injury to Dignity, Feelings and Self-respect

[273] Generally, the Tribunal has the remedial authority to award monetary compensation to an applicant where the infringement of her rights under the *Code* has resulted in injury to her dignity, feelings, and self-respect: s. 45.2(1) of the *Code.* However, where a person's rights under the *Code* have been infringed by the government pursuant to a legislative provision, different considerations apply. In such a case, monetary compensation may only be awarded if the Tribunal finds that the government has engaged in conduct that is negligent, clearly wrong, in bad faith, a result of wilful blindness or an abuse of power: *Ball v. Ontario (Community and Social Services)*, 2010 HRTO 360; *Hendershott*, above*; Ivancicevic*, above.

[274] This principle traces its origins to *Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405. In that case, the Supreme Court of Canada found certain provincial legislation abolishing a system of supernumerary judges violated the institutional guarantees of judicial independence contained in s.11(d) of the *Canadian Charter of Rights and Freedoms* and the Preamble to the C*onstitution Act, 1867* and was therefore constitutionally invalid. For our purposes, the decision is significant because the court found that, absent conduct that is clearly wrong, in bad faith or an

abuse of power, an award for damages will not be made to remedy the harm suffered as a result of the mere enactment or application of a law that is subsequently declared to be unconstitutional (at para. 79).

[275] The rationale underlying the principle in *Mackin* is that the rule of law would be undermined if governments were deterred from applying the law by the possibility of future damage awards in the event the law was, at some future date, to be declared invalid. *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28 ("*Ward*"), at para. 39. The limited immunity provided by *Mackin* is also justified because the law does not wish to chill the exercise of government's legislative and policy-making functions. *Ward*, above, at para. 40.

[276] The applicant argues that the Tribunal has been too quick to "fall into lockstep" with the approach in *Mackin* in cases such as *Ball*. The applicant contends that the correct approach is the one that was taken by the Tribunal in *Hogan*, above, at paras.165-166, where the majority considered *Mackin* and decided that it did not apply to limit the availability of damages in cases under the *Code*. The conclusion in *Hogan* appears to have been based, at least in part, on the fact that finding legislation to be inapplicable pursuant to s.47(2) of the *Code* is "not similar to rendering a provision unconstitutional", which was the context for the decision in *Mackin*.

[277] The applicant submits that the Supreme Court of Canada's 2006 decision in *Tranchemontagne v. Ontario (Director, Disability Support Program),* 2006 SCC 14, [2006] 1 S.C.R. 513, lends support to the approach to damages taken in *Hogan* insofar as the court in *Tranchemontagne* also emphasized the distinction between rendering a law inapplicable pursuant to s.47 of the *Code* and declaring a law constitutionally invalid pursuant to s.52 of the *Charter*. Indeed, the applicant submits that the jurisprudence that has applied *Mackin* to limit government liability for damages in cases under the *Code* has been "superseded" by the Supreme Court's 2006 decision in *Tranchemontagne*. The applicant submits that, in a post-*Tranchemontagne* era, it is incumbent on the respondent to justify a continued limitation on the availability of damages under the *Code* in cases against the Crown, particularly in light of the fact that

the *Code* itself contains no such limitation. On the contrary, submits the applicant, s.47 of the *Code* makes the whole of the *Code*, including its remedial provisions, binding upon the Crown.

[278] The Supreme Court of Canada's 2006 decision in *Tranchemontagne* found that the Social Benefits Tribunal ("SBT") had jurisdiction to interpret and apply the *Code,* notwithstanding that its enabling legislation prohibited it from considering the constitutional validity of laws and regulations. According to the Court's reasoning, at para. 31, the fact that the SBT had no jurisdiction to overturn legislation enacted by the legislature that created it did not mean that the SBT lacked jurisdiction to apply legislation enacted by that legislature in order to resolve conflicts between statutes (i.e. s.47 of the *Code*).

[279] Although the Supreme Court's decision thus emphasizes that different kinds of scrutiny occur under the *Code*, on the one hand, and the *Charter*, on the other, I agree with the respondent that the decision does not speak, directly or indirectly, to the issue of whether damages are available if a person's rights under the *Code* are found to have been infringed as a result of the application of legislation by the government.

[280] I also agree with the respondent that the Divisional Court's decision in *Braithwaite*, above, is dispositive of this issue. In *Braithwaite*, at para. 88, the Ontario Divisional Court found that the principle in *Mackin* applies to limit the availability of damages in cases under the *Code.* Specifically*,* in the absence of conduct that is clearly wrong, in bad faith or an abuse of power, the Court held that damages are not available to remedy an infringement of the *Code* resulting from the application of legislation. That decision is binding on me. Thus, in order for the applicant to succeed in her claim for damages, she would have to establish that the respondent acted in a manner which was clearly wrong, in bad faith, or an abuse of power or otherwise fell within the exceptional circumstances identified in *Mackin*.

[281] Although, at one point during the hearing, the applicant stated that she was not arguing that the respondent's conduct fell within the exceptional circumstances in which

damages may be available to remedy discrimination resulting from the application of legislation, at another (earlier) point, she suggested that the respondent's conduct in applying s.36 of the *VSA* had been "clearly wrong" and in flagrant disregard of its human rights obligations. Although it is thus not entirely clear that the applicant seeks damages pursuant to the exception in *Mackin*, to the extent that she does, I am not persuaded that the respondent's conduct in this case meets the threshold that might expose it to liability for damages.

[282] I do not doubt that the applicant feels very strongly that the respondent was wrong to have required her to certify that she had undergone "transsexual surgery" in order to obtain a birth certificate that accorded with her gender identity. That said, there is no evidence upon which I might conclude that, when the respondent applied the provisions of the *VSA* to the applicant, it acted in a manner that was clearly wrong, in bad faith, an abuse of its powers or that otherwise met the threshold of gravity required to justify an award of damages against it. There is no evidence that the respondent knew that its requirements for changing sex designation on a birth registration were inconsistent with its obligations under the *Code*. That has only just been determined. The absence of any evidence establishing that the respondent had knowledge that the application of the provisions of the *VSA* infringed the applicant's rights under the *Code* militates against a finding that the respondent is liable to the applicant in damages (*Mackin*, above, at para. 82-83; *Ball,* above*,* at para. 171), particularly in the absence of any other evidence of ulterior motives, bad faith, or abuse of power on the part of the respondent.

[283] Accordingly, I decline to order the respondent to pay the applicant monetary compensation for injury to her dignity, feelings and self-respect arising out of the infringement of her rights under the *Code*.

Out-of-pocket expenses incurred in relation to hearing/calling of expert witness

[284] I also deny the applicant's claim for "special damages" to cover the cost of out-of-pocket expenses incurred in relation to the hearing and/or in relation to bringing Dr.

Karasic to testify as an expert witness. The applicant's claim for "special damages" to cover the cost of disbursements incurred in relation to the hearing is essentially a claim for legal costs by another name: *Ketola v. Value Propane Inc. (No.2)* (2002), 44 C.H.R.R. D/37 (Ont. Bd. Inq.) at para. 22-28; *Hogan*, above, at para. 189-190 and para. 242. The Tribunal has no jurisdiction to award legal costs: *Clennon v. Toronto East General Hospital*, 2010 HRTO 506; *Dunn v. United Transportation Union, Local 104*, 2008 HRTO 405. This aspect of the applicant's claim for monetary compensation is denied accordingly.

Apology

[285] By way of remedy, the applicant also seeks an Order from the Tribunal directing the respondent to provide her with an apology.

[286] As a general rule, the Tribunal is reluctant to order apologies pursuant to its remedial powers under the *Code*. As the Tribunal stated in *Abdallah v. Thames Valley District School Board,* 2008 HRTO 230:

> Historically, the jurisprudence of this Tribunal has generally declined to order parties to provide an apology on the basis that such orders are viewed as inappropriate or an ineffective remedy and raise potential freedom of expression concerns. (See also *Turnbull v. Famous Players*, 2001 CanLII 26228 (ON H.R.T.), (2001) 40 C.H.R.R. 333 at para. 264, and the cases cited therein).

[287] There is nothing in the circumstances of this case that persuades me that I ought to depart from the Tribunal's general approach to ordering apologies. I therefore decline to order the respondent to apologize to the applicant.

Order for Future Compliance

[288] I now turn now to the issue whether the Tribunal should make an order under s. 45.2(1).3 to promote future compliance with the *Code* in the case at hand.

[289] Pursuant to s.45.2(1).3 of the *Code*, the Tribunal has the authority to make an

Order directing any party to the Application to do anything with respect to its future practices (s.45.2(2)(a)) that, in the opinion of the Tribunal, the party ought to do to promote compliance with the *Code*. Moreover, the *Code* specifically provides that the Tribunal may make such an Order even if not requested by the parties: s.45.2(2)(b).

[290] The Tribunal does not have jurisdiction to set aside or strike down legislation: *Tranchemontagne v. Ontario (Director, Disability Support Program*) [2006] 1 S.C.R. 513, at para. 34-36. Nor does the Tribunal have authority to formulate or require the adoption of a new legislative or regulatory provision. *Malkowski v. Ontario Human Rights Commission*, 2006 CanLII 43415 (ON SCDC), at para. 34.

[291] However, where the Tribunal finds that a legislative provision purports to require or authorize conduct that contravenes the *Code* (and unless the Legislature has enacted a provision specifically providing that the impugned provision is to apply despite the *Code*), then, pursuant to s.45.2(1).3 and s.47 of the Code, the Tribunal may direct the respondent not to follow the offending legislation, not only with respect to the applicant in a given case, but with respect to those similarly situated to the applicant. *Hendershott,* above*,* at para. 128; *Ivancicevic*, above, at para. 217.

[292] As part of its power to make "an order directing any party to the application to do anything that, in the opinion of the Tribunal, the party ought to do to promote compliance with this Act", the Tribunal also has the remedial authority to direct a respondent to take positive steps in order to comply with its obligations under the *Code*.

[293] Thus, in *Ball*, after finding that the government's failure, in regulations under the *Ontario Works Act*, *1997*, S.O. 1997, c. 25, Sched. A, as amended, and the *Ontario Disability Support Program Act*, *1997*, S.O. 1997 c. 25, Sched. B, to provide adequate and/or any special diet allowances for persons with certain disabilities as compared to others with different disabilities was discriminatory, the Tribunal directed those responsible for administering the Ontario Disability Support Program and Ontario Works to provide special diet benefits for individuals with the disabilities in question in accordance with the *Code* principles set out in the decision. *Ball*, above, at para. 172.

Although the Crown in that case successfully challenged one of the Tribunal's factual findings on judicial review (as well as the legal finding and remedial order that flowed therefrom), it did not challenge the Tribunal's jurisdiction to order that the special diet program be administered in accordance with the *Code*. Nor did the court on judicial review appear to take issue with the Tribunal having provided such a remedy. See *Ontario (Community and Social Services) v. W.B.*, 2011 ONSC 288, at para. 26.

[294] In the case at hand, I have found that requiring transgendered persons, pursuant to s.36 of the *VSA,* to have "transsexual surgery" in order to obtain a change in sex designation on a birth registration is contrary to the *Code*. As the *Code* has primacy over other legislation and the legislature has not exempted s.36 of the *VSA* from the application of the *Code*, the surgical requirement in s.36 of the *VSA* ought not to be applied by the respondent (*Tranchemontagne*, above, at para. 35), subject to one caveat discussed below.

[295] In addition, I have found that the overall legislative scheme for issuing birth certificates under the *VSA* has a discriminatory impact on transgendered persons. This discriminatory impact triggers the respondent's duty to accommodate the needs of transgendered persons in relation to the system for issuing birth certificates under the *VSA,* pursuant to s.11 of the *Code*. Thus, in order to promote future compliance with the *Code*, I find it appropriate to direct the respondent to accommodate the needs of members of the group to which the applicant belongs in relation to the legislative scheme for issuing birth certificates under the *VSA* by taking steps to eliminate the discriminatory effect of that scheme on them, up to the point of undue hardship, and in accordance with the principles reflected in this decision.

[296] I decline to grant, however, the applicant's request that I specify the precise manner by which the respondent is to accommodate the needs of transgendered persons in relation to the system for issuing birth certificates and/or changing sex designation on a birth registration under the *VSA*.

[297] I do not disagree with the applicant that the respondent could fulfill its duty under

the *Code* to accommodate the needs of transgendered persons by allowing them to change the sex designation on their birth certificates by submitting doctors' certificates certifying that the sex designation on their registrations of birth should be changed (i.e. s.36 of the *VSA* minus the surgical requirement). I also agree that, if it wishes to do so, the respondent could opt to accept guarantors' statements as satisfactory evidence to support a change in sex designation without running afoul of the *Code*. However, as the respondent points out, these may not be the only options by which the respondent might accommodate the needs of transgendered persons under the *VSA*. There may be a number of ways in which the respondent could fulfill its duty to accommodate the needs of transgendered persons, some of which may better meet the respondent's legitimate objectives under the *VSA* than others. In the circumstances of this case, I agree with the respondent that the ultimate selection of the method by which the respondent will fulfill its obligations under the *Code* is best left to the respondent.

[298] Accordingly, within 180 days of the date of this Decision, I order the respondent to revise the criteria for changing sex designation on a birth registration, up to the point of undue hardship, so as to remove the discriminatory effect of the current system on transgendered persons. Such revision should be in accordance with the reasoning in this Decision. In addition, within a further 30 days, the respondent is ordered to take reasonable steps to publicize the revised criteria for changing sex designation on a birth registration so that transgendered persons are aware of them.

[299] Finally, the caveat mentioned above: I am aware that some transgendered persons may have already undergone or are in the process of undergoing surgery with a view to satisfying the respondent's requirements for a change in sex designation pursuant to s. 36 of the *VSA*. I do not want any such transgendered persons to be prejudiced by this Decision, and order that their applications for a change in sex designation on a birth registration be administered in the normal course pending the development and publication by the respondent of the revised criteria for changing sex designation on a birth registration.

ORDER

[300] The Tribunal makes the following orders:

1) The respondent shall cease requiring transgendered persons to have "transsexual surgery" in order to obtain a change in sex designation on their registration of birth;

2) Within 180 days of the date of this Decision, the respondent shall revise the criteria for changing sex designation on a birth registration, up to the point of undue hardship, so as to remove the discriminatory effect of the current system on transgendered persons. The revision of the criteria for changing sex designation on a birth registration should be in accordance with the reasoning in this Decision.

3) Within a further 30 days, the respondent shall take reasonable steps to publicize the revised criteria for changing sex designation on a birth registration so that transgendered persons are aware of them.

4) Any applications by transgendered persons who have already undergone or are in the process of undergoing "transsexual surgery" with a view to satisfying the respondent's requirements for a change in sex designation pursuant to s. 36 of the *VSA* shall be administered in the normal course pending the development and publication of the revised criteria for changing sex designation on a birth registration.

Dated at Toronto, this 11th day of April, 2012.

"Signed by"

_____

Sheri D. Price
Vice-chair