

# QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2018 SKQB 159**

Date: **2018 05 24**  
Docket: QBG 2037 of 2017  
Judicial Centre: Regina

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BETWEEN:

DAVID ARNOT, CHIEF COMMISSIONER OF  
THE SASKATCHEWAN HUMAN RIGHTS

APPLICANT

- and -

FRANCES THACKERAY FORSBERG (on behalf  
of RENN WILLOW FORSBERG) and DUSTIN  
DYCK (on behalf of LUCAS DYCK)

COMPLAINANTS

- and -

GOVERNMENT OF SASKATCHEWAN and  
eHEALTH SASKATCHEWAN

RESPONDENTS

**Counsel:**

Scott Newell and Meghan Seidle for the Saskatchewan Human Rights  
Commission

Larry Kowalchuk and Micah Kowalchuk for the complainants

Barb Mysko for the Government of Saskatchewan and eHealth Saskatchewan

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JUDGMENT  
MAY 24, 2018

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KROGAN J.

[1] All parties have agreed that I may hear and determine the applications before the court despite having been appointed the pre-hearing conference Justice with respect to these matters.

[2] The parties have also agreed, in accordance with Rule 3-72 of *The Queen's Bench Rules*, that the Request for a Hearing pursuant to s. 29.6 of *The Saskatchewan Human Rights Code*, SS 1979, c S-24.1 [*Code*] may be amended to add Dustin Dyck (on behalf of Lucas Dyck) as a party to this action. As such, there is an order for that amendment.

[3] The request for the hearing pursuant to s. 29.6 of the *Code* is advanced by the Chief Commissioner of the Saskatchewan Human Rights Commission [Commission] respecting the complaints of Francis Thackeray Forsberg and Dustin Dyck [complainants] against the Government of Saskatchewan and eHealth Saskatchewan due to specific provisions in *The Vital Statistics Act, 2009*, SS 2009, c V-7.21 [*Act*].

[4] Section 65 of the *Act* provides that a certificate of birth is to set out, among other particulars, the sex of an individual. Section 31 of the *Act* allows for a person who is at least 18 years of age and whose birth is registered in Saskatchewan, to apply to the Registrar of Vital Statistics to have the designation of sex amended on a certificate of birth if certain information, as outlined in s. 31, is provided. However, there is currently no mechanism in the *Act* to enable such an amendment where an individual is under the age of 18 years. Further, where an individual, regardless of age, does not identify either as male or female, the *Act* still requires a designation on their certificate of birth. The choice not to identify is not permitted by the *Act*.

[5] It is because of these issues arising from the *Act* that the complainants have sought the assistance of the Commission and the intervention of the court. A date for a hearing of these matters has been set and is quickly approaching. The Commission comes before the court now with an application that would conclude the matter without the necessity of the hearing. The application arises as a result of a Statement of Facts which all parties have, in writing, agreed to and also because of the positions taken by the parties as a consequence of those facts.

[6] A determination regarding this application is required on an expedited basis. This decision is therefore of a more conclusory nature than had time been a greater luxury.

[7] Procedurally, it is necessary that an order abridging the time for service and filing of this particular application be granted and it is. The substance of the application must now be considered.

[8] The *Code* is essential to the health and strength of our community. Section 3 captures the objects of the *Code* which include recognition of the inherent dignity and equal, inalienable rights of persons. The *Code* also supports the advancement of public policy that aims to eliminate discrimination. Discriminatory practices identified in Part II of the *Code* are explicitly prohibited. Such discrimination includes the denial of services offered to the public on the basis of a prohibited ground.

[9] Section 12 of the *Code* is situated in Part II. Relevant portions of s. 12 read:

12(1) No person, directly or indirectly, alone or with another, or by the interposition of another shall, on the basis of a prohibited ground:

(a) deny to any person or class of persons the...services...that are offered to the public; or

(b) discriminate against any person or class of persons with respect to the...services...that are offered to the public.

...

[10] As identified in s. 2 of the *Code*, gender identity is a prohibited ground.

[11] The provision of a birth certificate pursuant to the act is a “service” within the meaning of the *Code* (see *XY v Ontario (Government and Consumer Services)*, 2012 HRTO 726 at para 85).

[12] The Agreed Statement of Facts contains a procedural history of the efforts of the complainants and the Commission. It also contains admissions of the Government of Saskatchewan (Ministry of Health) and eHealth Saskatchewan [respondents] that are important to this discussion. Paragraphs 27 and 28 of the Agreed Statement of Facts read:

27. The Respondents admit that section 31 of the Act discriminates against Renn Forsberg by not outlining criteria to allow for a change to her sex designation on Renn's birth certificate.

28. The Respondents admit that section 65 of the act discriminates against Lucas Dyck to the extent that it does not provide an option for Lucas to remove the sex designation from Lucas' birth certificate.

[13] The admissions contained in the above paragraphs lead to a conclusion that s. 31 and s. 65 of the *Act* breach s. 12 of the *Code*. A response from the court is required to preserve the dignity of the complainants and to recognize the equal, inalienable rights of all persons.

[14] Although having acknowledged that s. 31 and s. 65 are discriminatory in the manner described, the respondents neither consent to nor oppose the specific relief sought by the Commission.

[15] That specific relief is captured in a draft order filed by the Commission and consented to by the complainants. The draft order reads:

On the application for a hearing brought by the Saskatchewan Human Rights Commission and upon reviewing the materials before the court:

WHEREAS the Complainants have filed complaints (the “Complaints”) alleging that *The Vital Statistics Act, 2009* (the “Act”) breaches section 12 of *The Saskatchewan Human Rights Code* on the basis of sex and gender identity;

WHEREAS section 20 of the *Act* requires that, in the event of a live birth, a statement of live birth is to be completed and the live birth is to be registered on the basis of that statement;

WHEREAS birth certificates are an extract of the statement of live birth and are issued by the Registrar of Vital Statistics (the “Registrar”) to individuals upon request;

WHEREAS section 31 of the *Act* does not permit individuals who are under the age of eighteen years to amend the sex designations on their birth certificates;

WHEREAS section 65 of the *Act* requires that birth certificates display a sex designation;

WHEREAS the Complainants are transgender individuals who are under the age of eighteen years;

WHEREAS the Complainants wish to have the designation of sex on their birth certificates changed or removed as quickly as possible;

WHEREAS an interim Order of this Court is necessary so that the Registrar of Vital Statistics changes the designation of sex on the birth registration and certificate or removes the designation of sex on the birth certificate, notwithstanding the absence of existing criteria.

IT IS HEREBY ORDERED:

- a. Section 31 of *The Vital Statistics Act, 2009* breaches the rights of Renn Forsberg under section 12 of *The Saskatchewan Human Rights Code* to the extent that it prohibits her from applying to have the designation of sex on her birth registration changed;
- b. The Respondents shall issue Renn Forsberg an amended birth certificate with a female sex designation within ten days of this Order;
- c. Section 65 of *The Vital Statistics Act, 2009* breaches the rights of Lucas Dyck under section 12 of *The Saskatchewan Human Rights Code* to the extent that it fails to provide an option for Lucas to remove the sex designation from the birth certificate;
- d. The Respondents shall issue Lucas Dyck a birth certificate without a sex designation within twenty days of this Order;
- e. The Respondents shall create new criteria to remedy the aforementioned breaches within 45 days of the issuance of this Order.
- f. There will be no order for financial compensation, damages or costs.

[16] The relief requested is necessary to address the identified discrimination and the breach of s. 12 of the *Code*. It is also necessary to ensure adherence with the objects of the *Code*.

[17] The draft order is granted. The hearing dates are vacated.

  
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J.  
L.L. KROGAN