Federal Court Decisions

Case name:	Canada (Attorney General) v. Canada (Human Rights Commission)
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T-2034-01

Neutral citation: 2003 FCT 89

BETWEEN:

T-1718-01

ATTORNEY GENERAL OF CANADA,

Applicant,

- and -

CANADIAN HUMAN RIGHTS COMMISSION,

Respondent.

T-2034-01

CANADIAN HUMAN RIGHTS COMMISSION,

Applicant,

- and -

ATTORNEY GENERAL OF CANADA,

Respondent.

REASONS FOR ORDER

LAYDEN-STEVENSON J.

[1] This matter is about the policies of the Correctional Service of Canada regarding transsexual inmates. The impugned policies relate to the placement of pre-operative transsexual inmates and the prohibition regarding access to sex reassignment surgery for incarcerated individuals.

[2] These reasons relate to two applications for judicial review: T-1718-01 (with respect to the policy regarding sex reassignment surgery) and T-2034-01 (having to do with the policy regarding placement of pre-operative transsexual inmates). Both applications are in relation to a decision of the Canadian Human Rights Tribunal (the tribunal) dated August 31, 2001. By order of the prothonotary dated January 22, 2002, pursuant to Rule 105 of the ***Federal Court Rules, 1998***, the applications were heard one immediately after the other.

FACTS

[3] Ms. Synthia Kavanagh , a transsexual prison inmate serving a life sentence for a 1989 second degree murder conviction, initiated a complaint to the Canadian Human Rights Commission (the commission) alleging discrimination by the Correctional Service of Canada (CSC) on the basis of sex and disability. Her individual claim against CSC was settled prior to the hearing before the tribunal. The agreed facts submitted to the tribunal are set out below.

a) A person with Gender Identity Disorder is someone who, in spite of normal internal and external sexual characteristics, is convinced that she or he belongs in the other gender.

b) Ms. Kavanagh has been diagnosed by Dr. Hucker as suffering from Gender Identity Disorder. Dr. Watson has diagnosed her as suffering from Gender Identity Disorder (high intensity).

c) Gender Identity Disorder is a recognized medical syndrome classified within the Diagnostic and Statistical Manual (DSM IV).

d) Hormone therapy, followed by sex reassignment surgery, is recognized by some doctors as an appropriate treatment for Gender Identity Disorder in properly screened candidates.

e) In 1989 Ms. Kavanagh was convicted of second degree murder and was sentenced to a term of life without the possibility of parole for 15 years in a federal correctional facility.

f) Throughout her incarceration, Ms. Kavanagh made persistent requests for sex reassignment surgery. She also frequently requested transfer to a correctional facility for women but, the respondent says, she has not been consistent in this request.

g) In her three complaints to the Canadian Human Rights Commission (CHRC), each dated September 7, 1993, Ms. Kavanagh sought the following accommodation for her Gender Identity Disorder:

i) reinstatement of her hormone therapy; ii) consideration for sex reassignment surgery; and iii) accommodation in a correctional facility for women.

h) Ms. Kavanagh 's hormone therapy was reinstated in October, 1993.

i) The Correctional Service of Canada (CSC), in accordance with its policies and medical advice, consistently denied Ms. Kavanagh access to sex reassignment surgery and a transfer to a correctional facility for women.

j) The CSC's current health services policy concerning the treatment of transsexuals in prison is set out in *Commissioner's Directive 800* ("Health Services Policy").

k) With respect to the placement of transsexuals in correctional facilities, the policy states as follows:

30. Unless sexual reassignment surgery has been completed, male inmates shall be held in male institutions.

l) With respect to sex reassignment surgery, the policy states as follows:

31. Sexual reassignment surgery will not be considered during the inmate's incarceration.

m) In 2000, in accordance with a settlement reached in her human rights complaints, Ms. Kavanagh received sex reassignment surgery at her own expense and, at her request, was transferred to the Joliette Institution for Women in Quebec where she continues to serve her sentence (as of the date of the Tribunal Hearing).

n) Since transferring to Joliette, Ms. Kavanagh has had a consensual sexual relationship with another female inmate.

o) Also while at Joliette, Ms. Kavanagh self-mutilated, which precipitated her voluntary placement at the Philippe Pinel Institute, a psychiatric hospital.

THE DECISION

[4] The tribunal found that discrimination on the basis of transsexualism constitutes discrimination on

the basis of sex as well as on the basis of disability, both of which are prohibited grounds of discrimination under subsection 3(1) of the ***Canadian Human Rights Act***, R.S.C. 1985, c. H-6 (CHRA). It determined that both of the policies in issue were prima facie discriminatory. It then considered whether there existed bona fide justification and applied the three-part test set out in ***British Columbia (Public Service Employee Relations Commission v. B.C.G.S.E.U.***, [1999] 3 S.C.R. 3 (***Meiorin***) and ***British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)***, [1999] 3 S.C.R. 868 (***Grismer***). CSC had to establish that it adopted the [policy] for a purpose that is rationally connected to the function being performed. The focus at this stage is not on the validity of the [policy] in issue, but rather on the validity of its more general purpose. CSC had to establish that it adopted its policy in good faith in the belief that it is necessary for the fulfilment of its purpose or goal. Finally, CSC had to establish that its policy is reasonably necessary to accomplish its goal, in the sense that it cannot accommodate persons with the characteristics of the complainant without incurring undue hardship.

[5] Regarding the rational connection test, counsel for the commission conceded that the CSC policies were rationally connected to its obligation to care for inmates. With respect to the good faith test, i.e., that CSC adopted its policies in good faith, counsel for the commission conceded that there was no evidence that CSC had acted other than in complete good faith in the formulation of its policies. Regarding the third test, undue hardship, the tribunal stated, "[T]he onus is on CSC to establish that its policy is reasonably necessary to accomplish its goal, in the sense that it cannot accommodate persons with the characteristics of the complainant, without incurring undue hardship".

[6] In the case of the policy prohibiting consideration of sex reassignment during incarceration (section 31 of the policy) the tribunal concluded that CSC had failed to justify the blanket policy prohibiting inmate access to sex reassignment surgery. In the case of the policy regarding placement (section 30 of the policy), the tribunal concluded that although it was satisfied that CSC had demonstrated that it is not possible to house pre-operative male to female transsexuals in women's prisons, CSC had not justified its failure to recognize the special vulnerability of the pre-operative transsexual inmate population within the various types of facilities available in the male prison system.

RELEVANT STATUTORY PROVISIONS AND GUIDELINES

[7] The ***Corrections and Conditional Release Act***, S.C. 1992, c. 20 (CCRA), subsection 86(1), mandates that CSC provide essential health care to inmates. Sections 97 and 98 authorize the Commissioner of Corrections to make rules and directives in relation to the management of CSC and generally for carrying out the purposes of Part I of the CCRA, which includes health care. Those sections read:

86.(1) The Service shall provide every inmate with (a) essential health care; and(b) reasonable access to non-essential mental health care that will contribute to the inmate's rehabilitation and successful reintegration into the community. (2) The provision of health care under subsection (1) shall conform to professionally accepted standards.	86. (1) Le Service veille à ce que chaque détenu reçoive les soins de santé essentiels et qu'il ait accès, dans la mesure du possible, aux soins qui peuvent faciliter sa réadaptation et sa réinsertion sociale. (2) La prestation des soins de santé doit satisfaire aux normes professionnelles reconnues.
97. Subject to this Part and the regulations, the Commissioner may make rules (a) for the management of the Service; (b) for the matters described in section 4; and (c) generally for carrying out the purposes and provisions of this Part and the regulations.	97. Sous réserve de la présente partie et de ses règlements, le commissaire peut établir des règles concernant_: a) la gestion du Service; b) les questions énumérées à l'article 4; c) toute autre mesure d'application de cette partie et des règlements.

98. (1) The Commissioner may designate as Commissioner's Directives any or all rules made under section 97.

(2) The Commissioner's Directives shall be accessible to offenders, staff members and the public.

98. (1) Les règles établies en application de l'article 97 peuvent faire l'objet de directives du commissaire.

(2) Les directives doivent être accessibles et peuvent être consultées par les délinquants, les agents et le public.

[8] The definition of "essential health services" is contained in Health Services Policy, Commissioner's Directive 800 (the policy). The policy contains a number of sections relevant to this matter.

POLICY OBJECTIVE

1. To ensure that inmates have access to essential medical, dental and mental health services in keeping with generally accepted community practices.

ESSENTIAL HEALTH SERVICES

2. Inmates shall have access to screening, referral and treatment services. Essential services shall include:

a. emergency health care (i.e., delay of the service will endanger the life of the inmate);

b. urgent health care (i.e., the condition is likely to deteriorate to an emergency or affect the inmate's ability to carry on the activities of daily living);

c. mental health care provided in response to disturbances of thought, mood, perception, orientation or memory that significantly impairs judgment, behaviour, the capacity to recognize reality or the ability to meet the ordinary demands of life. This includes the provision of both acute and long-term mental health care services ...

NON-ESSENTIAL INMATE-REQUESTED SERVICES

26. All inmate-requested services deemed non-essential by the institutions physician will be at the inmate's complete expense including consultation fees

and at the discretion of institutional heads, any associated escort costs. Health Services shall be responsible for the coordination of arrangements for

all inmate-requested services.

OBJECTIF DE LA POLITIQUE

1. S'assurer que les détenus ont accès aux services médicaux, dentaires et de santé essentiels, conformément aux pratiques généralement admises dans la collectivité.

SERVICES DE SANTÉ ESSENTIELS

2. Les détenus ont accès à des services d'évaluation, d'aiguillage et de traitement. Les services essentiels comprennent :

a. les soins d'extrême urgence (le retard du service mettra en danger la vie du détenu);

b. les soins d'urgence (l'état du détenu se détériorera probablement au point d'exiger des soins d'extrême urgence ou le détenu pourra perdre la capacité d'exercer ses activités);

c. les soins de santé mentale donnés en réponse aux troubles de la pensée, de l'humeur, de la perception, de l'orientation ou de la mémoire qui altèrent considérablement le jugement, le comportement,

le sens de la réalité ou l'aptitude à faire face aux exigences normales de la vie. Cette définition vise les services actifs et prolongés de soins de santé mentale

SERVICES NON ESSENTIELS DEMANDÉS PAR DES DÉTENUS

26. Lorsque le détenu demande des services qui ne sont pas jugés essentiels par le médecin de l'établissement, il doit en assumer tous les frais, y compris les frais de consultation et, à la discrétion du directeur, les coûts connexes associés aux fonctions d'escorte. Les services de santé sont responsables de la coordination des dispositions relatives à tous les services demandés par

des détenus.

The following provisions are also contained in the policy:

30. Unless sexual reassignment surgery has been completed, male inmates shall be held in male institutions.	30. À moins d'avoir subi une opération chirurgicale pour changer de sexe, les détenus de sexe masculin doivent être gardés dans des établissements réservés aux hommes.
31. Sexual reassignment surgery will not be considered during the inmate's incarceration.	31. Ce type de chirurgie reconstructive ne sera pas envisagé pendant la peine du détenu.

APPLICATION FOR JUDICIAL REVIEW - T-2034-01 (CSC POLICY WITH RESPECT TO PLACEMENT OF TRANSSEXUAL INMATES)

[9] The tribunal declared section 30 of the CSC policy (placement of transsexual inmates) to be discriminatory and ordered CSC to take steps, in consultation with the Canadian Human Rights Commission, to formulate a policy that ensures that the placement needs of transsexual inmates are identified and accommodated, in accordance with [the tribunal's] decision. The order further requires the parties to file with the tribunal copies of CSC's revised policy within six months of the date of the decision. The tribunal specifically retains jurisdiction to deal with any outstanding issues relating to the terms of the policy.

[10] The application for judicial review of the "placement" decision is brought by the Canadian Human Rights Commission (the commission), which will be referred to as either the "commission" or the "applicant" in this section of these reasons.

THE APPLICANT

[11] The applicant argues, in its written submission, that the tribunal erred by relying upon impressionistic evidence in reaching its conclusion that male to female pre-operative transsexual inmates cannot be placed in female institutions. The basis for the argument is that there was no study, report, brief or analysis of any description before the tribunal with respect to this issue. The commission submits that there was no evidence that CSC seriously considered accommodating pre-operative transsexuals in institutions other than those that conform with the inmate's anatomical sex. The vague impressions of the CSC witnesses regarding the effect on the female inmate population were not substantiated and further, contends the commission, there was no evidence with respect to the capacity of CSC to educate the female inmate population regarding the nature of gender dysphoria to counteract prejudices.

[12] Referring to the test for justification from ***Meiorin*** and ***Grismer***, the commission argues that those cases underscore the onus on the discriminating party to provide cogent evidence that it is impossible to accommodate without incurring undue hardship and that impressionistic evidence does not suffice. The applicant submits that the result in ***Sheridan v. Sanctuary Investments Ltd. (c.o.b. B. J.'s Lounge)*** (1999), C.H.R.R. D/467 (B.C.H.R.C.) ought to have been applied.

[13] At the hearing of the application, counsel for the commission made only passing reference to the written argument regarding "impressionistic evidence". Rather, the oral submissions focussed nearly exclusively on the tribunal's alleged failure to properly address the test set out in ***Meiorin*** and ***Grismer***. Specifically, the commission says that the tribunal failed to require CSC to demonstrate that it had canvassed all possibilities of accommodation. That failure is an error of law. The applicant maintains that it was the commission, not CSC, that presented alternatives regarding accommodation. It was not sufficient for the tribunal to make the finding that it did because CSC was required to go further and canvass all possibilities. The commission contends that the evidence from CSC is to be proactive, not reactive. It submits that the application for judicial review should be allowed and the matter should be returned to canvass and determine whether options, other than those presented by the commission, exist. Finally, the commission submits that if the application is not allowed, the court should send a clear message to the tribunal that the onus lies with the respondent with respect to exhausting all accommodation alternatives. It is essential, argues the commission, that clarification be provided regarding the details that are missing in the tribunal's analysis.

THE RESPONDENT

[14] The respondent disputes the allegations regarding the details that allegedly are missing in the tribunal's analysis and disputes the allegation that the evidence was impressionistic. The respondent refers to the evidence provided by three expert witnesses and three lay witnesses. The evidence of Ms. Wrenshall, declared to be an expert in the prison system and specifically with respect to female inmates, included reference to research as well as the recommendations of the Arbour Commission report. It was not necessary, submits the respondent, to enter the research in evidence; it was sufficient that the witness had reference to it in arriving at her conclusions. As for the lay witnesses, the respondent submits that their evidence was founded on specific credible observations. It was therefore open to the tribunal to accept this evidence and it did not commit a reviewable error in this regard.

[15] The respondent also argues that the tribunal correctly concluded that there was sufficient evidence to support a finding that pre-operative male to female transsexuals pose a risk to female inmates and that ***Meiorin*** permits consideration of whether a particular method of accommodation would create a substantial interference with the rights of others. The ***Sheridan*** case is distinguishable because the concern regarding the female inmate population is not analogous to the use of public washrooms by women.

[16] The respondent agrees that the onus lies with CSC to lead evidence of undue hardship but disputes that it must establish a process of investigation. The order in which the evidence is presented impacts on the commission's argument. The respondent submits that the commission's witnesses testify first. If the evidence tendered by the commission deals with various accommodation options and CSC also tenders evidence with respect to those options, can it be said that CSC failed to lead evidence? The position taken by the applicant, argues the respondent, is tantamount to requiring CSC to state that it cannot conceive of any other options. While that might have been preferable for completeness, it was not, submits the respondent, an error of law for the tribunal not to require it.

ANALYSIS

[17] The deference to be afforded a human rights tribunal has been considered in a number of authorities and was discussed at some length by Gibson J. in ***International Longshore and Warehouse Union (Marine Section), Local 400 v. Oster***, [2002] 2 F.C. 430 (T.D.). Applying the guidance provided in ***Pushpanathan v. Canada (Minister of Citizenship and Immigration)***, [1998] 1 S.C.R. 982 and ***Baker v. Canada (Minister of Citizenship and Immigration)***, [1999] 2 S.C.R. 817, Gibson J. determined that the appropriate standard of review with respect to the decision of a human rights tribunal is, "correctness in respect of questions of law, reasonableness simpliciter in respect of questions of mixed law and fact and patent unreasonableness in respect of fact finding". I adopt the standard of review as set out by my colleague.

[18] The failure of a tribunal to apply the proper test is, as the commission submits, a question of law. The difficulty that I have with the commission's position is that it necessitates a narrow and, in my view, overly restrictive reading of the tribunal's decision. The tribunal correctly identified the issue as "placement of pre-operative transsexuals". Having found the CSC policy that male inmates shall be held in male institutions to be prima facie discriminatory, it then determined that, "the onus shifts to CSC to establish that it has a bona fide justification for its policy". As stated earlier, counsel for the commission conceded that CSC had satisfied both the rational connection and the good faith tests, leaving only the undue hardship test to be considered and determined.

[19] After reviewing all of the evidence, the tribunal determined that CSC had not justified its policy with respect to the placement of transsexual inmates. In arriving at that determination, it considered various accommodation options. It considered the option of a dedicated facility and determined that it was not a feasible alternative. The tribunal found that the logistics of this option created insurmountable problems for CSC because of the very small number of transsexuals (of whom only a portion will be interested in sex reassignment), the incompatibles within this number, the security levels of the identified inmates, the housing of the individuals in locations away from family and community support, the appropriateness of housing pre-operative male to female with female to male transsexuals as well as the 'ghettoisation' that could result, and the lack of the necessary critical mass for the provision of programming. The commission does not take issue with that finding.

[20] The tribunal also considered the option of placing the pre-operative transsexual in the target gender institution. Again, the tribunal determined that this was not a viable option. It found that the carceral setting was a unique context and that the vulnerability of the female inmate population as well as the physical risk posed by a pre-operative male to female transsexual to the female population precluded this option as a viable

accommodation alternative. The commission's argument regarding the issue of "impressionistic evidence" in relation to this finding will be addressed separately. For the moment, I am concerned with the allegation that the tribunal failed to apply the proper test.

[21] Another specific accommodation option referenced was that of housing the pre-operative transsexual in regional health centres during transition. In this respect, the tribunal noted that this suggestion emanated from the commission witnesses and that counsel for CSC had provided a response by reference to section 28 of the CCRA. The tribunal did not make any determination in this respect and although it did not specifically state that it had insufficient evidence before it to make such a determination, it is implicit, when regard is had to the decision in its totality, that that was the case.

[22] Finally, the tribunal found that CSC had not justified its policy with respect to placement because the policy failed to recognize the special vulnerability of the pre-operative transsexual inmate population. While recognizing that some measures in this respect had been taken, the tribunal found that these measures occurred on an ad hoc basis and were inconsistent. It also determined that there was a lack of formalized, requisite training for CSC staff dealing with this particular population.

[23] It is within this context that counsel for the commission, at the judicial review hearing, argued that the tribunal erred in law when applying the tests set out in ***Meiorin*** and ***Grismer***. In my view, the tribunal was explicit in stating that the onus lay with CSC. Moreover, it found that CSC did not satisfy the onus and had not justified its policy. I fail to see how the tribunal, when regard is had to the decision in its totality, can be said to have erred in law by not requiring the respondent to justify its policy. It did require CSC to justify its policy and found that it had failed in this regard. The tribunal did not err in law and the commission fails on this ground.

[24] I turn now to the allegation that the tribunal erred by relying on impressionistic evidence in reaching its conclusion that male to female pre-operative transsexual inmates cannot be placed in female institutions. Although the applicant's written submission characterizes this issue as a question of law, counsel during oral argument submitted that it was one that was, "close to mixed law and fact". The respondent characterizes it as one of mixed law and fact. In my view, it involves a question of whether the evidence relied upon by the tribunal was impressionistic evidence such that it erred in relying upon it in arriving at its factual finding. It is a question of mixed law and fact. It is therefore to be reviewed on a standard of reasonableness simpliciter.

[25] It is true that a standard that excludes members of a particular group on impressionistic assumptions is generally suspect: ***Grismer***. Impressionistic evidence has been referred to as being evidence founded on "dilute generality": ***Lee v. Canada (Canadian Human Rights Commission) and The British Columbia Maritime Employers Association*** (1997), 211 N.R. 235 (F.C.A.), leave to appeal to S.C.C. refused, [1997] 3 S.C.R. x. I take this to mean that it is evidence based on unsupportable impressions. The CSC, in its efforts to justify its position with respect to placing pre-operative transsexuals in the target gender institution, submitted that this particular accommodation option would create a substantial interference with the rights of other people i.e., the female inmate population.

[26] The tribunal concluded that there existed a "legitimate, objective basis for concern with respect to the vulnerability of the female inmate population and the impact that the placement of an anatomical male would have on these women". It also considered the physical risk to the female inmate population and concluded that there existed a "potential risk to female inmates ... although its significance should not be overstated". In arriving at the latter finding i.e., physical risk, the tribunal relied on the expert evidence of CSC forensic psychiatrist witnesses Dr. Dickey and Dr. Hucker as well as psychologist Ms. Petersen. Regarding the finding of vulnerability, it relied on the evidence of the lay witnesses Ms. Laishes, Ms. Lamm, and Ms. Dowson and largely on the evidence of Ms. Nancy Wrenshall, an expert on the prison system and specifically issues involving female inmates. Ms. Wrenshall's opinion was that the placement of pre-operative male to female transsexuals in female prisons would present a great risk of harm due to the vulnerability of the female inmate population with respect to males. Her opinion was based on her knowledge of the research regarding this issue, on some of the recommendations arising from the Arbour Commission and on her personal observations and experiences in dealing with the female inmate population. While that evidence does not constitute scientific data, neither can it be said to be founded on unsupportable impressions. In my view, the evidence was not "impressionistic" evidence. There is no fixed rule with respect to the nature and sufficiency of the evidence to justify a discriminatory practice: ***Ontario (Human Rights Commission) v. Borough of Etobicoke***, [1982] 1 S.C.R. 202.

[27] The tribunal noted that more information in this regard would have been helpful. Nonetheless, it was

satisfied, on the evidence that it had before it, that placement of pre-operative transsexual male inmates in a female facility was not a viable accommodation alternative. It appears, when reference is had to the comments of the tribunal set out below, that counsel for the commission was of the same view.

Both the Commission and Ms. Kavanagh acknowledge the concerns that arise with respect to the reception that a pre-operative transsexual would receive in a target gender institution. Both suggest that a compromise, such as a transitional facility, or accommodation at Regional Health Centres, is perhaps required. The 'bottom line', the Commission says, is that CSC's current standard does not pass muster, and something different must be done.

[28] Consideration of matters of this nature requires common sense and flexibility in the context of the factual situation presented in each case: ***Meiorin*** citing ***Commission scolaire régionale de Chambly v. Bergevin***, [1994] 2 S.C.R. 525.

[29] Here, on a standard of reasonableness simpliciter, the decision of the tribunal with respect to the accommodation option of placement in the target gender institution must withstand a somewhat probing examination: ***Canada (Director of Investigation and Research) v. Southam Inc.***, [997] 1 S.C.R. 748. For the reasons given, I conclude that the decision of the tribunal was reasonably open to it and that there exists no basis upon which this court should interfere.

[30] The applicant has not succeeded on either of its alleged grounds. The application for judicial review is dismissed. No costs are awarded.

APPLICATION FOR JUDICIAL REVIEW - T-1718-01 (CSC POLICY WITH RESPECT TO ACCESS TO SEX REASSIGNMENT SURGERY)

[31] The tribunal declared section 31 of the CSC policy (prohibition against consideration of sex reassignment surgery during inmate's incarceration) to be discriminatory and ordered CSC to cease applying the policy. The tribunal suspended its order for a period of six months from the date of the decision to allow CSC to consult with the Canadian Human Rights Commission with respect to the formulation of a new policy, consistent with the tribunal's reasons, regarding inmate access to sex reassignment surgery. The tribunal specifically retains jurisdiction to deal with any outstanding issues relating to the terms of the policy.

[32] The application for judicial review of the "sex reassignment surgery" decision is brought by the Attorney General of Canada on behalf of CSC. I will, for convenience, refer to the Attorney General as either "CSC" or the "applicant" in this section of these reasons.

THE APPLICANT

[33] The applicant argues that the tribunal erred by finding that sex reassignment surgery could fall within the definition of "essential health services" under the CCRA and the policy. Specifically, CSC submits that the defect in the decision flows from an assumption that was contrary to the weight of the evidence and resulted in an invalid inference. The tribunal, maintains CSC, wrongly equated the concept of a non-cosmetic procedure with an essential service and in so doing, it erred. Therefore, it was neither correct nor reasonable for the tribunal to conclude that sexual reassignment surgery fits within the definition of essential medical services.

[34] Alternatively, CSC alleges that the tribunal erred in determining that the inmate's physician should decide if the sex reassignment surgery should be publicly funded as an essential medical service. In all other cases, submits the applicant, it is CSC, through its institutions physicians, which determines whether inmate requests are essential or non-essential. When a non-essential service is approved, the institutional head retains control of the decision to pay associated escort costs. CSC submits that it would be consistent with this practice to treat requests for sex reassignment surgery funding in the same way. Although the inmate's physician could provide useful medical input into the process, there are additional operational determinations unique to sex reassignment surgery i.e., facility, logistical, security and associated financial factors. This combination of medical and operational decisions, contends the applicant, requires that CSC retain control of the decision-making process. The decisions of the institutions physicians are subject to the grievance process that is in turn subject to judicial review. Hence, submits CSC, there is recourse for parties who disagree with decisions made concerning essential medical services. The applicant, relying on ***Cameron v. Nova Scotia (Attorney General)*** (1999), 177 D.L.R. (4^{th}) 611 (N.S.C.A.), leave to appeal refused, [2000] 1 S.C.R. viii (***Cameron***), maintains that the court's role in reviewing policy based determinations by officials who are

accountable for public funds is limited. CSC, submits the applicant, is accountable for the decisions of its institutions physicians for the expenditure of public funds under parts III and IV of the ***Financial Administration Act***, R.S.C. 1985, c. F-10. Since inmate's physicians are not accountable to Parliament or to taxpayers for the expenditure of public funds and there is no recourse or review with respect to their decisions, CSC submits that the tribunal exceeded its jurisdiction by improperly depriving CSC of control over the funding determination.

THE RESPONDENT

[35] The respondent argues that this application constitutes a challenge to the tribunals's remedial order that CSC consult with CHRC respecting the formulation of a new policy. Relying on ***Ross v. New Brunswick School District No. 15***, [1996] 1 S.C.R. 825 (***Ross***), the commission submits that a human rights tribunal has broad discretionary powers to redress a discriminatory practice and must be given deference regarding its findings of fact. In this respect, the commission says that the tribunal did not find sex reassignment surgery to be an essential medical service. It found that the determination would have to be made on a case by case basis. The determination, maintains the respondent, was supported by the evidence, is not patently unreasonable and is clearly reasonable, if not correct.

[36] The commission argues that the alternative argument is premature because the manner of determining funding has not yet been established or approved by the tribunal. It has been left to the parties to flesh out and to return to the tribunal regarding outstanding issues in relation to the terms of the policy.

ANALYSIS

[37] Having earlier in these reasons determined the appropriate standard of review for decisions of the humans rights tribunal, I need not do so again. It is important, for purposes of this analysis, to review what findings the tribunal did make.

[38] First, it determined that there existed a prima facie case of discrimination with respect to the CSC sex reassignment surgery policy and it further found that CSC had not justified a blanket prohibition policy. CSC does not take issue with that finding. The tribunal also found that sex reassignment surgery constitutes a legitimate, medically recognized treatment for transsexualism in properly selected individuals. CSC does not take issue with that finding.

[39] The tribunal determined that the real life experience requirement of the treatment protocol for gender identity disorder could not be satisfactorily fulfilled within the carceral setting. It also found that a candidate would have to meet the psycho-stability requirements to be a suitable candidate for surgery. It then determined that there could exist cases (if the real life experience requirement had been met prior to the individual's incarceration and the individual possessed the requisite level of psycho-stability) where a federal inmate could be a good candidate for sex reassignment surgery. CSC does not take issue with those findings. The tribunal further determined that a candidate's suitability for surgery would best be determined by the physicians from a recognized gender identity disorder clinic who are supervising the inmate's transition and are familiar with his or her situation. As I understand the applicant's position, CSC does not take issue with that finding.

[40] CSC does take issue with the tribunal's determination that sex reassignment surgery in some cases could be essential and in others elective. In this respect, CSC submits that the tribunal erred. The CSC expert witnesses asserted that sex reassignment surgery could never be essential. The applicant accepts that the tribunal had what the applicant describes as a "credibility problem" with one of those witnesses, but submits that the evidence of the two remaining witnesses stands uncontradicted.

[41] The tribunal was mindful of the evidence of the CSC experts but was troubled by their "categorical assertions". The tribunal referred to the Harry Benjamin Standards of Care (internationally recognized and accepted standards for the understanding and treatment of gender identity disorder) and noted that those standards specifically described sex reassignment surgery as being, "not experimental, investigational, elective, cosmetic or optional in any meaningful sense". The standards also refer to sex reassignment surgery as being "medically indicated and medically necessary". The tribunal relied on those standards and determined that, when coupled with commission expert witness Dr. Watson's evidence regarding the disabling torment that can be suffered by individuals with untreated transsexualism, it "may very well be that there are some individuals for whom sex reassignment surgery is essential and others for whom it is elective". It concluded that, "this is a determination best made, on a case by case basis".

[42] I view this finding and the allegation of error pertaining to it as a question of fact, i.e. the tribunal weighed the evidence (as it was entitled to do) and made a finding based upon the evidence. It cannot be said that its finding was made in the absence of some evidence to support it. Deference is shown to the factual findings of tribunals unless these findings can be found to be patently unreasonable. That is not the case here. If I am wrong, at its highest, it is a question of mixed law and fact in that it concerns the manner in which the tribunal applied the evidence to the defined criteria relative to essential medical services. On a standard of reasonableness simpliciter, I cannot conclude that this determination was unreasonable or that the tribunal's finding, on the basis of the evidence that it referred to and chose to rely upon regarding medical treatment, was not reasonably open to it. I am not persuaded that my intervention is warranted with respect to this finding.

[43] There remains the allegation that the tribunal exceeded its jurisdiction. The tribunal concluded that the ultimate determination (of whether in a particular case the surgery was to be determined to be essential or elective) is to be made in the same way as the determination for a candidate's suitability for surgery i.e., by the physicians from a recognized gender identity disorder clinic who are supervising the inmate's transition and are familiar with his or her situation. If the medical opinion is that sex reassignment surgery is an essential service for a particular inmate, it follows that it should be paid for by CSC, as would any other essential medical service. CSC submits that, in making this finding, the tribunal vests the final determination as to whether the surgery is essential or elective with a private citizen rather than with a designate within CSC. It is CSC that is accountable for the decisions of its institutions physicians and for the expenditure of public funds.

[44] The tribunal is granted broad discretionary powers under section 53 of the CHRA. To address the applicant's argument, it is again necessary to examine the context in which the impugned finding was made.

[45] At the time of the hearing there were five medical practitioners in Canada providing assessments for sex reassignment surgery. Two of those were Quebec psychiatrists who were unwilling to assess incarcerated individuals. The inmate population, at the time of the hearing, consisted of 12,500 persons. Of those, 10 were transsexuals and 4 of the 10 were seeking sex reassignment surgery. The tribunal determined that for an inmate to qualify for consideration, he or she had to have completed the real life experience before being incarcerated and had to meet the psycho stability requirements. The assessment process for suitability for surgery is best carried out by the physicians from a recognized gender identity disorder clinic who are supervising the inmate's transition and are familiar with his or her situation. Finally, the tribunal found that, if a candidate is suitable, whether the surgery is to be determined essential or elective, is to be determined on an individual basis and that the determination should be made by those who, in effect, determine the suitability.

[46] In arriving at its finding, the tribunal recognized that it was treating the referral process for sex reassignment surgery differently than other medical assessments. It noted that it is the essence of the principle of accommodation that it is sometimes necessary to treat historically disadvantaged people differently than others, in order to achieve substantive equality. There is a plethora of authority from the Supreme Court of Canada to support the latter statement.

[47] The unique and particular circumstances that exist here lead me to conclude that the determination made by the tribunal was correct. In view of the highly specialized expertise required to make such an assessment, the institutions physician is ill-equipped to make such a determination. Counsel for the applicant submitted that when inmates are referred to outside specialists for assessment, the choice of specialist is normally made by the institutions physician. That, for the very reasons provided by the tribunal, is unworkable because it is only those who have followed the inmate's transition who are familiar enough with the circumstances of the inmate to make such a determination.

[48] The applicant also argued that such an arrangement would negate the grievance procedure. I fail to see why that is so. The Commissioner is authorized to issue directives. In the policy, as it currently exists, the institutions physicians are delegated the authority to determine what treatment is essential or elective. I have not been referred to any provision that would preclude the Commissioner from delegating the determination for sex reassignment surgery in the manner suggested by the tribunal. There exists any number of drafting possibilities, "deeming" and "adopting" come immediately to mind, whereby the determination of the physician becomes the determination of CSC. A carefully drafted policy can satisfy the accountability concern as well as protect the inmate's grievance rights.

[49] It is clear that the tribunal regarded the determination, whether sex reassignment surgery in a particular case is essential, as a medical one. The circumstances of the particular population in this case require that such a determination be made by one qualified to make it.

[50] Insofar as the issue of funding is concerned, the definition of essential health service does not refer to cost nor does funding form part of the definition. Unlike most, if not all provincial health care plans (such as the one at issue in ***Cameron***), the CSC policy does not provide a prescribed, itemized list of treatments and services that are approved for payment, if medically required. Rather, the policy provides a definition delineating the circumstances when treatments and services are to be considered essential.

[51] That being said, the tribunal, in addressing this issue, did no more than adhere to the provisions of the CCRA. Essential health care, pursuant to the CCRA (subsection 86(1)), is provided to inmates. The provision is mandatory. If sex reassignment surgery is determined to be essential, subsection 86(1) applies. This is precisely the determination made by the tribunal. The finding does not constitute an excess of jurisdiction.

[52] I am mindful of the applicant's reliance on ***Cameron*** and I do not take issue with the conclusion that the role of the court is limited when reviewing policy-based determinations by officials who are accountable for public funds. However, the right of government to allocate resources as it sees fit is not unlimited. "It must exercised according to law. The government's right to allocate resources cannot override a statute such as the *Canadian Human Rights Act*": ***Canada v. Kelso***, [1981] 1 S.C.R. 199. See also: ***Canada (Attorney General) v. Uzoaba*** (1995), 94 F.T.R. 192.

[53] A human rights tribunal enjoys a broad discretionary power to award remedies to redress a discriminatory practice. An order must be based on a full consideration of the facts, but the tribunal is entitled to deference in respect of such factual findings: ***Ross***.

[54] For the reasons delineated herein, I conclude that the tribunal did not exceed its jurisdiction. I add, in relation to the applicant's reliance on ***Cameron***, that the analysis portion of the decision dealing with discrimination determined that the issue of funding was to be considered in relation to justification (in ***Cameron***, under section 1 of the *Charter*). It was open to CSC to address the issue of justification by establishing undue hardship on the basis of cost. In this regard, I note again the comments of the tribunal that, while there was some evidence as to the cost of sex reassignment surgery, there was no information with regard to CSC's overall health service budget, nor was any real attempt made to justify the prohibition of sex reassignment surgery on a cost basis.

[55] The applicant has not succeeded on either of its alleged grounds. The application for judicial review is dismissed. No costs are awarded.

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Judge

Ottawa, Ontario

January 30, 2003

FEDERAL COURT OF CANADA

TRIAL DIVISION

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS: T-1718-01 and T-2034-01

STYLES OF CAUSE: T-1718-01

Attorney General of Canada

v. Canadian Human Rights Commission

T-2034-01

Canadian Human Rights Commission

v. Attorney General of Canada

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