



MANITOBA

LAW REFORM COMMISSION
COMMISSION DE RÉFORME DU DROIT

REPORT

ON

THE REVISION OF BIRTH CERTIFICATES
OF TRANS-SEXUAL PERSONS

Report #26

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The Manitoba Law Reform Commission was established by "*The Law Reform Commission Act*" in 1970 and began functioning in 1971.

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INTRODUCTION

The subject of this Report is the revision of the birth certificates of trans-sexual persons to accord with the revision of those persons' anatomical and chemical revisions and social functioning.

Although the matter may seem to be arcane and of little practical import, it is, as we are informed and believe, of vital importance to those persons who are afflicted with the invincible conviction that they are "members of the opposite sex cursed with the wrong sexual apparatus".¹ Such persons, it is said, in undergoing surgical castration and revision are not in their way of thinking being mutilated by the removal of *useful* organs. "But from a pragmatic viewpoint, a transsexual's genitals are not useful because they are not of the sex with which he identifies. He wishes to exchange sexual apparatus useless to *him* for artificial genitalia that will be useful in his new sex role."²

The question of the legality, both criminal and civil, of the surgical and chemical procedures which are undertaken to revise the appearance of a trans-sexual person is not the burden of this Report. It has been canvassed thoroughly by others.³ In any event the procedures can be, and are, performed on native Manitobans beyond

¹D.K. Smith, "Transsexualism, Sex Reassignment Surgery and the Law", [Vol. 56:963 1971] *Cornell Law Review*, 963.

²*Ibid.*, 983.

³C.H.C. Edwards, "Recent Developments Concerning the Criteria of Sex and Possible Legal Implications", (1959) 31 *Man. Bar Rev.* 115 at 125-6; reprinted in (1960) 83 *Cdn Med. Assoc'n Journal* 756-760; Smith, *op. cit.* 985.

our borders. Although the revisionary surgery once available to foreigners in Denmark will not now be performed on one who is not a domiciliary of that state, the procedures are, we have been told, readily available in Morocco and several other states of the world, including North American jurisdictions. Some persons, born in Manitoba, have undergone the surgical and hormonal procedures. Some of these, either in person or by their legal counsel, have requested the Commission to undertake this study.

Clearly, any conclusion developed on the formal subject of this Report will require consideration and resolution of many related questions of ethics, morality, compassion, good sense and a large purview of medical practice as well as law in relation to social norms and tolerance. The very idea that the law might recognize something other than the classical two sexes of our mammalian human species will seem utterly bizarre if not repulsive to some. The trans-sexual persons who have presented themselves to us in person or by correspondence and who have been described to us by reputable members of the medical profession are, however, real Manitobans whose plight presents real social and legal problems to which the common and statute law or our province provides no satisfactory answers.

TRANS-SEXUALISM

From our discussions with medical practitioners, and with a post-operative trans-sexual person who attended a meeting of the Commission, and from our readings, we conclude that trans-sexualism is usually more a matter of psychological than of physical malformation. A trans-sexual

is a person anatomically of one sex who invincibly believes that he or she is of the other sex. The strength of the belief amounts to an obsession to have the body, appearance and social status revised to conform with that of the individual's "proper" gender.

We were told by the medical practitioners with whom we consulted that the belief stems from influences experienced in infancy and early childhood. We are told that the belief of being imprisoned in a body of the wrong gender may and does generate desperate acts of self-mutilation or suicide. The belief is described by us as invincible because, we are told, it does not yield to psychotherapy or any other kind of treatment. It is unshakeable.

One might also define trans-sexualism in negative terms. Trans-sexuals, we are told, are not homosexual. Considering themselves to be inflicted with the wrong sex organs and characteristics, they desire revision through surgery and chemo-therapy so that they may become "normal" persons of the "proper" gender. Trans-sexuals, we are told, are not transvestites. To dress in the clothing of the opposite sex is not, for trans-sexuals, a means of acting out a fantasy for general sexual stimulation, to be terminated at will for the purpose of resuming one's real role. Trans-sexuals, we are told, are not (or not necessarily) hermaphrodites, in that most trans-sexuals of whom we have heard do not have ambiguous reproductive organs or chromosomal anomalies. Many trans-sexual persons are quite unexceptional physical specimens of the male or female sex and were accurately and easily identified as such at birth.

As stated, the difficulty with trans-sexuals is inevitably psychological and social, not physical or chromosomal.

In the absence of any special legislation, legal conclusions may still have to be formulated for some purposes in relation to the status and activities of trans-sexual persons. Medical knowledge permits perception of facts which, though unknown to previous generations, are nevertheless cognizable by courts of law where the issue of gender is material to the disposition. One such case is instructive in regard to the matter of trans-sexualism.

Corbett v. Corbett (Otherwise Ashley)⁴

The *Corbett* case was concerned with the status of a post-operative trans-sexual whose "outward appearance, at first sight, was convincingly feminine"⁵ in the words of Mr. Justice Ormrod, the trial judge, who is also a medical doctor. It appears to have been the first occasion on which a court in England was called upon to decide the sex of an individual.

The petitioner, Arthur Cameron Corbett, sought a declaration that the ceremony of marriage which took place in Gibraltar in 1963 between himself and the trans-sexual respondent, April Ashley (né George Jamieson) was null and void, on the ground that the respondent, at the time of the

⁴[1970] 2 All E.R. 33; 2 W.L.R. 1306.

⁵*Ibid.*, at page 47.

ceremony, was a person of the male sex. The respondent had undergone a so-called 'sex-change operation' at Casablanca in May 1960. In the alternative, the petitioner alleged non-consummation owing to the incapacity or wilful refusal of the respondent. The respondent denied all the above recited allegations.

The details of George Jamieson's transformation into April Ashley and of the courtship by Arthur Corbett are of no strict pertinence, but Mr. Justice Ormrod's reasons for judgment do comprehend some passages which are concisely instructive for the purposes of this Report.

The respondent was examined by medical inspectors as related by Ormrod, J.:

I now turn to the medical evidence and will begin by reading the report and the supplementary report of the medical inspectors to the court, Mr. Leslie Williams, FRCS, FRCOG, and Miss Josephine Barnes, DM, FRCS, FRCOG:

'We, the undersigned, appointed by the High Court Medical Inspectors in the above cause, have this day, at 44 Wimpole Street, W. I., examined the sexual organs of April Corbett (otherwise Ashley) the respondent. We find that the breasts are well developed though the nipples are of masculine type. The voice is rather low pitched. There are almost no penile remains and there is a normally placed urethral orifice. The vagina is of ample size to admit a normal and erect penis. The walls are skin covered and moist. There is no impediment on "her part" to sexual intercourse. Rectal examination does not reveal any uterus or ovaries or testicles. There is no scar on the thigh indicating where a skin graft might have been taken. We strongly suggest that an attempt be made to obtain from

Dr. Burou, Clinique du Parc, 13 Rue Lepbei, Casablanca a report on what exactly was done at the operation. We also strongly suggest that an investigation into "her" chromosomal sex be carried out by some expert such as Prof. Paul Polani, Dept. of Paediatric Research, Guys Hospital, London.
22nd May, 1968'

'Supplementary Report

April Corbett the respondent was examined at 44 Wimpole Street, London, W. I., on May 22nd, 1968 by Miss Josephine Barnes and Mr. Leslie Williams. April Corbett had had an operation for the construction of an artificial vagina and the surgical result was remarkably good. It may be noted that the normal vagina is lined by skin which is moistened by mucoid secretion from the cervix uteri. The artificial vagina in this case also appeared to be lined with skin and it was moist presumably owing to the presence of sweat glands in the skin used to line the artificial vagina. The suggestion in the first report that a chromosome test should be done was because the result of such a test would be one means of making our factual information about the case more complete.
6th July, 1968.'

The suggested investigation into the respondent's 'chromosomal sex' refers to a method of examining the structure of the individual body cells for evidence of male or female characteristics, which I shall have to discuss in more detail later. The investigation was carried out by Professor F T G Hayhoe of Cambridge who reported, on 31st October 1968, that all the cells which he examined were of the male type.⁶

In dealing with the evidence concerning transsexualiam, Mr. Justice Ormrod is reported thus:

There was general agreement among all the doctors on the basic principles and the fundamental scientific facts. Anomalies of sex may be divided into two broad divisions, those cases which are

⁶ *Ibid.*, at pages 40 and 41.

primarily psychological in character, and those in which there are developmental abnormalities in the anatomy of the reproductive system (including the external genitalia). Two kinds of psychological abnormality are recognised, the transvestite and the transsexual. The transvestite is an individual (nearly, if not always a man) who has an intense desire to dress up in the clothes of the opposite sex. This is intermittent in character and is not accompanied by a corresponding urge to live as or pass as a member of the opposite sex at all times. Transvestite males are usually heterosexual, often married, and have no wish to cease to play the male role in sexual activity. The transsexual, on the other hand, has an extremely powerful urge to become a member of the opposite sex to the fullest extent which is possible. They give a history, dating back to early childhood, of seeing themselves as members of the opposite sex which persists in spite of their being brought up normally in their own sex. This goes on until they come to think of themselves as females imprisoned in male bodies, or vice versa, and leads to intense resentment of, and dislike for, their own sexual organs which constantly remind them of their biological sex. They are said to be 'selective historians', tending to stress events which fit in with their ideas and to suppress those which do not. Some transsexual men live, dress and work regularly as females and pass more or less unnoticed. They become adept at make-up and knowledgeable about using oestrogen, the female sex hormone, to promote the development of female-like breasts, and at dealing with such masculine attributes as facial and pubic hair. As a result of the publicity which has been given from time to time to so-called 'sex-change operations', many of them go to extreme lengths to importune doctors to perform such operations on them. The difficulties under which these people inevitably live result in various psychological conditions such as extreme anxiety and obsessional states. They do not appear to respond favourably to any known form of psychological treatment and, consequently, some serious-minded and responsible doctors are inclining to the view that such operations may provide the only way of relieving the psychological distress. Dr. Randell has recommended surgical

treatment in about 35 cases, mostly restricted to castration and amputation of the penis, but in a few carefully selected cases he and Professor Dewhurst and the plastic surgeon who is working with them have undertaken vagino-plasty as well, that is the construction of a so-called artificial vagina. The purpose of these operations is, of course, to help to relieve the patient's symptoms and to assist in the management of their disorder; it is not to change their patient's sex, and, in fact, they require their patients before operation to sign a form of consent which is in these terms:

'I . . . of . . . do consent to undergo the removal of the male genital organs and fashioning of an artificial vagina as explained to me by . . . (surgeon). I understand it will not alter my male sex and that it is being done to prevent deterioration in my mental health.

(Signature of Patient)'

Professor Roth is doubtful about the therapeutic efficacy of these procedures and has only recommended one of his patients for operation.

There is, obviously, room for differences of opinion on the ethical aspects of such operations but, if they are undertaken for genuine therapeutic purposes, it is a matter for the decision of the patient and the doctors concerned in his case. The passing of the Sexual Offences Act 1967, s. 1, seems to have removed any legal objections which there might have been to such procedures. This phenomenon of transsexualism must, however, be seen in its true perspective. It occurs in men and women of all ages, some of whom are married in their true sex and are fathers or mothers of children. In a paper published on (sic) the British Medical Journal in December 1959, Dr. Randell refers to 13 transsexual men who were or had been married. Some of his male patients, on whom operations have been performed, have been men of mature age; one was a naval petty officer aged 42 years. All his male transsexual patients, which now number 190,

have been biologically, that is anatomically and physiologically, normal males. Female transsexuals present corresponding problems but they are not relevant to the present case.⁷

Mr. Justice Ormrod noted the criteria of sex as follows:

. . . All the medical witnesses accept that there are, at least, four criteria for assessing the sexual condition of an individual. These are -

- (i) Chromosomal factors.
- (ii) Gonadal factors (ie presence or absence of testes or ovaries).
- (iii) Genital factors (including internal sex organs).
- (iv) Psychological factors.

Some of the witnesses would add -

- (v) Hormonal factors or secondary sexual characteristics (such as distribution of hair, breast development, physique etc which are thought to reflect the balance between the male and female sex hormones in the body).

It is important to note that these criteria have been evolved by doctors for the purpose of systematising medical knowledge, and assisting in the difficult task of deciding the best way of managing the unfortunate patients who suffer, either physically or psychologically, from sexual abnormalities. . . .

. . . Still more recently, much more knowledge has been obtained about these cases by the development of techniques which enable the structure of the nucleus of the individual cells of the body to be observed under the microscope. Using these techniques, it is possible to see the individual chromosomes in the nucleus. These are the structures

⁷*Ibid.*, at pp. 42 and 43.

on which the genes are carried which, in turn, are the mechanism by which hereditary characteristics are transmitted from parents to off-spring. The normal individual has 23 pairs of chromosomes in his ordinary body cells, one of each pair being derived from each parent. One pair is known to determine the sex of normal individuals. The normal female has a pair which is described as XX; the normal male a pair which is described as XY. The Y chromosomes can be distinguished quite clearly from the X. In the male, the X chromosome is derived from the mother and the Y from the father. In the female one X chromosome is derived from the father and one from the mother. All the ova of a female carry an X chromosome but the male produces two populations of spermatozoa, one of which carries the Y, and the other the X chromosome. Fusion of a Y spermatozoon with an ovum produces an embryo with XY chromosomes which, under normal conditions, develops into a male child; fusion of an ovum with an X spermatozoon produces an XX embryo, which becomes a female child. Various errors can occur at this stage which lead to the production of individuals with abnormal chromosome constitutions, such as XXY and XO (meaning a single X only). In these two cases, the individuals will show marked abnormalities in the development of their reproductive organs. The XXY patient will become an under-masculinised male with small, under-developed testes and some breast enlargement. The abnormality will become apparent at puberty when the male secondary sex characteristics, such as facial hair and male physique, will not develop in the normal way. The XO individual has the external appearance of a female, a vagina and uterus but no active ovarian tissue. Without treatment the vagina and uterus remain infantile in type and none of the normal changes of puberty occur. Administration of oestrogen, however, produces many of these changes. The individual of course remains sterile.⁸

In conclusion, Mr. Justice Ormrod stated:

My conclusions of fact on this part of the case can be summarised, therefore, as follows. The

⁸ *Ibid.*, at pp. 44 and 45.

respondent has been shown to have XY chromosomes and, therefore, to be of male chromosomal sex; to have had testicles prior to the operation and, therefore, to be of male gonadal sex; to have had external genitalia without any evidence of internal female sex organs and, therefore, to be of male genital⁹ sex; and psychologically to be a trans-sexual.

REVISED BIRTH CERTIFICATE

As stated in the introductory passages of this Report, the question concerning the Commission is whether a post-operative trans-sexual person whose birth is recorded in Manitoba ought to be accorded a revised birth certificate so that the designation of sex would conform with the person's altered appearance. The people under consideration are not mere triflers who would like to try out an altered role and revert to the sex diagnosed at birth if they did not like the new role. The people under consideration are those who have not flinched at undergoing the surgery and therapy, and who are therefore thoroughly committed to life in the physical appearance of the opposite sex.

Indeed, conceding that for these people the die is cast, one might well wonder what status or role is left to them if they have no legal basis whatever for making their way in life as a member of the opposite sex. Without such basis would the law consider a post-operative trans-sexual as some kind of voyeuristic trespasser for using public toilet, shower or clothes-changing facilities reserved for the opposite sex? If convicted of a driving

⁹ *Ibid.*, at pp. 46 and 47.

offence for which a short term of imprisonment is mandatory, in which prison should the post-operative trans-sexual be confined? One could go on contemplating questions about pensions, retirement, insurance, criminal sexual conduct and inheritance. Now, it is true that in many if not all of the recited circumstances a person - that is to say, a non-trans-sexual person - does not need to produce a birth certificate. But the trans-sexuals with whom we have communicated place great importance on having a revised birth certificate because they are the ones who are challenged about their sex. They are the ones who might seem to others to be "not quite right" because their physical transformations cannot always be performed to convincing perfection. Without the instant corroboration which can be provided by a birth certificate, the challenged trans-sexual is in a most unfortunate plight.

Our species, through the media of charities and government programs, goes to significant lengths to provide human and financial resources for the social development of people who need or appear to need help. And we do this as a matter of social justice. We even engage collectively through legislation in big deceptions as a thrust of social policy. Thus, an adopted child is entitled to a birth certificate identifying the adopting parents as if they were the child's biological parents.¹⁰ In this instance, the law's policy is to resolve the conflict of values in favour of the Legislature's judgment of helping the social development of the adopted person. The same judgment is

¹⁰ "The Vital Statistics Act", C.C.S.M., Cap. V60, Sec. 10(9)

applicable, with no less poignancy, to the social development of the committed post-operative trans-sexual. We accordingly consider that it would be a reform, and we recommend, that every certifiably identified post-operative trans-sexual person who was born in Manitoba be entitled to a birth certificate designating that person's sex in conformity with that person's anatomical and chemical revisions and social functioning.

If this recommendation be translated into law, Manitoba would not be the first or only province to accept the principle. Statutory provisions to the like effect have been enacted in Alberta,¹¹ British Columbia,¹² Saskatchewan,¹³ and New Brunswick¹⁴ for example. As we have perused the various statutes of the other provinces, we observed that the modalities of implementation are no less important than the stark principle for they give form and qualification to its expression.

FORM AND QUALIFICATIONS OF THE PRINCIPLE

The Birth Certificate Alone

Since the principle is recommended for implementation by the Legislature of Manitoba, the birth records to be

¹¹S.A. 1973, c. 86 amending R.S.A. 1970, c. 384.

¹²S.B.C. 22 Eliz. II, 1973, Chap. 160.

¹³S.S. 1974-75, Cap. 61.

¹⁴S.N.B. 1973, Chap. 27.

amended can and should be only those of persons born in this province. This accords with the constitutional precept that the Legislature of a province cannot legislate for 'extra-territorial' effect and it is consonant with Sec. 4(1) of "The Vital Statistics Act",¹⁵ which states:

4(1) The birth of every child born in the province shall be registered as provided herein.

The only kind of certificate issued under the Act which would show the trans-sexual person's new sex designation, should be a certificate of birth. The Alberta statute provides, in addition, that every marriage certificate issued after the making of a notation of change is to be issued as if the registration had been made with the sex as 'changed'. We do not recommend any such provision in the Manitoba law. This Orwellian sort of enactment would place a child of that marriage in the position of seeming to have both parents of the same sex, which is absurd and would be cruelly embarrassing. It could create further mischief by confusion as to which of the spouses is the post-operative trans-sexual, which in turn might cast on the non-trans-sexual spouse the burden of proving his or her unimpaired capacity to enter into a later lawful marriage. Furthermore, not everyone who is married in Manitoba was born in Manitoba, and the application of such changed designations would be spotty and imprecise since birth certificates and marriage certificates are not guaranteed to be issued under matching provincial crests or seals. Finally, in seeming to register marriages of a female and a female or of a male and a male, the province would seem to be violating the common law's

¹⁵C.C.S.M. Cap. V60.

substantive precepts of marriage which Parliament has not seen fit to revoke, and which are beyond the authority of a provincial legislature.

We think it unnecessary to include death certificates in this recommended reform. Since people who die in Manitoba are not necessarily or always those who were born here, there is no virtue or need to involve death certificates in the question. The sex of the deceased is undoubtedly recorded to the best of the informant's knowledge and belief and, in the case of a post-operative trans-sexual, would likely be recorded in accordance with the post-operative appearance and social role of the deceased.

Gender Identification

Just as Manitoba-born persons do not necessarily marry and die in the province, so Manitoba trans-sexual persons do not necessarily undergo trans-sexual surgery and chemo-therapy in the province. It is estimated by an official of the Manitoba Health Services Commission that the actual number of true trans-sexuals in the province must be about 10 persons, and that trans-sexual surgery has been performed "in about 7 cases in the last 7 years". Although the number of Manitoba-born trans-sexual persons cannot be large, one can with some justification (and personal knowledge, based on our correspondence) assume that there are more of such persons, residing outside the province, to whom a new right to a revised birth certificate would apply. So, in addition to those who have

stayed here, the proposed law could afford help to Manitoba-born trans-sexuals (a) who reside elsewhere and/or (b) who have undergone surgery and treatment elsewhere - but who must obtain a revised birth certificate, if at all, under "The Vital Statistics Act" of Manitoba.

Moreover where the physical and hormonal revisions were effected outside the province, or even outside Canada, it could be futile to enact that our Recorder of Vital Statistics must have a report from the medical professionals who performed the revisions. From our correspondence, we rather think that the enactment of the proposed reform would induce some expatriate Manitobans to return, presenting the Recorder with a long past *fait accompli*. Therefore, if the application for a revised birth certificate cannot be supported by acceptable evidence from another time and place of the transformation, there should be some institute, panel, or committee legally recognized in Manitoba who will (or will not) certify the transformation to the satisfaction of the Recorder of Vital Statistics. Obviously one would not expect the Recorder to undertake the intimate physical examinations required to determine eligibility for a revised sex designation on the applicant's birth certificate. Therefore there is a need for the proposed law to accord recognition to a gender identity panel or panels composed of medical specialists who practice their profession in Manitoba and upon whose certificates the Recorder would be empowered to accept or reject the trans-sexual person's application for a revised sex designation on that person's birth certificate. To avoid fraud or other misuse, care

must be taken to ascertain not only revised gender identity but, equally as important, the personal identity of the applicant with the person whose birth records are to be altered as one and the same individual. The gender identity panel does not need to be a new permanently established institution. Panels could be assembled on an *ad hoc* basis from lists of volunteer specialists. The appointment of a gender identity panel could be performed by the Minister of Health and Social Development upon the occasion of the rare applications being made to the Recorder. Such panels could be appointed from among the medical specialists of Winnipeg, Brandon, Thompson or any other centre with a sufficient medical corps. The fee for serving on such panel and completing the documentation should be paid by the Manitoba Health Services Commission, which, in turn may be able to make reciprocal agreements to recover the cost from the medicare authorities of the province, state or country in which the applicant actually resides and may be paying medicare premiums. Ideally, a gender identity panel should consist of a gynaecologist, a psychiatrist and a reconstructive surgeon, but the composition could be left to the Minister in such consultation as he desires with the medical profession.

Basic Qualifications

No one would suggest that an accidentally or even surgically castrated man could be said to have undergone procedures for the revision of his appearance to that of a woman. Equally, no one would suggest that a woman who has undergone a pan-hysterectomy and mammectomy has been so

revised as to have taken the appearance of a man. Indeed each may wish to retain the social role of his or her true gender despite the physical losses. Without the psychological will to achieve a changed appearance, coupled with further revisionary surgery of a cosmetic nature and further chemo-therapy, if appropriate, such persons would not likely apply and would not qualify for the altered sex designation on their birth certificates.

The recommendations made in this Report would apply to a person whose sex, as recorded by the Recorder of Vital Statistics, was correctly diagnosed at birth or has since been correctly recorded,¹⁶ and who is firmly convinced that the gender of his or her physical being is repugnant to his or her character, personality and functioning in society. We recommend that such person should be permitted to apply to the Recorder for a change of the sex designation on any certificate of that person's birth thereafter issued by the Recorder if that person:

- (a) has undergone surgery by which the sexual functions related to sex of record have been terminated and the external appearance of the site of primary and secondary organs of sex is altered (if that appearance is not naturally formed) to resemble that of a person of the gender to which the transsexual wishes his or her designated sex of record changed;
- (b) has undergone or continues to undergo hormonal or other chemo-therapy and reconstructive surgery, in cases where the same are indicated and advisable in relation to that transsexual's health, with the objective of complementing the surgery described above; and

¹⁶"The Vital Statistics Act", C.C.S.M., Cap. V60, Sec. 23.

(c) is reasonably able to function in society as a person of the gender to which the transsexual wishes his or her designated sex of record changed,

and the trans-sexual's application is accompanied by a duly completed Certificate of Apparently Changed Gender (Form A) signed by the members of a Gender Identity Panel as should be defined in the recommended amendments to "*The Vital Statistics Act*". Form A referred to above is Appendix A to this Report.

In view of the diminishing distinctions of gender roles in terms of job opportunities and the like which have characterized Manitoba society in recent years, item (c) above would have to be liberally interpreted. Indeed, the distinctions of role which endure may well be related much more to sex than to gender, after all. The classical limit on parliamentary sovereignty will still hold true. No legislative enactment will change a woman into a man or *vice versa*. The revisions performed by the medical practitioners will indeed extinguish the trans-sexual person's original essential sexual functions, but they will not confer on a revised man the capability to conceive, bear and suckle babies, nor will they confer on the revised woman the capability to sire.

The above observations raise the problem of possible applications to the Recorder for a "switch-back". This is much more of a medical problem than a legal one, since the possibilities must be quite limited. We do know of persons who have later regretted the trans-sexual revision which they have undergone. The matter of restoring the originally designated sex of record, if such ever occurs, could be processed in a manner much the same as the first application for a change of designation.

Legal Form and Procedures

The certificate to be provided by the Gender Identity Panel is mentioned in the previous section as "Form A".

Further procedural enactments should comprehend the following requirements and guidelines:

If the Recorder is not satisfied as to the truth and sufficiency of the application he may, in order to obtain such additional evidence as may be necessary, require the attendance at his office of the applicant or of any other person, and may question him or her respecting any matter pertaining to the application and supporting material (note analogy to Sec. 4(9) of *"The Vital Statistics Act"*).

The Recorder shall establish and maintain a register, to be called the "trans-sexuals' Register" in which he shall enter the particulars of all applications for change of designation of sex of record as to the truth and sufficiency of which he is satisfied or has been satisfied by additional evidence (note analogy to Sec. 10(2) of *"The Vital Statistics Act"*).

When the particulars of an application for change of designation of sex of record are entered in the Trans-sexuals' Register, the Recorder shall cause a notation of the change of designation of sex of record to be made on the registration of birth of the applicant (note analogy to Sec. 10(7) of *"The Vital Statistics Act"*).

Where a notation of the change has been made on a registration of birth, any birth certificate issued thereafter shall be issued as if the registration had been made with the changed designation of sex of record as the sex registered.

A Gender Identity Panel consists of three medical specialists, [recommended: a gynaecologist, a psychiatrist, and a reconstructive surgeon] all of whom are qualified and licensed to practise in the Province of Manitoba and all of whom actually reside and practise in Manitoba.

A Gender Identity Panel shall examine the applicant trans-sexual and be obliged to meet together and confer about the advisability of giving a Certificate (Form A) at least once before giving such Certificate.

A form of Certificate of Apparently Changed Gender shall be void unless it is signed and concurred in by all members of the Gender Identity Panel and is presented to the Recorder not later than three calendar months after it is dated; the Certificate is dated on the day the last member of the Panel to sign does sign it, provided that if more than two calendar months intervene between the first and the last signing of the Certificate, it is void.

A Certificate of Apparently Changed Gender may consist of one, two, or three forms "A" such that all members of the panel attest the Certificate by their signatures and all concur that the applicant meets the requirements of the Act for a change of designation of sex of record. Where members of the panel do not concur, that member or those members may furnish the Recorder with written reasons for dissent. The Recorder shall keep incomplete Certificates of Apparently Changed Gender and any written dissent of panel members in the Trans-sexuals' Register but unless a unanimous Certificate be furnished by the panel members, the Recorder shall not cause any notation of change to be entered in the applicant's birth records.

No person shall be entitled to inspect or be provided with written or orally communicated information from the Trans-sexuals' Register unless so authorized by an Order of The Court of Queen's Bench or a County Court and in every such case the Recorder shall abide by the Order only if it contains a precise statement of the purpose for which it was made and the purpose to which the information from the Trans-sexuals' Register is to be put, but the Recorder is not to assess the sufficiency of such stated purpose.

The purposes for which access to and copies of any information in the Trans-sexuals' Register

may be had by anyone designated in the Court Order shall be to facilitate the establishing of the identity of a person whose sex designation might have been changed, in order to determine whether such person, and whether living or deceased

- entered into a form of marriage;
- is the parent of a child;
- is a testator, or an intestate, or a settlor of any trust or property, or is holder of any account or of a Canadian passport, or has any interest in or right or title to any property;
- is a beneficiary or designated person under any will, trust or any devolution of an estate;
- is, or whose personal representatives are, a party to any action, proceeding or process in or of any Canadian court or statutory tribunal, where denial of such status has been asserted on the ground of incorrect identity in regard to sex or gender; or
- ought to be more particularly identified in any matter which, in the opinion of the Court, or of a judge thereof, is of similarly serious import to the matters immediately above mentioned;

and such determination is necessary to the due adjudication of the matter, or to the administration of justice.

Anyone who uses, communicates or publicizes the information obtained by virtue of an Order under this Part in any manner not contemplated by the Order shall be conclusively deemed to have committed a violation of privacy of any trans-sexual person referred to in the Order, and shall be liable to judgment under "*The Privacy Act*"¹⁷ unless the consent of such person to such use, communication or publicity be first obtained.

¹⁷C.C.S.M., Cap. P125.

Family Ramifications

The 1973 amendment to British Columbia's *Vital Statistics Act*¹⁸ states the principle of permitting a change of sex designation with the following initial expression:

21A.(1) Where a person in respect of whom transsexual surgery has been performed is unmarried on the date he applies under this section, the Director shall . . . change the sex designation on the registration of birth of such person

New Brunswick's statute is to the same effect in relation to being unmarried. These provisions beg a question to which they seem to furnish no rational answer. What if the person be married? The implication of silence on this issue seems necessarily to be that the Director shall not change that person's sex designation, in such a case. The qualifying status of being unmarried thus becomes an implied requirement for divorce in the case of an already married transsexual. Surely, if the principle of helping people who are already surgically, chemically and psychologically committed to live out and document their invincible transsexual conviction be valid at all, it is equally valid for the married as well as the unmarried post-operative transsexual persons.

The policy of law in Canada still runs counter to encouraging the breakdown of marriages, to be sure. However the married post-operative transsexual has already created marriage breakdown by deliberately destroying all the sexual and social basis of his or her marriage. This is so whether or not the other spouse consented to the

¹⁸*Supra*, footnote 12.

trans-sexual spouse's surgery, and whether or not the other spouse will actually petition for divorce on the ground of marriage breakdown. To require that the marriage be dissolved in law before the post-operative trans-sexual spouse can apply for a change of sex designation is officious. Indeed it may be that neither party wishes to have their semblance of marriage officially dissolved. The implied requirement of divorce seems to give credence to the false notion that the post-operative trans-sexual could be truly transformed into a person of the opposite sex, therefore making it impossible (or at least distasteful) to note a change of such a married person's sex designation. The implied requirement of divorce seems to pander to the notion that a change of recorded sex designation might be the final touch needed for the trans-sexual's prospective marriage to a person of the trans-sexual's real gender.

Should spousal consent be a legal requirement before trans-sexual surgery is performed? We think not; for as a legal requirement, the necessity for obtaining such consent could be enforced only within the territory of the enacting province, but the surgery can be performed in any of many clinics and hospitals outside the province where the legislature's writ does not run.

Where a married applicant seeks a change of recorded sex designation (and disclosure of the spouse's identity and address, if known, should be required) then the spouse should be notified of the application and its outcome. The successful applicant should remain liable for any continuing or subsequently imposed spouse and child maintenance obligations and all other outstanding obligations

in law, except restitution of conjugal rights. The Commission intends, in projected Reports on family law, to recommend amendments to "*The Change of Name Act*"¹⁹ to require notification to an ex-spouse of name change in cases where maintenance obligations remain extant. It is entirely consonant with that view to recommend, as we do, that an actual spouse be notified of an application for change of sex designation.

TRANS-SEXUALS AND MARRIAGE

The most important, if not the only, instance in which another person has a directly personal legal interest in the sex of someone is in marriage. Both the Parliament of Canada and the Legislatures of the provinces have some legislative authority under the *British North America Act*²⁰ in relation to marriage. Parliament's authority under Sec. 91, Head 26, is to make laws in relation generally to marriage and divorce; the Legislature's authority under Sec. 92, Head 12 is to make laws in relation to the more limited subject of the solemnization of marriage in the province. As judicially interpreted, the interaction of these respective powers means that the Legislature of Manitoba cannot validly enact laws defining marriage substantively, nor the capacity of persons to marry beyond the form and requirements for solemnization. While marriage has not been defined in legislation by Parliament, it has been defined judicially.

¹⁹C.C.S.M., Cap. C50.

²⁰1867, 30 & 31 Vict. c. 3 (U.K.).

In *Hyde v. Hyde & Woodmansee*,²¹ Lord Penzance observed:

Marriage has been well said to be something more than a contract, either religious or civil - to be an Institution Its incidents vary in different countries, but what are its essential elements and invariable features? If it be of common acceptance and existence, it must need (however varied in different countries in its minor incidents) have some pervading identity and universal basis. I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman to the exclusion of all others.²²

Although Parliament has modified one element (ie. union for life) of this common law definition through the enactment of divorce legislation, the definition must stand in law unless and until modified or abrogated by competent legislation.

A recent Manitoba case illustrates the application of the common law rule. In *Re North & Vogel and Matheson*,²³ it was found that the applicants, both male, went through a form of marriage in February, 1974, and later an official notice of marriage with supporting documents was submitted to the Recorder of Vital Statistics for registration. The Recorder refused to register the 'marriage' of the applicants and communicated his decision to them. After an exhaustive review of the statutes and authorities on this and other

²¹ (1865-9) Vol. 1, L.R. 1 P. & D. 130.

²² *Ibid.*, at page 133.

²³ (1975) 52 D.L.R. (3d) 280.

aspects of the case, Chief County Court Judge Philp concluded:

I view it as self-evident that the ceremony performed on February 11, 1974 was not a ceremony of marriage; it was a nullity. There was nothing before the respondent to be registered under subsection 12(3) of "*The Vital Statistics Act*", quoted above. That the applicants purported to comply with all of the conditions of solemnization prescribed in "*The Marriage Act*" cannot alter the fact that a marriage did not take place.

The manner in which the common law, as it stands unaltered by Parliament, might well apply to the attempted marriage of a trans-sexual person is illustrated by Mr. Justice Ormrod in the *Corbett*²⁴ case, thus:

Having regard to the essentially heterosexual character of the relationship which is called marriage, the criteria must, in my judgment, be biological, for even the most extreme degree of transsexualism in a male or the most severe hormonal imbalance which can exist in a person with male chromosomes, male gonads and male genitalia cannot reproduce a person who is naturally capable of performing the essential role of a woman in marriage. In other words, the law should adopt, in the first place, the first three of the doctors' criteria, ie the chromosomal, gonadal and genital tests, and, if all three are congruent, determine the sex for the purpose of marriage accordingly, and ignore any operative intervention. The real difficulties, of course, will occur if these three criteria are not congruent. This question does not arise in the present case and I must not anticipate, but it would seem to me to follow from what I have said that greater weight would probably be given to the genital

²⁴*Supra*, footnote 4.

criteria than to the other two. This problem and, in particular, the question of the effect of surgical operations in such cases of physical inter-sex, must be left until it comes for decision. My conclusion, therefore, is that the respondent is not a woman for the purposes of marriage but is a biological male and has been so since birth. It follows that the so-called marriage of 10th September 1963 is void.²⁵

In humanely helping trans-sexual persons to find social adjustment in accord with their compelling beliefs, the provincial law should not pander to the possible deception of others in so personal a matter as marriage, nor yet encourage the performance of marriage ceremonies which might be absolute nullities.

One last extract from the judgment in the *Corbett* case provides a useful insight to this topic:

I must now return briefly to counsel for the respondent's submissions. If the law were to recognize the 'assignment' of the respondent to the female sex, the question which would have to be answered is, what was the respondent's sex immediately before the operation? If the answer is that it depends on 'assignment' then, if the decision at that time was female, the respondent would be a female with male sex organs and no female ones. If the assignment to the female sex is made after the operation, then the operation has changed the sex. From this it would follow that if a 50 year old male transsexual, married and the father of children, underwent the operation, he would then have to be regarded in law as a female, and capable of 'marrying' a man! The results would be nothing if not bizarre. I have dealt, by implication, with the submission that, because the respondent is treated by society for many purposes as a woman, it is illogical to refuse to treat her as a woman for the purpose of marriage. The illogicality would only arise if marriage were

²⁵ *Ibid.*, at pages 48 and 49.


substantially similar in character to national insurance and other social situations, but the differences are obviously fundamental. These submissions, in effect, confuse sex with gender. Marriage is a relationship which depends on sex and not on gender.

Thus, until medical knowledge comprehends more subtle or even undiscovered facts about trans-sexuals and the kind of surgery and therapy which they seek in order to achieve the appearance and social functioning of the other sex, one should pay heed to the exhaustive study and conclusions developed in the *Corbett* case. The exact same issue appears not to have been presented to any Canadian court. We cannot state with certainty that Mr. Justice Ormrod's conclusions would be those of a Canadian judge who might be called upon to decide the same issue. Although it is most probable that a post-operative trans-sexual would be considered not to have undergone a 'sex change' for the purpose of marriage, the matter is not settled, either by jurisprudence or by Parliament, in Canada.

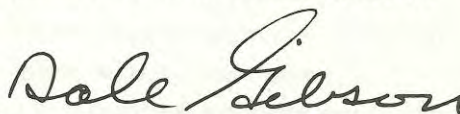
In conclusion, the Commission expresses its profound gratitude to the trans-sexual persons and their counsel who corresponded with us, and to the eminent medical specialists who gave of their time and knowledge in educating the Commission in this matter.

This is a Report pursuant to Section 5(2) of

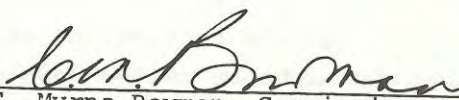
"The Law Reform Commission Act" signed this 13th day of
September, 1976.



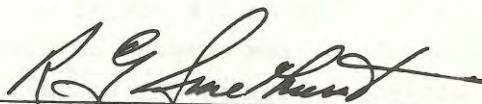
Francis C. Muldoon, Chairman



R. Dale Gibson, Commissioner



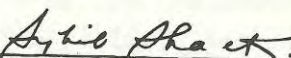
C. Myrna Bowman, Commissioner



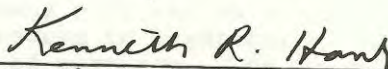
R.G. Smethurst, Commissioner



Val Werier, Commissioner



Sybil Shack, Commissioner



Kenneth R. Hanly, Commissioner

APPENDIX A

FORM "A"

[CERTIFICATE OF APPARENTLY CHANGED GENDER]

(May be completed by all or some members of a Gender Identity Panel or may be completed separately by each)

We, (a) _____ a _____
 _____ (Set out specialty)

(b) _____ a _____
 _____ (Set out specialty)

(c) _____ a _____
 _____ (Set out specialty)

being qualified and licensed to practise medicine in the Province of Manitoba, a member of a Gender Identity Panel reviewing the application of _____, an alleged trans-sexual, certify that we/I have examined _____ (whose sex as shown on a Manitoba Birth Certificate, a copy of which is attached, is correctly described) and _____ has (here described the appropriate factors and conditions as required by items (a), (b) and (c))* _____

We/I further certify that the Gender Identity Panel reviewing this application by _____ has met together and conferred about the advisability of giving this Certificate of Apparently Changed Gender and we all/I concur that _____ meets the requirements of "The Vital Statistics Act" for a change of the designation of _____'s sex of record.

_____ MD. signed this ___ day of _____ 19__

_____ MD. signed this ___ day of _____ 19__

_____ MD. signed this ___ day of _____ 19__

*[see pages 22 and 23 ante]