HUMAN RIGHTS TRIBUNAL OF ONTARIO

B E T W E E N:

Ontario Human Rights Commission

Commission

-and-

**Michelle Hogan, Martine Stonehouse,
A. B. and Andy McDonald**

Complainants

-and-

**Her Majesty the Queen in Right of Ontario
As represented by the Minister of Health and Long-Term Care**

Respondent

INTERIM DECISION

Panel: Patricia E. DeGuire, Mary Ross Hendriks and Ajit Jain

Date: November 9, 2005

File Number: HR-0507 to 0510-02

Citation: 2005 HRTO 49

Human Rights Tribunal of Ontario
400 University Avenue, 7th Floor
Toronto ON M7A 1T7
Phone (416) 314-0004 Fax (416) 314-8743 Toll free 1-800-668-3946
TTY (416) 314-2379 / 1-800-424-1168
E-mail hrto.registrar@jus.gov.on.ca
Website www.hrto.ca

APPEARANCES

Ontario Human Rights Commission	) Anthony Griffin, Counsel) Brian Smith, Counsel) Michelle Krepp, Student-at-Law) Tess Sheldon, Student-at-Law
Martine Stonehouse, A. B., and Andy McDonald,	) Susan Ursel, Counsel) Eugenia Capillary, Student-at-Law) Amanda Stewart, Student-at-Law
Michelle Hogan, Complainant	) On her own behalf
Her Majesty the Queen in Right of Ontario as represented by the Ministry of Health and Long-Term Care, Respondent	) Janet Minor, Counsel up to) Jan.19, 2004) Jonathan Batty, Counsel up to) Jan. 19, 2004) Anne Marie Van Raay, Counsel) Sept. 23, 24, 2003) Robert E. Charney, Counsel) from Oct. 4, 2004 to present) Sean Hanley, Counsel from Oct.) Oct. 4, 2004 to present) Jennifer Wilson, Counsel

DeGuire, Vice-Chair and Jain, Member (Ross Hendriks, Vice-Chair, dissenting in part):

INTRODUCTION

[1] Because of the nature of these cases, it would take some time before the Tribunal would be in a position to release the final written Decision and Reasons. Therefore, the Tribunal thinks that in the meantime it is helpful to the parties, particularly the Complainants, to issue an Interim Decision, which includes an Order for partial Remedy. The Tribunal's full remedy will be dealt with in its final Decision and Reasons.

[2] On December 16, 2002, the Human Rights Tribunal of Ontario (the "Tribunal") received the referral of four Complaints from the Ontario Human Rights Commission (the "Commission"). The Commission requested that the cases be combined—dealt with in the same proceeding—according to subsection 32(3) of the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the "*Code*").

[3] The Complaints allege that the Respondent, Ontario, has discriminated against these Complainants because of disability and sex contrary to section 1 of the *Code*.

[4] Specifically, they allege that by passing Regulation 528/98 amending R.R.O. 1990, Regulation 552 (*Health Insurance Act,* R.S.O. 1990, c. H.6), effective October 1, 1998 (the "Regulation"), which de-listed sex reassignment surgery ("SRS"), among other services, Ontario discriminated against them because of disability and sex.

[5] Specifically, Michelle Elyn Hogan alleges that her right to equal treatment with respect to services without discrimination was infringed by Ontario because of sex and disability contrary to sections 1 and 9 of the *Code* by Ontario's cancellation of public funding for SRS.

[6] Martine Stonehouse alleges that her right to equal treatment with respect to services without discrimination was infringed by Ontario because of disability and sex

contrary to sections 1 and 9 of the *Code* by Ontario's cancellation of public funding for SRS.

[7] The Complainant, with the pseudonym A. B., alleges that her right to equal treatment with respect to services without discrimination because of sex has been infringed by Ontario contrary to sections 1 and 9 of the *Code* by Ontario's cancellation of public funding for SRS.

[8] Andy T. McDonald alleges that his right to equal treatment with respect to services without discrimination because of sex has been infringed by Ontario contrary to sections 1 and 9 of the *Code* by Ontario's cancellation of public funding for SRS.

DECISION

[9] The Tribunal has held a hearing on the merits of these Complaints. The Tribunal has heard the evidence: oral and the final written submissions from all the parties. Further, the Tribunal has considered the issues raised by all the parties within the context of the evidence and the relevant provisions of the *Code*.

[10] The majority finds that Ms. Hogan's, Ms. Stonehouse's and A.B.'s right to equal treatment with respect to services, without discrimination because of disability has been infringed by Ontario.

[11] The majority finds that Mr. Andy McDonald's right to equal treatment with respect to services, without discrimination because of disability, has not been infringed by Ontario.

BRIEF REASONS

[12] The Tribunal finds that by providing SRS to the Complainants in the way it did before the de-listing on October 1, 1998, Ontario was providing a service within the purview of section 1 of the *Code.* Notably, the *Code* does not define the term "services" exhaustively. It does, however, provide an exhaustive list of what does not constitute

services. Simply stated, if it is not listed, it is deemed services for the purpose of the *Code*.

[13] It is an uncontested fact that by Regulation 528/98, which amended R.R.O. 1990, Regulation 552, effective October 1, 1998, Ontario deemed SRS and any supporting services for such surgery, among other services, not to be insured services.

[14] However, clause 24(1)(3) provides that despite that exclusion, sex-reassignment surgery and any supporting services for such surgery are insured services if performed on a person who, as of October 1, 1998, had completed the Centre for Addiction and Mental Health in Toronto ("CAMH") Gender Identity Disorder ("GID") Clinic ("Clinic") Program "*operated by"* that Clinic; and had been recommended for surgery by that Clinic, upon completion of the program.

[15] In its pleadings, Ontario accedes that GID is a disability. (Persons who are not happy about or feel discomfort with their birth-assigned sex can be said to be experiencing GID: the Commission 's final written submissions, at paragraph 6).

[16] It is not necessary at this juncture to state whether there was discrimination because of sex. It is enough, to state that the Tribunal finds that the ground of disability has been proven.

[17] Based on the evidence, the transition from female to male and from male to female is a long process, with possible set backs along the way. In the majority's view, given the nature of the program, once registered at the clinic, the Complainants had relied on obtaining the clinic's recommendation, and ultimately SRS. It is important to note that each of three Complainants continued with the program at the clinic and was recommended for SRS.

[18] Notably, on October 1, 1998, all three Complainants were patients at the Clinic and participating in the Clinic's program. They had gone there so that they could receive the Clinic's recommendation for SRS because it was the only clinic in Ontario

that had an arrangement with the Ontario Health Insurance Plan ("OHIP") to consider sex-reassignment surgery and any supporting services for such surgery as insured services.

[19] The majority is satisfied that the de-listing of SRS had a disproportionate adverse impact on the three Complainants who had already enrolled in the Clinic's transition program. The majority finds that the adverse impact constitutes an infringement of section 1 because of disability to meet the constituent elements of subsection 11(1) of the *Code*: Section 11 is an interpretative section of the *Code.*

[20] Although Ontario had inserted a "grandparent" provision in the Regulation to include trans-gendered people who had already begun the transition at the Clinic, the majority finds that the accommodation in the grandparent provision was not reasonable. For example, the provision could have extended coverage until those who had enrolled in the program before the effective date of the Regulation had received the Clinic's recommendation or had been rendered unsuitable for SRS by the Clinic.

[21] Specifically, the majority finds that the provision was not properly designed to ensure that Ontario met its purpose without placing undue burden on these three Complainants. The majority finds that these Complainants—albeit at different stages of the transition—were far along their individual course of treatment, and should have fell within the purview of the grandparent clause.

The Complainants

Michelle Elyn Hogan

[22] Ms. Hogan first visited the Clinic in November 1995. She began her transition from male to female in March 1997. She began hormone treatment in July 1998. She received the Clinic's recommendation on March 18, 2002 after completing its required program.

[23] There is no evidence before this Tribunal that the Clinic had found her to be unsuitable for SRS. The evidence is she became a patient of the Clinic because she was determined to have SRS. She went there to receive the Clinic's recommendation for SRS. As noted above, it was the only clinic that had an arrangement with Ontario whereby OHIP deemed SRS and any supporting services for such surgery insured services if such services were performed on a Clinic's patient who had completed its program, and thereafter, had been recommended for SRS.

Martine Caroline Stonehouse

[24] Ms. Stonehouse first visited the Clinic on October 27, 1982. On June 6, 1994, she began the Real-Life Test, a formal test required in the transition from male to female and from female to male. On September 16, 1994, she had an official name change as indicated above. She began hormone replacement therapy on April 11, 1997. She received the recommendation for SRS on August 3, 1999, after completing the clinic's program.

A.B.

[25] A.B. first visited the Clinic around May 1994. She began the process of transition in 1995. Since 1996, she began hormone replacement therapy. She began the formal Real-Life Test, which is required by the Clinic as a touchstone for transition, around February 11, 1998. She received the recommendation for SRS on May 10, 2001, after completing the Clinic's program.

Andy Thomas Albert McDonald

[26] Mr. McDonald was diagnosed with GID ("transsexualism') around 1976. That diagnosis was made in British Columbia.

[27] Mr. McDonald was not a patient of the Clinic or had he heard of the Clinic at the time the Regulation became effective. He began the formal Real-Life Test, as required

by the Clinic's program, on May 14, 2001. That date was his first contact with the Clinic. He began hormone treatment on July 23, 2002.

[28] Unlike the other three Complainants, Mr. McDonald has not demonstrated that he was a patient with the Clinic or had began the formal treatment or transition before the de-listing of SRS as an insured service effective October 1, 1998.

[29] Therefore, it cannot be said that the de-listing had a disproportionate adverse impact on him. He was neither a patient of the Clinic, nor had he begun the program, and thus had not relied on the government's arrangement with CAMH to fund his treatment, if recommended for SRS. As noted earlier, Mr. McDonald admits that he was not aware of the Clinic. Moreover, although he was referred there in September 2000, his first visit was in May 2001. According to the evidence, he began CAMH's GID program on May 14, 2001.

[30] Regarding the Complainants, Hogan, Stonehouse and A.B., given the nature of these Complaints, it would be unfair and impractical to the Complainants, especially those who are waiting for funding to complete the SRS part of the transition, to continue their treatment only after the Tribunal's full Decision and Reasons are released.

[31] Thus, the Tribunal makes the Interim Order below:

ORDER

(1) Effective immediately, Ontario shall fund SRS for Martine Stonehouse under the same scheme as it did before the de-listing of SRS on October 1, 1998;

(2) Within thirty (30) days of the date of this Decision, Ontario shall pay to the Complainant identified in these proceedings as A. B., and to Michelle Hogan, the sum equal to the amount for which they would have been eligible under OHIP before the de-listing of SRS on October 1, 1998;

(3) That, within five (5) business days of this Order, lead counsel of Ontario gives a copy of this Order to the Minister of Health and Long-Term Care, and the General Manager or the appropriate entity that makes decisions about funding SRS treatment, so that they will know that Ontario has breached the *Code* and

that it is their responsibility to ensure that this partial remedy is honoured as the Tribunal stipulates; and

(4) Ontario shall inform the Registrar (Acting), that it has complied with paragraphs 1 and 2 of this Order within five business days of compliance.

[32] The Tribunal remains seized of this matter and shall issue its final Decision and Reasons, in full, as soon as possible.

Dated at Toronto, this 9th day of November, 2005.

"Signed By"

_____

Patricia E. DeGuire,
Vice-Chair

"Signed By"

_____

Ajit Jain,
Member

Ross Hendriks, Vice-Chair (dissenting in part):

BACKGROUND

[33] Only services that are prescribed by regulation pursuant to the *Health Insurance Act*, R.S.O. 1990, c.H-6 ("*HIA*") are insured services under the Ontario Health Insurance Plan ("OHIP"). Insured services typically fall under Regulation 552. Insured physician services generally are set out in a schedule of benefits adopted by reference in Regulation 552, commonly known as the Schedule of Benefits for Physician Services ("SOB-PS").

[34] Regulation 528/98 amended Regulation 552 and the SOB-PS to de-list sex reassignment surgery from them, effective October 1, 1998. Immediately prior to October 1, 1998, sex reassignment surgery had been an insured service of longstanding for persons with profound Gender Identity Disorder ("GID") who had completed the Gender Identity Clinic program operated by the Centre for Addiction and Mental Health ("CAMH"), formerly known as the Clarke Institute of Psychiatry (the "Clarke"), and whom the CAMH or the Clarke had recommended for such surgery, after completing an extensive two-year "real life test" in accordance with the globally-recognized treatment for persons with GID, the Harry Benjamin International Gender Dysphoria Association's Standards of Care (the "Standards of Care").

BRIEF REASONS

[35] Profound GID is a serious disability, the nature and treatment of which has received extensive peer-reviewed examination in leading medical literature, which I will examine in detail in the final Partial Dissent and Reasons to follow. As set out by my colleagues in paragraphs 15 and 16, Ontario admits that GID is a disability, and we are unanimous that the ground of disability has been proven.

[36] In my view, the ground of sex has also been proven. I will set out my reasons why both grounds of disability and sex have been violated in the provision of "services"

under section 1 of the *Code*, in the final Partial Dissent and Reasons to follow. Moreover, while not argued by counsel, in my forthcoming analysis I also find that these grounds are intersectional.

[37] After careful consideration of the evidence, I have concluded that for individuals such as the Complainants with profound GID who have been selected by the CAMH in accordance with the Standards of Care, sex reassignment surgery is a legitimate, international, medically-recognized, non-cosmetic treatment of longstanding.

[38] In the alternative, after careful consideration of the testimony of the medical experts, I am satisfied that the medical debate relied upon by Ontario to support its decision to de-list this service was only discovered by it well after Regulation 528/98 had been promulgated, and was not a factor in arriving at the decision to de-list this service.

[39] The process by which Regulation 528/98 was promulgated was substantially different than the usual process by which other insured services were reviewed and de-listed during the same time period, which I will examine in detail in the final Partial Dissent and Reasons to follow.

[40] In essence, Regulation 528/98 was promulgated without any prior consultation of outside medical experts in this area of specialization, which was contrary to Ontario's usual practice at the time. Moreover, it was clearly not done as part of the extensive "tightening and modernization" process undertaken by Ontario at the time to review other insured services to ascertain if they were a worthwhile use of public resources and should remain insured under the SOB-PS. This contemporaneous "tightening and modernization" process conducted by Ministry staff reviewed hundreds of items listed in the SOB-PS. The evidence indicates that the de-listing of sex reassignment surgery, without consultation from medical experts, the Ontario Medical Association ("OMA"), or from the senior working groups or committees formed to review changes to the SOB-PS, was unusual even for surgical procedures performed out-of-province, because the request did not come from Ministry staff, it came directly from the Minister of Health. In

fact, Cabinet had received advice from its very own Legislation and Regulations Committee just two days prior to promulgating Regulation 528/98 against doing so. Ontario has not adduced any evidence that Cabinet had a non-discriminatory reason at the time for its decision to de-list sex reassignment surgery.

[41] Ontario has failed to refute the *prima facie* case that the Complainants have established. Ontario has also failed to show that the decision to de-list sex reassignment surgery was made for valid medical reasons known to it at the time, or that it engaged in a meaningful process prior to de-listing this service that would have brought any such reasons to light.

[42] For these reasons, I find that the conduct of Ontario in promulgating Regulation 528/98 breached the *Code*. Further, I find that the conduct of Ontario was negligent, reckless and an abuse of power.

[43] The Complainants, through their pleadings, in their own testimony, and in the testimony of their witnesses, have recounted to the Tribunal the needless suffering and loss of dignity that the de-listing of sex reassignment surgery has caused to both themselves and to the very small number of others with profound GID who require sex reassignment surgery in order to live their lives in equanimity as opposed to tragedy.

[44] My colleagues would extend the timing of the grand-parenting clause for the three Complainants who resided in Ontario at the relevant time, in recognition of the fact that they would have sought all treatment necessary for their profound GID if they had known that sex reassignment surgery was about to be de-listed. While I agree with my colleagues as a practical matter that these Complainants require this result, I disagree that this case properly falls within section 11 of the *Code* as a matter of law. I have concluded that I must go further and make findings of fact and law based on section 1 of the *Code* that all of the Complainants have been subjected to discrimination by Ontario, and that systemic discrimination has occurred, for reasons that will be set out in full in the final Partial Dissent and Reasons to follow, along with an assessment and analysis of damages and interest.

[45] The *Code* is a quasi-constitutional, fundamental law of general application intended to supercede all other legislation. I rely upon my jurisdiction under it as set out in sections 41(1), 47(1) and 47(2) to resolve the conflict between section 1 of the *Code*, which prohibits discrimination in the provision of services based on disability and sex, with the promulgation of Regulation 528/98, which de-listed sex reassignment surgery.

[46] I adopt paragraphs 1 and 2 of my colleagues' Order herein, which provide practical and immediate relief to Ms. Stonehouse, A.B. and Ms. Hogan;

[47] I would have made the following interim orders, as set out below:

(1) Effective today, Ontario must fund the sex reassignment surgery for Mr. McDonald under the same scheme set out in the SOB-PS and Regulation 552 as it did immediately before the promulgation of Regulation 528/98;

(2) Ontario is to cease this contravention of the *Code* and refrain from committing the same or similar contravention, within thirty (30) days of today; and

(3) I remain seized of this matter and reserve my right to make any other determinations, including determinations with respect to damages and interest, that I deem necessary to eradicate discrimination in the final Partial Dissent and Reasons.

Dated at Toronto, this 9th day of November, 2005.

"Signed By"

_____

Mary Ross Hendriks
Vice-Chair