

## Overview of LGBT Human Rights in Canada

1. Jurisdiction over LGBT human rights in Canada is divided between the Parliament of Canada and provincial and territorial legislatures. In recent years, Canada has taken several important steps to improve legal protections for LGBT persons. Starting in the 1970s, provincial legislatures enacted protection from sexual orientation discrimination. In 1995, sexual orientation was read into the *Canadian Charter of Rights and Freedoms* as a ground analogous to those on which discrimination is prohibited.<sup>1</sup> In 1996, the *Canadian Human Rights Act* was amended to explicitly include sexual orientation as a prohibited ground of discrimination. All provinces and territories have included sexual orientation in their human rights legislation accordingly. In 2005, the Federal *Civil Marriage Act* legalized same-sex marriage throughout the country. Nevertheless, despite improved legal protections for LGBT persons, a significant amount of work remains necessary to establish meaningful equality for all LGBT Canadians.

2. In 2009, during Canada's previous UPR, the Netherlands recommended that Canadian governments use the Yogyakarta Principles as a guide to the development of human rights laws within the country, particularly in respect to LGBT rights.<sup>2</sup> Canada accepted this recommendation.<sup>3</sup> However, Egale notes that there are many areas where Canada continues to be in violation of the Yogyakarta Principles. The remainder of this report discusses these areas in greater detail.

## Trans Human Rights

3. Protections for trans people in Canada remain limited and vary by jurisdiction. There are currently no federal (national) laws that explicitly prohibit discrimination on the basis of gender identity. Despite attempts by opposition Members of Parliament to introduce legislation that would expand anti-discrimination protection on the basis of gender identity, the current government has demonstrated little interest in seeing such legislation pass.<sup>4</sup> Unlike other minority groups, transgender, transsexual, gender-variant and Two-Spirit Canadians do not have protections under the *Charter of Rights and Freedoms* because they are not currently recognized as an identifiable group. Nor is gender identity protected in the *Canadian Human Rights Act*. At the provincial level, some progress has been made since Canada's last UPR in 2009. Prior to 2012, only the Northwest Territories explicitly provided protection on the basis of gender identity in its human rights code.<sup>5</sup> In 2012, Manitoba amended its human rights code to include gender identity<sup>6</sup>, while Ontario amended its human rights code to include gender identity and gender expression.<sup>7</sup> No other provinces have explicit protections on the basis of gender identity or gender expression, nor is Egale currently aware of any proposed legislation to rectify this legislative gap.

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<sup>1</sup> [Egan v. Canada, [1995] 2 S.C.R. 513]

<sup>2</sup> See: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/152/99/PDF/G0915299.pdf?OpenElement> (recommendation 29)

<sup>3</sup> See: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/139/49/PDF/G0913949.pdf?OpenElement> (para. 36)

<sup>4</sup> The most recent opposition bill was Private Member's Bill C-279 (Randall Garrison – Esquimalt-Juan de Fuca), *An Act to Amend the Canadian Human Rights Code* (Gender Identity and Gender Expression). As of August 2012 the bill remains at Committee stage.

<sup>5</sup> See The Northwest Territories Human Rights Act S.N.W.T. 2002, available at: <http://nwthumanrights.ca/wp-content/uploads/2010/01/NWT-Human-Rights-Act-2009.pdf>

<sup>6</sup> See Ontario Human Rights Code, R.S.O. 1990, available at: [http://www.e-laws.gov.on.ca/html/statutes/english/elaws\\_statutes\\_90h19\\_e.htm](http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90h19_e.htm)

<sup>7</sup> See Manitoba Human Rights Code, C.C.S.M, 1987, available at: <http://web2.gov.mb.ca/laws/statutes/ccsm/h175e.php>

4. While Egale supports the recent legislative changes in Manitoba and Ontario, the lack of protections for trans persons at the national level, and in the majority of provinces and territories, violates the Yogyakarta Principles. Specifically, Principle 1 provides the right to universal enjoyment of human rights; Principle 3 calls for the right for equal recognition before the law; and Principle 12 calls on states to use all necessary measures to eliminate discrimination on the basis of gender identity. Egale calls on the federal government and all remaining provinces and territories to expand their human rights codes to explicitly prohibit discrimination on the basis of gender identity.<sup>8</sup> Only after the federal government and all provinces and territories in Canada explicitly include gender identity within their human rights legislation can Canada be considered compliant with the recommendation provided by the Netherlands in the previous UPR.

5. In addition to the legislative and constitutional barriers listed above, trans people encounter discrimination when seeking to change their sex-designation on state-issued identification documents. In Canada, trans people are currently required to undergo sex reassignment surgery (SRS) before they are legally able to change the sex listed on their passports. The same criterion is used in most provinces and territories where trans people must undergo SRS before changing the sex designation assigned to them on birth certificates, with the notable exception of Ontario. These policies contravene Yogyakarta Principle 3, which states that no person should be required to undergo medical procedures or treatments as a prerequisite to legal recognition of his/her gender identity. By requiring trans people to undergo SRS prior to changing official documents, Canadian jurisdictions violate the inherent right of trans people to determine their own identity for themselves without undue state-imposed restrictions and regulations. It also discriminates against those who cannot undergo SRS, either for religious, cultural or health issues.

6. In April 2012, the Human Rights Tribunal of Ontario ruled that the SRS requirement for changing birth certificates perpetuated disadvantage for trans people and discriminated against them.<sup>9</sup> This decision was an important and welcome step in upholding the principle of self-determination and in reducing the hardships experienced by trans Canadians. Using the Yogyakarta Principles as a benchmark, Egale calls on other provinces and the Canadian government to remove all medical procedures and treatments as requirements for trans people to affirm who they are and be recognized accordingly on state-issued documents.

7. Trans Canadians living outside of Montreal, Toronto and Vancouver have insufficient access to knowledgeable medical specialists. This reality is particularly challenging for trans persons who live outside of major urban centers and wish to pursue hormone therapy and/or SRS.

8. Finally, there are inadequate protections for trans persons in federal penitentiaries. In 2010, the federal government halted funding for SRS for trans inmates. This decision was in violation of verdicts reached by the Canadian Human Rights Tribunal in 2001 and the Federal Court of Canada in 2003 which had ruled that the Correctional Service of Canada (CSC) must provide access and financial coverage for SRS when deemed medically necessary. The Tribunal found that restricting funding for SRS constituted discrimination on the basis of sex and disability in the *Canadian Human Rights Act*.<sup>10</sup> In addition, the blanket prohibition on funding SRS to federal inmates violates Yogyakarta Principle 9, which calls for the

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<sup>8</sup> See the Yogyakarta Principles at <http://www.yogyakartaprinciples.org>

<sup>9</sup> *XY v. Ministry of Government and Consumer Services*, [2012] O.H.R.T.D. No. 715.

<sup>10</sup> See *Canada (Attorney General) v. Canada (Human Rights Commission)*, 2003 FCT 89. Available at: <http://canlii.ca/en/ca/fct/doc/2003/2003fct89/2003fct89.html>

right to treatment with humanity while in detention. Egale urges the Canadian government to reinstate funding for SRS and other medically necessary treatments to trans inmates.

### **Blood Donation Policy**

9. Unchanged since 2009, Canada continues to enforce a lifetime ban on men who have sex with men (MSM) from donating blood. This policy contravenes the spirit of the Yogyakarta Principles by perpetuating stereotypes and prejudice within the blood donation system, while ignoring scientific advances which have made the indefinite ban obsolete. Research conducted in Australia<sup>11</sup> and the United Kingdom<sup>12</sup> has found that a 12-month deferral is equally effective as a lifetime ban in maintaining the safety of the blood supply. Canadian experts in the field have issued similar declarations in respect to the ineffectiveness of the lifetime ban.<sup>13</sup> The Canadian government has rejected calls to reform this discriminatory policy.

10. Egale believes that Canada should adopt a behavioural-based framework that defers donations from persons who have engaged in risky sexual activity, rather than relying on a blanket ban against an entire demographic. These policies have been successfully adopted in Italy in 2001, and more recently in Spain, without jeopardizing the safety of the blood supply.<sup>14</sup> Spain and Italy's leadership on this issue is noted as a model that Canada could follow.

11. While Egale is opposed to restricting blood donors based on sexual orientation, many countries, including Argentina, Australia, Hungary, Japan, Sweden and the United Kingdom have introduced 12-month deferrals for MSM donors. South Africa has a 6-month restriction in place. If Canada does not opt to pursue a behavioural-based approach, a 6-month or 12-month deferral for MSM donors would be preferable to the current lifetime ban.

### **Family Policy**

12. Same-sex couples in Canada face unique forms of discrimination when attempting to have children. While laws governing adoption have been standardized for LGBT & heterosexual couples, the law privileges heterosexual couples if parents choose to employ assisted reproductive technology (ART). In Ontario, for example, when a heterosexual couple employs sperm donation to conceive a child, the non-biological father is immediately conferred parentage. Conversely, when male same-sex partners employ ART to have a child, the non-biological parent is not immediately listed on the birth certificate and must acquire an adoption order no sooner than seven days after the child's birth. For lesbians, the same

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<sup>11</sup> Seed Clive R et al. "No evidence of a significantly increased risk of transfusion-transmitted human immunodeficiency virus infection in Australia subsequent to implementing a 12-month deferral for men who have had sex with men (CME)" 50.12 (December 2010): 2722–2730.

<sup>12</sup> Lifetime blood donation ban lifted for men who have had sex with men." Department of Health. <http://mediacentre.dh.gov.uk/2011/09/08/lifetime-blood-donation-ban-lifted-for-men-who-have-had-sex-with-men/> September 8, 2011. Accessed August 15, 2012.

<sup>13</sup> Wainberg, Marc et al. "Reconsidering the lifetime deferral of blood donation by men who have sex with men." Canadian Medical Association. May 25, 2010. Accessed: August 15, 2012. Also see, Julia Belluz, "Who's afraid of gay men's blood? We are." *Maclean's Magazine*. <http://www2.macleans.ca/2011/09/14/whos-afraid-of-a-gay-mans-blood-we-are/> September 14, 2011. Accessed August 15, 2012.

<sup>14</sup> Tatchell, Peter. End the Gay Blood Ban. *The Guardian*, <http://www.guardian.co.uk/commentisfree/2009/nov/30/gay-sex-give-blood-ban>. November 30, 2009. Accessed August 23, 2012.

procedure applies to the non-biological parent if the sperm donor is known. In these cases, Ontario policy requires non-biological LGBT parents to adopt their own children.

13. These provisions have significant implications beyond their discriminatory nature. For one, the adoption process necessitates various administrative processes, legal uncertainties, and associated financial costs, which heterosexual parents are not required to endure. Moreover, when LGBT parents undergo these processes, they are legally restricted from caring for the child and are excluded from making critical medical decisions for a newborn with life-threatening complications.

14. It should be noted that the process of accessing ART poses special difficulties for gay men. While the 2004 Canadian statute governing assisted reproduction prohibits discrimination based on sexual orientation, MSM are effectively prevented from accessing ART because they are forbidden to donate sperm as a result of Health Canada policies.<sup>15</sup> These policies effectively deny gay men the ability to donate their own sperm for their own child. Heterosexual men, by contrast, can donate sperm for use in ART without notable restriction. Through a lengthy and cumbersome application with Health Canada, gay men can receive individual exemptions on a case-by-case basis. However, that a gay man can only access in vitro fertilization via special approval from a government body is an affront on the rights of MSM to found their own families.

15. The above practices contravene Yogyakarta Principle 24, which affirms the rights of LGBT couples to found a family through artificial insemination without discrimination on the basis of sexual orientation. The Canadian government must reform these policies in order to eliminate the unnecessary delay and legal uncertainties facing same-sex partners who have children through ART.

### **Age of Consent**

16. Canadian laws governing age of consent discriminate against Canada's GBT community. In Canadian Criminal Law, the age of consent for vaginal intercourse is 16 years old whereas the age of consent for anal intercourse is 18 years of age. This inconsistency was challenged in the Ontario Court of Appeal in 1995, which ruled that the unequal age of consent violated the anti-discrimination clause guaranteed in the *Charter*. The Quebec Court of Appeal reached a similar decision in 1998, as did Alberta in 2002 and British Columbia in 2003.<sup>16</sup> Nevertheless, the relevant section remains in the Criminal Code. While the law can no longer be applied in Quebec, Ontario, Alberta, and British Columbia, it can still be exercised in other jurisdictions. Moreover, the Parliament of Canada's failure to abrogate a provision repeatedly signalled to be discriminatory sends a negative message to the LGBT community. Lastly, the outdated law violates Principle 2 of the Yogyakarta Principles, which calls for equal ages of consent for both vaginal and anal intercourse.

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<sup>15</sup> Health Canada. 2000. *Health Canada Directive: Technical Requirements For Therapeutic Donor Insemination*. Ottawa.

<sup>16</sup> Pilon, Marylin. "Canada's Legal Age of Consent to Sexual Activity." Library of Parliament. 25 January 1999, revised 12 April 2001. <http://www.parl.gc.ca/Content/LOP/ResearchPublications/prb993-e.htm#%284%29end> Accessed April 16, 2012; R. v. Roth, 2002 ABQB 145R; <http://www.canlii.org/en/ab/abqb/doc/2002/2002abqb145/2002abqb145.html>; R v. Blake

## Immigration & Asylum

17. The Designated Country of Origin list (DCO) puts many LGBT persons at risk, whether they are seeking to come to Canada or are already here. *An Act to amend the Immigration and Refugee Protection Act* (Bill C-31) provides the minister with the sole ability to designate refugee claimants as coming from “safe countries.” Applicants from DCOs face expedited hearings and are denied access to the Refugee Appeal Division (RAD). Although applicants can appeal to the Federal Court, they are not awarded an automatic stay in the country while their case is considered. Countries that are ostensibly democratic are generally placed on the DCO list. However, many countries that have basic democratic institutions discriminate against LGBT persons, which is often not immediately visible when deciding which countries are placed on the DCO list. Egale calls for the introduction of an independent expert-panel that can decide, rather than the minister, which countries to place on the DCO list. The panel must be sensitive to, and knowledgeable about, LGBT human rights when selecting countries to place on the DCO list.

## Hate Crimes, Bullying and Other Concerns

18. Almost two-thirds of hate crimes motivated by sexual orientation are violent, making hate crimes against LGBT persons among the most violent forms of hate crime reported in Canada.<sup>17</sup> It is widely acknowledged that hate crimes against LGBT persons are greatly underreported, often due to concerns particular to LGBT persons, including fear of retribution from family or friends and publicly disclosing one’s sexual orientation.

19. Bullying of LGBT students or those perceived to be LGBT also remains a serious problem in educational facilities, with 64% of LGBT and questioning students reporting feeling unsafe at school.<sup>18</sup> These unsafe learning environments have contributed to higher rates of suicide for LGBT youth, relative to the general population.<sup>19</sup> Egale calls on provincial and federal governments to institute changes in their education curricula that address the realities faced by LGBT youth. For example, greater efforts should be made to introduce gay-straight alliances (GSA’s) throughout the country.

20. First Nations and Aboriginal Canadians who identify as two-spirit or LGBT face unacceptably high levels of violence and discrimination. A report recently produced by the National Aboriginal Health Organization (NAHO) indicated that LGBT and two-spirited Aboriginal youth are two times more likely to face assault than heterosexual Aboriginal youth.<sup>20</sup> Facing homophobia, transphobia and violence in their communities, LGBT and two-spirited Aboriginal youth often have no supports or safeguards. This can lead to alcoholism, drug abuse, sex work and in certain cases, suicide.

21. As of 21 September 2012, Egale is not aware of any attempts by the state to inform the public of the UPR process, or engage in consultations with civil society organizations ahead of the NGO submission deadline of 9 October 2012.

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<sup>17</sup> Statistics Canada. *Police-reported Hate Crimes, 2010*. <http://www.statcan.gc.ca/daily-quotidien/120412/dq120412b-eng.htm>. April 12, 2012. Accessed August 23, 2012.

<sup>18</sup> Catherine Taylor and Tracey Peter et al (2011), *Every Class in Every School: Final Report on Homophobia, Biphobia, and Transphobia in Canadian Schools. Final Report*. Toronto, ON: Egale Canada Human Rights Trust, pg. 17.

<sup>19</sup> Woods, Michael. “Gay students endure ‘cycle of hate’ in schools.” *The Toronto Star*. <http://www.thestar.com/news/canada/article/1073942--gay-students-endure-cycle-of-hate-in-schools>. Friday October 21, 2011. Accessed on August 23, 2012.

<sup>20</sup> National Aboriginal Health Initiative (2012), *Suicide Prevention and Two-Spirited People*.