

GENDER AND THE LAW 45.307

Fall 2009

Professor Karen Busby

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MATERIALS

Course Materials for Gender and the Law (Fall 2009) compiled by Karen Busby. Available from the MDC.

COURSE EVALUATION

1. Research Paper (80% of final grade).

You are required to write a paper which demonstrates independent research, critical thinking, effective communication, and originality. During the second or third week of classes, you must schedule an interview with me to discuss your topic. I will be happy to see you to discuss the paper throughout the term. The final paper should be 20 to 30 pages long and is due on the last day of classes (Tuesday, December 8). If you wish, you can submit a draft of your paper on or before Friday, November 13. I will return the paper to you within a week of the date you hand it in with comments on how it can be improved. I will NOT accept drafts later than November 13. I am required to remind you of the university regulations on plagiarism and cheating which are found in the 2009-10 University Calendar. Permission to defer (including extension of a due date) cannot be granted by a professor but must be received from the Associate Dean.

2. Participation (20% of final grade).

Given the small size of the seminar, it will be conducted as a seminar and all seminar members will be expected to be prepared for seminar and ready to make a meaningful contribution either in small group discussion or in the larger seminar group. As part of your participation grade you are required to hand in or email to me before seminar five comments or questions (hand written comments are fine) that you have arising from the materials assigned for that seminar at least three times during the course. If the course website is up and running, these comments should be posted to that site unless they contained personal observations that you are not ready to share with the seminar. I hope that we will be able to discuss the questions during the seminar. If you fail to hand in these lists or if they indicate a very weak grasp of the material, up to 10 points might be deducted from your participation score.

I do not require students to do presentations on their research papers. However I do encourage students to volunteer to take a lead role in a specific seminar. You may want to take a lead role if, for example, one of the questions presented for the seminar is of particular interest to you; you want to the seminar to explore additional questions; you want to enhance the seminar using alternative media; or your paper is connected to the seminar topic and you really want to do a presentation on your paper and the topic connects to a seminar topic. You would assume the lead for 15-20 minutes. If you think that you might want to take a lead role please discuss this with me at least one day in advance of a seminar. (We will likely need to met in person for this discussion.)

You are required to hand in a 1-2 page report either at the last seminar or with your paper that sets out what mark out of 20 you think you should receive for participation and, unless I seriously disagree with your assessment of your performance, you will receive the grade you think you deserve. In making this self evaluation, you should consider attendance, preparedness for seminar, including the seminar comment assignments and participation on the course website, seminar contributions, whether you volunteered to take a “lead role” in seminar and out-of-class discussions (like discussions with other students, family and friends, willingness to raise gender issues in other classes). By Faculty regulation, seminar participation portions of the grades are not appealable.

COURSE OUTLINE

INTRODUCTORY SEMINAR: LAW AS THE OBJECT AND THE OBJECTIVE OF FEMINIST INQUIRY

- * A Note on the Readings for this Seminar

- * Jane Doe v. Carleton University Statement of Claim (December 23, 2008)

- * Jane Doe v. Carleton University Statement of Defence (February 11, 2009)

- * Morgan Dunlop, “Apology being prevented, Carleton president says” (August 19, 2009)

- * Paper Topics Memo

- * *Optional*: Diana Majury, “The Charter, Equality Rights and Women: Equivocation and Celebration” (2002)

SEMINAR 2: FEMINIST AND LEGAL METHODS: IRRECONCILABLE DIFFERENCES?

- * A Note on the Readings for this Seminar

- * Karen Busby, “Not a Victim Until a Conviction is Entered” (2006)

- * Elizabeth Comack and Tracey Peter, “How the Criminal Justice System Responds to Sexual Assault Survivors: The Slippage Between “Responsibilization” and ‘Blaming the Victim’” (2006).

- * *R. v. K.M.* (1992) (Man.C.A.)

- * *R. v. Bauder* (1997) (Man.C.A.)

- * *R. v. R.W.S.* (1998) (Man.C.A.), rev’d (1999) (S.C.C.)

SEMINAR 3: HISTORICAL PERSPECTIVES ON WOMEN'S STATUS IN LAW

* A Note on the F

- * Mary Landon Shanley, "Introduction" in *Feminism, Marriage, and the Law in Victorian England* (1989)
- * Constance Backhouse, "The Ceremony of Marriage" (1992)
- * *Optional* Sylvia Van Kirk, "A Question of Blood" and "A World We Have Lost" (1980)

SEMINAR 4 STATE INTERVENTION IN PREGNANCY: ABORTION AND THE CHALLENGE OF SEX AND DISABILITY SELECTION

- * A Note on the Readings for this Seminar
- * Chris Kaposy & Jocelyn Downie, "Judicial Reasoning About Pregnancy and Choice" (2008)
- * Angela Long, "Why Criminalizing Sex Selection Techniques is Unjust: An Argument Challenging Conventional Wisdom" (2006)
- * *Optional*: Samara Polansky, "Overcoming the Obstacles: A Collaborative Approach to Informed Consent in Prenatal Genetic Screening" (2006)

SEMINAR 5 STATE INTERVENTION IN PREGNANCY: REVISITING SURROGATE MOTHERHOOD

- * A Note on the Readings for this Seminar
- * Rakhi Ruparelia, "Giving Away the 'Gift of Life': Surrogacy and the Canadian Assisted Human Reproduction Act" (2007)
- * Karen Busby and Delaney Vun, "Revisiting *The Handmaid's Tale*: Feminist Theory Meets Empirical Research on Surrogate Motherhood" (2009)
- * *Optional*: Elizabeth Scott, "Surrogacy and the Politics of Commodification" (2008)

SEMINAR 6 LOVE AND MARRIAGE: DO THEY ALWAYS GO TOGETHER LIKE A HORSE AND CARRIAGE

- * A Note on the Readings for this Seminar
- * Colette Chelack and Joan McPhail, "Sharing a Life: Manitoba Legislation Respecting Rights and Obligations of Common Law Partners" (2005)
- * Robert Leckey, "Contracting Claims and Family Law Feuds" (2007).

SEMINAR 7 ADDRESSING WIFE ABUSE: WHAT IS THE ROLE OF THE CRIMINAL JUSTICE SYSTEM?

- * A Note on the Readings for this Seminar
- * Michael Evans, "Impersonal touch helps uncover domestic violence" (2009)
- * Excerpts from Holly Johnson, "Measuring Violence Against Women: Statistical Trends 2006". (The whole report is available on the Statistics Canada website.)
- * Wendy Whitecloud and Paul Chartrand, "Violence Towards Aboriginal Women and Children" (excerpt from the Report of the Aboriginal Justice Implementation Committee (2001)).

- * Jane Ursel, “Over-Policed and Under-Protected: A Question of Justice for Aboriginal Women” (2006).
- * Manitoba Department of Justice Policy Directives (“Laying and Staying of Charges” and “Domestic Violence”)
- * *Jensen v. Stemmer* (2007) MBCA 42 (leave to appeal to the SCC denied).

**SEMINAR 8 FROM “CUSTODY AND ACCESS” TO “EQUAL PARENTAL RESPONSIBILITY”:
A FEMINIST ANALYSIS OF BILL C-422 (AN ACT TO AMEND THE DIVORCE ACT)**

- * A Note on the Readings for this Seminar
- * Backgrounder for Private Members Bill C-422 (Equal Parenting) (2009)
- * Pamela Cross, National Association of Women, “Not in the Best Interests of Women and Children: An Analysis of Bill 422: An Act to Amend the *Divorce Act*” (2009)
- * Bill C-422

SEMINAR 9: FEMINISM, RELIGION AND CULTURE: A SURVEY OF SOME ISSUES

- * A Note on the Readings for this Seminar
- * National Association of Women and the Law, Letter (February 2005) to Ontario politicians opposing the government’s then-stated intention to facilitate faith based arbitrations.
 - * Natasha Bakht, “Were Muslim Barbarians Really Knocking at the Gates of Ontario?: The Religious Arbitration Controversy—Another Perspective (2006)
 - * *Optional*: New Regulations under the Ontario Arbitration Act (reflecting recent amendments to the act).
 - * *Optional*: Bailey et al. “Expanding Recognition of Foreign Polygamous Marriages” Policy Implications for Canada”. (A research report in the “Polygamy in Canada: A Collection of Research Reports” series commissioned by the Status of Women Canada in 2005.)
- Optional*: *Syndicat Northcrest v. Amselem* (2004) (SCC).

SEMINAR 10: SEXUAL ASSAULT: FULL ANSWER AND DEFENCE V. EQUALITY FOR MUSLIM WOMEN

- * A Note on the Readings for this Seminar
- * *R. v. N.S.* (2009) O.S.C
- * Women’s Legal Education and Action Fund, Draft Intervener Factum in the *N.S.* case.

SEMINAR 11: WORK AND EQUALITY: EMPLOYMENT STANDARDS THAT WORK FOR WOMEN

- * A Note on the Readings for this Seminar
- * Institute for Women’s Policy Research, “The Gender Wage Gap by Occupation” (2009)
- * Debra Parkes, “Employment Standards that Work for Women” (2008)
- * *The [Manitoba] Employment Standards Code Amendment Act* (in force April 30, 2007).

* *Optional: Nygard International v. Michalowski* 2006 MBCA

SEMINAR 12: CONSTITUTIONAL CHALLENGES TO CANADA'S PROSTITUTION LAWS

* A Note on the Readings for this Seminar

* *Bedford et al. v. Canada* OSC (2009)

* *Downtown Eastside Sex Workers United Against Violence Society v. The Queen* BCSC (2008)

* Excerpt from Pivot Legal Society, "Beyond Decriminalization: Sex Work, Human Rights and a New Framework for Law Reform" (2006).

* Gunilla Ekberg, "The Swedish Law that Prohibits the Purchase of Sexual Services" (2004).

Optional: James Robertson, "Prostitution" (2003).

SEMINAR 13: WOMEN'S STATUS AS DEFINED IN LAW REVISITED: "AIN'T I A WOMAN?"

* A Note on the Readings for this Seminar

* Excerpt from *The Manitoba Human Rights Code*

* Excerpt from *The Vital Statistics Act* (Manitoba)

* Michele Landsberg, "Rape Crisis Centre in B.C. Endures Assault" (2000)

* Paul Attfield, "Strong enough for a man, but built like a woman" (2009)

* Associated Press, "Male or Female? Gender Tests are not always easy" (2009)

* Alice Dreger, "Shifting the Paradigm of Intersex Treatment"

* Lori Chambers, "Unprincipled Exclusions: Feminist Theory, Transgender Jurisprudence, and Kimberly Nixon" (2007)

Optional: Excerpts from Catherine Taylor, *Nowhere Near Enough: A Needs Assessment of Health and Safety Services for Transgender and Two Spirit People in Manitoba and Northwestern Ontario* (2006)

A NOTE ON THE READINGS FOR THE FIRST SEMINAR

INTRODUCTORY SEMINAR: LAW AS THE OBJECT AND THE OBJECTIVE OF FEMINIST INQUIRY

The purpose of the first SEMINAR is to review some of the administrative details of the course, to get to know each other a bit and to have a conversation about topics for your research papers. I have given you a list of research topics but I would encourage you to think outside of this list as well. I have included the Majury article in the readings because it is an excellent yet succinct summary and critique of some of the major cases that have had an impact on women in the last 20 years. Reading it will help those of you who are new to Gender studies to "get up to speed" (and it is a refresher for the others) and something in the article might pique your research interests.

In preparation for today's seminar please consider the following issues:

* What topics are you considering for your Gender research paper?

* If a reporter called you for a comment on the pleadings filed in *Doe v. Carleton University* or the President's statement, what would you say?

Readings

Jane Doe v. Carleton University Statement of Claim (December 23, 2008)

Jane Doe v. Carleton University Statement of Defence (February 11, 2009)

Morgan Dunlop, "Apology being prevented, Carleton president says (August 19, 2009)

Paper Topics

Optional: Diana Majury, "The Charter, Equality Rights and Women: Equivocation and Celebration" (2002)

A NOTE ON THE READINGS FOR THIS SEMINAR

SEMINAR 2: Feminist and Legal Methods: Irreconcilable Differences?

There are two longer readings for today's seminar. My article tries to demonstrate how foundational principles in criminal law make sexual violence convictions particularly difficult to obtain. The Comack and Peter article demonstrates how non-doctrinal factors seem to conspire against victims even in serious sexual assault cases. In going through the readings, keep in mind two of the inquiries that are central to this course:

1. **Law as the object of feminist inquiry:** how does this law under examination subordinate women and does it have different impacts on differently situated women? whose interests are served by this law?
2. **Law as the objective of feminist inquiry:** if law reform was the goal, what did the reformers want to change and why? Did they succeed (and what counts as success)?

There are three very short cases from the Manitoba Court of Appeal. In seminar we will consider whether and how these cases are examples of the analysis contained in the two articles. After reading these articles and cases ask yourself the question: *if a friend was sexually assaulted and came to you for advice on whether to report the assault to the police, what advice would you give her?*

Readings

Karen Busby, "Not a Victim Until a Conviction is Entered" (2006)

Elizabeth Comack and Tracey Peter, "How the Criminal Justice System Responds to Sexual Assault Survivors: The Slippage Between "Responsibilization" and "Blaming the Victim" (2006).

R. v. K.M. (1992) (Man.C.A.)

R. v. Bauder (1997) (Man.C.A.)

R. v. R.W.S. (1998) (Man.C.A.), rev'd (1999) (S.C.C.)

NOTE ON THE READINGS FOR THIS SEMINAR

SEMINAR 3: WOMEN'S STATUS AS DEFINED IN LAW

The readings for this seminar give some historic examples of the subordination of women through law and how that subordination is compounded by factors such as seminar, race, and sexual orientation. We will focus in particular on marriage because this is an area that most of you probably already have some knowledge about from Legal History and your other studies. As well, the institution and legal effects of marriage are topics that are pervasive in this course, so using marriage as a focus for our history seminar provides a foundation for these later seminars.

Some issues to consider in advance of seminar include:

1. Early "feminists" sought to identify how marriage subordinated women and to address this subordination through legal reform. How did these laws subordinate women? How would you rate their success at creating social change?

2. Why were marriages a la facon du pays central to the success of the fur trade in what is now known as western and northern Canada? What factors lead to the diminished respect afforded to these marriages?

Readings

Mary Landon Shanley, "Introduction" from *Feminism, Marriage, and the Law in Victorian England* (1989).

Constance Backhouse, "The Ceremony of Marriage" (1992).

Optional: Sylvia Van Kirk, "A Question of Blood" and "A World We Have Lost" (1980)

A NOTE ON THE READINGS FOR THIS SEMINAR

SEMINAR 4 STATE INTERVENTION IN PREGNANCY: ABORTION AND THE CHALLENGE OF SEX AND DISABILITY SELECTION

For 30 years women living in Canada have been offered prenatal testing if they have some risk of giving birth to a child with a disability. With the completion of the Human Genome Project, our ability to identify genetic disorders prior to birth will skyrocket. While you have probably heard about sex-selective abortions in other countries, you may be surprised to learn that such abortions may not be uncommon in Canada either.

In this seminar we will consider questions such as:

1. Do you think that there are good reasons to be concerned about access to abortions in Canada?

2. What are the implications of ready access to prenatal technologies and the information they provide for pregnant women, their families, people with disabilities, the medical profession and society as a whole?

3. Should certain uses of prenatal technologies be prohibited, like access to information in order to abort based on gender or dis/ability selection?

Readings

Chris Kaposy & Jocelyn Downie, "Judicial Reasoning About Pregnancy and Choice" (2008)

Optional: Samara Polansky, “Overcoming the Obstacles: A Collaborative Approach to Informed Consent in Prenatal Genetic Screening” (2006)

Angela Long, “Why Criminalizing Sex Selection Techniques is Unjust: An Argument Challenging Conventional Wisdom” (2006)

Optional: Assisted Human Reproduction Act, S.C. 2004, c.2

A NOTE ON THE READINGS FOR THIS SEMINAR

SEMINAR 5: STATE INTERVENTION IN PREGNANCY: THE PROHIBITION OF COMMERCIAL SURROGACY

The Baby M case in the late 1980s and feminist theory based on that case had a tremendous influence on the development of Canadian laws on commercial surrogacy. Concerns about women’s ability to give meaningful consent, the dangers of exploitation and the potential for commodification of women and children overrode personal autonomy and reproductive freedom. The overarching question for today’s seminar is: *should the federal government maintain a prohibition against commercial surrogacy arrangements?*

READINGS

* Rakhi Ruparelia, “Giving Away the ‘Gift of Life’: Surrogacy and the Canadian Assisted Human Reproduction Act” (2007)

* Karen Busby and Delaney Vun, “Revisiting *The Handmaid’s Tale*: Feminist Theory Meets Empirical Research on Surrogate Motherhood” (2009)

* *Optional:* Elizabeth Scott, “Surrogacy and the Politics of Commodification” (2008)

A NOTE ON THE READINGS FOR THIS SEMINAR

SEMINAR 6: LOVE AND MARRIAGE: DO THEY ALWAYS GO TOGETHER LIKE A HORSE AND CARRIAGE?

In this seminar we will examine the notion of “family” and, in particular marriage. Some of the specific issues we will look include:

* *Why do people marry? Should marriage have a continuing role in our modern society and, if so, should this be reflected in our laws?*

* *How is the family supported or otherwise regulated by law? What is the state’s interest in regulating families? How should it respond to demands to recognize changing or alternative family forms like same-sex marriages or polygamous marriages?*

* *Should there be any differences in how marital and common law relationships (same and opposite) sex are treated in law, in particular on the issues of support and property on relationship breakdown or death?*

* *Should family members be bound to the contracts they make with each other?*

READINGS

- * Colette Chelack and Joan McPhail, “Sharing a Life: Manitoba Legislation Respecting Rights and Obligations of Common Law Partners” (2005)
- * Robert Leckey, “Contracting Claims and Family Law Feuds” (2007).
- * *Optional: Nova Scotia v. Walsh and Bono* (2003) SCC. and *Hartshorn v. Hartshorn* (2004) SCC. (These are two recent cases from the SCC on division of family property.)

A NOTE ON THE READINGS FOR THIS SEMINAR

SEMINAR 7: ADDRESSING WIFE ABUSE: WHAT IS THE ROLE OF THE CRIMINAL JUSTICE SYSTEM?

The main topics to be discussed in this seminar are:

- 1. What are some of the specific problems faced by women, in particular Aboriginal women, who want to leave relationships? deal with abusive relationships? or, access the criminal justice system?*
- 2. What role should the state, in particular the criminal justice system, play in addressing the problem of wife abuse? Are aggressive police and Crown prosecutorial policies flawed and unfair? Are feminists buying a law and order agenda?*

READINGS

- * Michael Evans, “Impersonal touch helps uncover domestic violence” (2009)
- * Excerpts from Holly Johnson, “Measuring Violence Against Women: Statistical Trends 2006”. (The whole report is available on the Statistics Canada website.)
- * Wendy Whitecloud and Paul Chartrand, “Violence Towards Aboriginal Women and Children” (excerpt from the Report of the Aboriginal Justice Implementation Committee (2001)).
- * Jane Ursel, “Over-Policed and Under-Protected: A Question of Justice for Aboriginal Women” (2006).
- * Manitoba Department of Justice Policy Directives (“Laying and Staying of Charges” and “Domestic Violence”)
- * *Jensen v. Stemmer* (2007) MBCA 42 (leave to appeal to the SCC denied).

NOTE ON THE READINGS FOR THIS SEMINAR

SEMINAR 8: FROM “CUSTODY AND ACCESS” TO “EQUAL PARENTAL RESPONSIBILITY”: FEMINIST ANALYSIS OF BILL C-422 (AN ACT TO AMEND THE DIVORCE ACT)

The federal government has been considering amendments to the *Divorce Act* for a number of years in response to the growing “fathers’ rights” lobby. Various parliamentary, senate and inter-governmental committees considered the issue. For example, in December 2002, Bill C-22 was introduced and while it went through second reading and committee hearings, it did not get third reading before the that Parliament ended. The current federal government has not yet entered into this debate but a Conservative MP, Maurice Vellacott introduced a private member’s bill in June 2009 that would give rise to a presumption of equal parental responsibilities.

The readings include a Back grounder on Bill C-422, a brief on the bill prepared by the National Association of Women and the Law and the English version of the bill. Two questions to think about in preparation for this seminar:

1. If you were a committee member, what questions would you put to the NAWL representative regarding its submission?

2. If you were the federal Minister of Justice would you introduce a bill to change custody and access laws? If so, what provisions would you include in the bill?

READINGS

* Backgrounder for Private Members Bill C-422 (Equal Parenting) (2009)

* Pamela Cross, National Association of Women, “Not in the Best Interests of Women and Children: An Analysis of Bill 422: An Act to Amend the *Divorce Act*” (2009)

* Bill C-422

A NOTE ON THE READINGS FOR THIS SEMINAR

SEMINAR 9: FEMINISM, RELIGION AND CULTURE

In this seminar we will consider three issues where the right to gender equality seem to collide with significant cultural or religious rights claims and try to determine a principled way to think about and resolve these issues.

Faith Based Arbitrations:

Under Manitoba law, parties to a dispute can contract to provide that the dispute will be determined by a private arbitrator and they can determine, by this contract, what law the arbitrator will apply, the procedures that will be used and the circumstances under which the matter can be appealed or reviewed by a court. Ontario, following much debate, recently changed its *Arbitration Act* to restrict the usage of private arbitrations on family law cases and to prohibit the use of any law other than the laws of Canada or a province (ie., cannot use Sharia law). *Following Ontario’s lead, should Manitoba amend its Arbitration Act to restrict the use of arbitration in family law cases.*

Readings

* National Association of Women and the Law letter (February 2005) to Ontario politicians opposing the government’s then-stated intention to facilitate faith based arbitrations.

* Natasha Bakht, "Were Muslim Barbarians Really Knocking at the Gates of Ontario?: The Religious Arbitration Controversy—Another Perspective (2006)

* *Optional*: New Regulations under the Ontario Arbitration Act (reflecting recent amendments to the act).

Recognition of Polygamous Marriages

Half of the 10 top source countries for immigration to Canada permit polygamy to some degree: India, Iran, Pakistan, Philippines, Sri Lanka. The Criminal Code (s.292) prohibits polygamy by making it an offence to "practise" "any form of conjugal union with more than one person at the same time whether or not it is recognized as a binding form of marriage" and Canada does not permit people who are in actually polygamous marriages to immigrate to Canada (although people in such families do immigrate here). Yet family law legislation in some provinces (Ontario, PEI and NWT) permit spouses in polygamous marriages to claim support. ***Can and should Canada and the provinces both denounce a practise AND recognize and accommodate a practise that actually exists and where the failure to recognize may lead to hardship for women?***

Readings

* Bailey et al. "Expanding Recognition of Foreign Polygamous Marriages" Policy Implications for Canada". (A research report in the "Polygamy in Canada: A Collection of Research Reports" series commissioned by the Status of Women Canada in 2005.)

Practising Hajib.

Many Muslim women believe that they are required to practise "hajib", which is a requirement to dress modestly including wearing some form of head covering when appearing in public. Such coverings range from a loose head scarf (shayla) to a full body covering with netting over the eyes (burqa). ***How does the interplay between equality, religion and culture play out when an observant Muslim women practices hajib in the following circumstances:***

- i. While participating in a judo or soccer tournament?***
- i. When employed as a kindergarten teacher?***
- ii. When presenting herself to vote in person?***
- iii. When complying with the requirement to provide photographs for official documents like passports and drivers licenses?***

Note that our next class will focus on what should happen when defence counsel asserts that a woman who practices hajib must remove her face veil when testifying in open court as a sexual assault complainant.

Reading

Optional: *Syndicat Northcrest v. Amselem* (2004) (SCC).

A NOTE ON THE READINGS FOR THIS SEMINAR

SEMINAR 10: SEXUAL ASSAULT: FULL ANSWER AND DEFENCE v. EQUALITY FOR MUSLIM WOMEN

N.S. alleges that she was sexually assaulted over a five year period by her uncle and another man and both were charged with multiple offences. At the preliminary inquiry she was asked to remove her hajib (a face veil) on the ground that defence counsel needed to see her face in order to observe her demeanor as a witness. She refused.

Both the preliminary hearing judge and a Superior Court judge ruled that she would have to remove her veil before testifying. The case is on appeal before the Ontario Court of Appeal and is expected to be heard this fall.

On November 12 we will be joined by Joanna Birenbaum, Director of Litigation for LEAF and counsel for LEAF as an intervener in the *N.S.* case. She will be giving a noontime lecture on this case (which you are expected to attend) and then the seminar will convene from 2-3:30 to discuss the case in more detail with Birenbaum. The LEAF factum will be made available to you in advance of the seminar.

The overarching question for the seminar is will be: ***What factors ought to figure into the balancing of an accused's Charter right to full answer and defence and a complainant's Charter right to religious and sexual equality?***

Readings

* *R. v. N.S.* (2009) O.S.C

* Women's Legal Education and Action Fund, Draft Intervener Factum in the *N.S.* case. This factum will be made available to you in advance of the seminar. (It is being penned as these materials are going off to the printers.)

A NOTE ON THE READINGS FOR THIS SEMINAR

Notes for next year: This seminar needs more: add in live in caregivers or pay equity.... Also Deb's article alone is misleading...students do not realize that changes have been made. Take out amendments...to difficult to follow.

SEMINAR11: Work and Equality: Employment Standards that Work for Women

In November 2005, Manitoba Labour Minister Nancy Allen announced that the government had begun a public consultation process on how to improve employment standards legislation in Manitoba. One impetus for this process was the *Michalowski* case. Professor Debra Parkes, working together with other lawyers and students under the auspices of LEAF, CBA and MAWL wrote a submission for this consultation process. In all, 70 written submissions and 38 oral submission were made. In due course, a report was prepared and then the government introduced changes to *The Employment Standards Act* that came into force in April 2007.

In this seminar we will start by considering why the gender wage gap is so persistent. Then we will discuss the review process, the state of Manitoba employment standards law especially as they impact on women and whether the amendments sufficiently address the concerns raised by the LEAF/MAWL/CBA brief. While reading Professor Parkes' brief, consider the following questions:

- 1. Is it accurate and fair to describe Manitoba employment standards legislation (at least before the amendments were made) as "sorry" and "shocking"? Is there anything in particular about the law that surprised you?***
- 2. What should the Manitoba government do to address the issues raised by this submission? What are the impediments to government action? Do the amendments that were made go far enough and, of they do not, what work remains to be done?***

Readings

* Institute for Women's Policy Research, "The Gender Wage Gap by Occupation" (2009)

* Debra Parkes, "Employment Standards that Work for Women" (2008)

* *The [Manitoba] Employment Standards Code Amendment Act* (in force April 30, 2007). Note that this reading is included as a reference tool. I don't really expect you to read and absorb the act.

* *Optional: Nygard International v. Michalowski* 2006 MBCA

A NOTE ON THE READINGS FOR THIS SEMINAR

SEMINAR 12: Constitutional Challenges to Criminal Prostitution Laws

Feminist theories on prostitution are widely divergent including radical feminist theories (prostitution is a form of sexual violence) and liberal or pro-sex theories (sex work provides economic empowerment). However they do seem to agree on one thing: that criminalizing women who are prostitutes is not a good thing and, in fact, may be dangerous. In March 2007, three women (Bedford, Lebovitch and Scott) involved in the sex trade in Toronto filed a statement of claim alleging that Canada's bawdy house laws should be declared unconstitutional. The case is expected to be heard this fall. One of the readings for today is the decision in three applications to intervene in the case. In August, 2007, the Vancouver-based Downtown Eastside Sex Workers United Against Violence Society (SWUAV) filed a broader constitutional challenge alleging that the Criminal Code offences of communication (street solicitation), bawdy house and procurement laws are unconstitutional. (This case is sometimes called the "Pivot" case after the society that organized the litigation.) This case was struck out in 2008 on the grounds that the plaintiffs did not have standing to bring the action.

Our main question for this seminar is, *"if you were working with a feminist organization, like the Women's Legal Education and Action Fund (LEAF), what position would you advocate that the organization take as an intervener particularly on s.15 (equality) in the Bedford or Pivot cases?"* Before getting to this question, we will consider the following questions:

1. To explore the theoretical dimensions or divergent feminist positions on prostitution, we will consider the question: *What, if anything, is problematic about a woman selling her sexual services as opposed to, say, secretarial labour to gain an income?*
2. *What does Canada's prostitution law try to achieve/ what is its objective?*
3. *What should the goal of prostitution law be? How, if at all, should prostitution in Canada be governed by law? Which of the following models would you advocate if you were a Member of Parliament: criminalization? regulation? abolitionism? total decriminalization?*

Readings

* *Bedford et al. v. Canada* OSC (2009)

* *Downtown Eastside Sex Workers United Against Violence Society v. The Queen* BCSC (2008)

* Excerpt from Pivot Legal Society, "Beyond Decriminalization: Sex Work, Human Rights and a New Framework for Law Reform" (2006).

* Gunilla Ekberg, "The Swedish Law that Prohibits the Purchase of Sexual Services" (2004). (Note that Ekberg, a lawyer, lives in Canada and is a well-known and influential feminist activist. Many Canadian feminists share her views and cite her work.)

Optional: James Robertson, "Prostitution" (2003). This paper contains an excellent, concise overview of Canadian prostitution law and its recent history.

NOTE ON THE READINGS FOR THIS SEMINAR

SEMINAR 13: WOMEN'S STATUS AS DEFINED IN LAW: AIN'T I A WOMAN?

In this seminar we are going back to the basic question asked by Sojourner Truth, a then-recently emancipated slave, at a 19th century conference on women's rights, "Ain't I a woman?". We will consider this question as if asked by a male to female transsexual (MtF) in the contexts of, for example, ability to work in a women-only space; upon arrest (body searches) and incarceration (male or female prison?); determining the right check-off box (m or f) on documents such as drivers licenses and passports; and ability to compete in elite sports as a woman. This issue has been a contentious one in feminist communities following the Vancouver Rape Relief Centre's refusal to permit Kimberly Nixon, a MtF, to work as a volunteer in its counselling programs. The British Columbia Human Rights Tribunal found in her favour. The BCSC overturned the HRT's decision and an appeal from that decision was rejected by the BCCA in late 2005. Leave to appeal to the Supreme Court of Canada was denied earlier this year. (So just in case you are lost...VRR won and Nixon lost. And many feminist legal activists breathed a sigh of relief that this messy situation was not being appealed to the Supremes.)

READINGS

- * Excerpt from *The Manitoba Human Rights Code*
 - * Excerpt from *The Vital Statistics Act* (Manitoba)
 - * Michele Landsberg, "Rape Crisis Centre in B.C. Endures Assault" (2000)
 - * Paul Attfield, "Strong enough for a man, but built like a woman" (2009)
 - * Associated Press, "Male or Female? Gender Tests are not always easy" (2009)
 - * Alice Dreger, "Shifting the Paradigm of Intersex Treatment"
 - * Lori Chambers, "Unprincipled Exclusions: Feminist Theory, Transgender Jurisprudence, and Kimberly Nixon" (2007)
- Optional:* Excerpts from Catherine Taylor, *Nowhere Near Enough: A Needs Assessment of Health and Safety Services for Transgender and Two Spirit People in Manitoba and Northwestern Ontario* (2006)

Excerpt from *The Manitoba Human Rights Code*

Review the excerpts below and ask yourself the question whether the Manitoba Human Rights Commission has the jurisdiction to accept a complaint based on discrimination against a person who identifies as trans-gendered or transsexual.

"Discrimination" defined

9(1) In this Code, "discrimination" means

- a) differential treatment of an individual on the basis of the individual's actual or presumed membership in or association with some class or group of persons, rather than on the basis of personal merit; or
- (b) differential treatment of an individual or group on the basis of any characteristic referred to in subsection (2); or
- (c) differential treatment of an individual or group on the basis of the individual's or group's actual or presumed association with another individual or group whose identity or membership is determined by any characteristic referred to in subsection (2); or

(d) failure to make reasonable accommodation for the special needs of any individual or group, if those special needs are based upon any characteristic referred to in subsection (2).

Applicable characteristics

9(2) The applicable characteristics for the purposes of clauses (1)(b) to (d) are

- (a) ancestry, including colour and perceived race;
- (b) nationality or national origin;
- (c) ethnic background or origin;
- (d) religion or creed, or religious belief, religious association or religious activity;
- (e) age;
- (f) sex, including pregnancy, the possibility of pregnancy, or circumstances related to pregnancy;
- (g) gender-determined characteristics or circumstances other than those included in clause (f);
- (h) sexual orientation;
- (i) marital or family status;
- (j) source of income;
- (k) political belief, political association or political activity;
- (l) physical or mental disability or related characteristics or circumstances, including reliance on a dog guide or other animal assistant, a wheelchair, or any other remedial appliance or device.

Excerpt from *The [Manitoba] Vital Statistics Act*

Note this interesting excerpt from *The Vital Statistics Act*. These sections were added in about 1976 (and similar amendments were made to most like acts across the country in the 1970s). Curiously, the Manitoba act was slightly amended, as noted below, in 2001.

Application to change designation of sex

25(1) The director may upon application by any person who has undergone transsexual surgery verified by statutory declaration and upon payment of the prescribed fee make a notation on the registration of birth of that person changing the designation of sex of that person so that it will be consistent with the results of the surgery.

Material in support

25(2) An application made under subsection (1) shall be accompanied by

(a) two medical certificates, signed by medical practitioners who are legally qualified to practise medicine in the jurisdiction in which the transsexual surgery was performed upon the applicant, certifying that

(i) the medical practitioners performed or assisted in performing the transsexual surgery upon the applicant, and

(ii) as a result of the transsexual surgery the designation of the sex of the applicant should be changed;

(b) a certificate, signed by a duly qualified medical practitioner other than a medical practitioner who performed or assisted in the transsexual surgery upon the applicant, certifying that

(i) the medical practitioner who signed the certificate examined the applicant,

(ii) the results of the examination substantiate that transsexual surgery was performed upon the applicant, and

(iii) as a result of the transsexual surgery the designation of the sex of the applicant should be changed; and

(c) any other documentary evidence the director may require.

Exception

25(3) Where the medical certificates required under clause (2)(a) cannot be obtained the director may require such other evidence of the matters to be contained in those certificates as the director considers necessary.

Certificates issue

[25\(4\)](#) Every birth *[note that the words “or marriage” were removed in 2001]* certificate issued after the making of a notation under this section, shall be issued as if the original registration had been made with the sex as changed