Federal Court Cour fédérale

Date: 20161031

Docket: T-255-16

Citation: 2016 FC 1205

Ottawa, Ontario, October 31, 2016

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

AUDREY CHÉDOR

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP CANADA

Respondent

JUDGMENT AND REASONS

[1] This is an application pursuant to subsection 48(3) of the *Canadian Human Rights Act*, RSC 1985, c H-6 and Rule 300(b) of the *Federal Court Rules*, SOR/98-106 [Rules], for the homologation and enforcement of the settlement signed on February 7, 2015 [Settlement] and approved by the Canadian Human Rights Commission [CHRC] on March 4, 2015.

[2] The present application was filed by the applicant on February 10, 2016, and is opposed by the respondent. The matter was heard by the Court in Montréal on September 12, 2016. I have considered the evidence submitted by the applicant in her applicant's record filed on April 20, 2016 and by the respondent in their respondent's record filed on May 10, 2016, together with the written and oral submissions made by the parties.

[3] For the reasons that follow, the present application is allowed in part.

Understanding and managing issues of gender identity and change of sex designation

[4] As a preliminary observation, this Court cannot emphasize more on the delicate character of the present proceeding. Individuals have a reasonable expectation that personal information concerning their private life and medical situation will not be disclosed or publicized without their consent. It goes on without saying that "retention of information about oneself is extremely important", and that "[the] protection of privacy is a fundamental value in modern, democratic states" (*Dagg v Canada (Minister of Finance)*, 1997 CanLII 358 (SCC), [1997] 2 SCR 403 at paras 67 and 65). When should an individual be compelled to disclose to the authorities personal information, and as the case may be, provide proof of undergone sex reassignment surgery [SRS] in order to obtain an official governmental document?

[5] It is in this particular context that the applicant and the duly designated representative of Citizenship and Immigration Canada [CIC] agreed to settle out of the intervention of tribunals and courts a very privy matter concerning the gender identity and change of sex designation of the applicant on her citizenship certificate. Although paragraph 6 of the Settlement provides that

the terms of same are confidential, the parties both indicated to the Court that they waive their rights on the privacy aspect of the Settlement, while there has been no motion or request that the present file of the Court or any part of same be sealed, or that the present matter be heard *in camera*.

[6] The applicant, Ms. Audrey Chédor, is a foreign born naturalized Canadian citizen who identifies herself as a "female and androgynous genderqueer", but not as a transgender. The Settlement stems from a discrimination complaint filed by the applicant with the CHRC in April 2012. In February 2015, the applicant finally received a revised certificate of citizenship, reflecting the applicant's sex as female and the respondent agreed within one year to review their policies with respect to gender designation in CIC documents.

[7] The respondent is presently designated in the herein proceeding as the Minister of Citizenship and Immigration Canada. Following the election of a new government on October 19, 2015, CIC has been reorganized, and is currently known as Immigration, Refugees and Citizenship Canada [IRCC]. Accordingly, it is appropriate to order that the style of cause be amended to reflect the current situation.

[8] The applicant fears today that, despite the Settlement, other individuals will nevertheless feel compelled, in case of change of sex or gender, to provide proof of SRS in order to have their application for a grant of citizenship, or a proof of citizenship, processed by the respondent. This is why the applicant seeks to homologate and enforce the Settlement as an order of this Court.

[9] As explained below, the Settlement is to a very great extent for the general benefit of a broad group of disadvantaged people facing gender or sex discrimination. “Transgender” is an umbrella term for people whose gender identity differs from what is typically associated with the sex they were assigned at birth. On the other hand, “transsexual” persons will experience a gender identity inconsistent – or not culturally associated – with the sex they were assigned at birth. Indeed, the original acronym LGBT used to refer to lesbian, gay, bisexual or transgender is now extending to include other discrete sexual and gender minorities that are not heterosexual or cisgender. This includes individuals who consider themselves as “queers”. This categorization is not intended to be offensive, but rather represent persons who reject the traditional binary division (man-woman, heterosexual-homosexual) of genders and sexualities. Assuming that an individual’s gender or sex identity exclusively belongs to the individual, what type of legal recognition will be given by the State to these fundamental inviolable characteristics?

[10] Pursuant to subsection 92(13) of the *Constitution Act, 1867*, 30 & 31 Victoria, c 3 (UK) [Constitution], the Provinces have the exclusive authority to make laws in accordance with “Property and Civil Rights in the Province”, thus the exclusive jurisdiction to issue birth certificates. On the other hand, citizenship is a matter of exclusive federal jurisdiction in accordance with the preamble of section 91 and subsection 91(25) of the Constitution. The citizenship certificate is a proof of citizenship, whereas the birth certificate is an authentic document proving the information recorded on it, namely, the person’s name, their sex, their place and date of birth and their parental affiliation. Therefore, to prove the identity of the applicant on the proof of citizenship, the Federal Government will usually rely on identity documents such as birth certificates or other acceptable documents which are issued by the

provincial governments, or as the case may be, from foreign competent authorities where applicants were not born in Canada.

[11] In the Province of Quebec, article 10 of the *Civil Code of Québec*, CQLR c CCQ-1991 [CCQ or Code] recognizes that every person is inviolable and is entitled to the integrity of his person. Section 71 of the Code further provides that every person whose sexual identity does not correspond to the designation of sex that appears in that person's act of birth may, if the conditions prescribed by the Code and by government regulation have been met, have that designation and, if necessary, the person's given names changed. On October 2015, section 71 was amended by the Government of Quebec to insure that these changes may in no case be made dependent on the requirement to have undergone any medical treatment or surgical operation whatsoever. However, subject to article 3084.1 of the Code, only a person who has been domiciled in Quebec for at least one year and is a Canadian citizen may obtain such changes. Based on the person's rights to the inviolability and integrity of his person, the Government of Quebec currently requests an applicant to submit a declaration from a physician, psychologist, psychiatrist, sexologist or social worker, who have followed the person concerned and who is of the opinion that changing this designation is appropriate.

[12] In 2012, the Human Rights Tribunal of Ontario [HRTO] found in *XY v Ontario (Government and Consumer Services)*, 2012 HRTO 726, [2012] OHRTD No 715 [*XY*], that the requirement for SRS was discriminatory and ordered the Government of Ontario to cease requiring transgendered persons to have "transsexual surgery" in order to obtain a change in gender designation on their birth certificate. As stated by the HRTO in *XY* at paragraph 164, "it

is beyond debate that transgendered persons […] are a historically disadvantaged group who face extreme social stigma and prejudice in our society", while noting at paragraph 215 that the former requirement "is based not on transgendered persons' actual characteristics but on assumptions about them and what they must do in order to "be" their gender". Although the *Ontario Vital Statistic Act*, RSO 1990, c V 4 [OVSA] was never amended, the Government of Ontario has revised the criteria for changing sex designation on a birth registration and there is no longer a requirement to provide evidence of SRS to support an application for change of gender or sex on an applicant's birth certificate.

[13] In *CF v Alberta (Vital Statistics)*, 2014 ABQB 237, [2014] AJ No 420, the plaintiff, CF, was born with male genitalia and was given a conventional male name but described herself as a "trans female". CF was seeking a declaration that her right to equal protection and equal benefit of the law without discrimination, as guaranteed to her by section 15 of the *Canadian Charter of Rights and Freedoms, The Constitution Act, 1982*, Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [Charter], was violated when the Director of Vital Statistics, pursuant to the *Vital Statistic Act*, RSA 2000, c V-4 [VSA], refused her application for a birth certificate stating her sex to be female because there was no proof of SRS. Endorsing the general reasoning of the HRTO in *XY*, the Court of Queen's Bench of Alberta found that the VSA's birth registration system created a distinction which was based on sex. The VSA's birth registration system, and in particular, the parts of it which relate to the issuing of birth certificates contributed to the disadvantages experienced by transgendered persons by perpetuating the prejudice and stereotyping to which they are subject. Consequently, the Court of Queen's Bench of Alberta declared that by not permitting the issuance of a birth certificate to the plaintiff which records her

sex as female, the VSA infringed the right to equal protection and benefit of the law protected by the Charter.

[14] These two decisions certainly triggered a new conception of the law with regards to the specific situation of the LGBTQ community, whether a concerned individual is a transgender, a transsexual, or a queer. The fundamental question, in this evolved society, is whether the sex designation appearing on a birth certificate always corresponds with the individual's gender or sex identity, that is, the one the individual really identifies with and is comfortable living with. Indeed, many provincial legislatures have now removed the requirement to provide medical statements that a SRS has been practiced by a surgeon. For example, since May 29, 2014, if a person's birth has been registered in British Columbia, a declaration by the applicant, stating that the applicant has assumed, identifies with and intends to maintain the gender identity that corresponds with the desired sex designation, together with a statement from a practicing physician or psychologist that confirms that the sex designation on the applicant's birth registration does not correspond with the applicant's gender identity, will normally be required before making a change to the person's sex designation (section 27 of *Vital Statistics Act*, RSBC 1996, c 479). For other examples, see also subsections 25(5) and (8) of *Vital Statistics Act*, CCSM c V60, as amended on February 1, 2015, and section 31 of the *Vital Statistics Act*, 2009, SS 2009, c V-7.21 as amended on June 30, 2016.

[15] In agreeing to confidentially settle the matter in February 2015, the parties were thus removing from public scrutiny a debate that has been going on for a number of years in the provincial arena and which has been favourably settled by legislation in many provinces.

Facts leading to the complaint and terms of the Settlement

[16] As the applicant explains in her affidavit, her medical file and personal life story are different from stereotypical transgender histories: the applicant never experienced any gender dysphoria throughout her life and is quite happy to be the person she is. However, the applicant is not willing to share with anyone her gynecological file or sexual life. The applicant's personal situation illustrates the complexity of gender identity which – socially or legally – may not always be equated with the particular sex of the individual from a clinical point of view. There is a fundamentally important psychological point of view in the individual's identification with one or another sex, as well as an individual's sexual orientation(s).

[17] As a foreign born naturalized Canadian, the applicant received in 2006 her original Canadian citizenship certificate: the mention "male" appeared on same. However, the applicant's entire Canadian life has been in the female sex. In 2008, the Quebec Registrar of civil status issued an updated birth certificate to the applicant which identifies her as a female. In December 2010, the applicant made an application to CIC to modify her citizenship certificate (proof of citizenship) and to receive a revised certificate pursuant to section 3 of the *Citizenship Act*, RSC 1985, c C-29.

[18] In November 2011, the applicant was advised by CIC that in order to establish that there had been a change of sex, CIC also required an official declaration of a qualified surgeon who would have performed a SRS, as well as declaration from a person who knew her before the surgery and that she was the one and same person.

[19] In effect, the citizenship agent was simply following the instructions mentioned in the operational guide called “CP 3 Establishing Applicant’s Identity” [the CP 3 Guide], whereas the following requirements are stated in subsection 6.6:

> The gender indicated on the certificate will be the same as the one shown on the person’s birth certificate or Immigration document. In order to establish that there has been a change of gender, CIC requires a statement from a surgeon confirming the surgical procedure and a statement from another person to the effect that they knew the applicant prior to the surgery and that this person is one and the same.
>
> Acceptable provincial documentation is listed in Appendix A, found at the end of this chapter.

[20] In further epistolary exchanges, the applicant was reminded by CIC officials that, unless she would provide those two statements from a surgeon and a third party, she would not be granted a revised citizenship certificate, and this, despite the fact that she had already provided acceptable provincial documentation that she was female, as well as her Canadian passport – recently issued on December 8, 2010 which clearly indicated that she was female. The applicant refused to comply with these requirements which she considered to be discriminatory toward herself and the LGBTQ community.

[21] On April 20, 2012, the applicant filed a complaint before the CHRC.

[22] In September 2014, the applicant was informed by the CHRC of their decision to refer her complaint of discrimination the case to the Canadian Human Rights Tribunal for further investigation.

[23] In January 2015, serious discussions to settle the complaint took place between the applicant and Mr. Himmat Shinhat, the then Director, Legislation and Program Policy (CIC), who was acting as the duly representative of the respondent. Mr. Shinhat did not subscribe an affidavit in the present proceeding. I have no reason to question the veracity of the facts and circumstances in which the parties came to a final agreement and which are related by the applicant in her affidavit.

[24] The applicant rejected the first draft submitted by the respondent since there was only an offer to issue a replacement citizenship certificate. The applicant was insisting on three non-negotiable points: (1) the removal of the discriminatory requirement of producing proof of undergone SRS; (2) the priority acceptance of any acceptable provincial document reflecting the change of sex designation; and (3) a revision of CIC policies with respect to change of sex designation, in that the Application Form CIT0001, and especially the corresponding Instruction Guide (CIT0001) and applicant kits – which needed to be transparent and non-discriminatory. Moreover, the applicant readily recognized that the respondent had discretion to identify other acceptable documents in cases where applicants could not submit provincial or territorial documentation – notably for Canadians living abroad. The review process would take some time though. There would be a delay of one year following the signing of settlement to implement the new policy and to update the Application Form CIT0001 and the corresponding Instruction Guide (CIT0001). All these conditions were accepted by the respondent, and a meeting was convened in Montréal, Quebec, on February 7, 2015 to sign the Settlement.

[25] On February 7, 2015, the parties signed the Settlement.

[26] Mutual concessions and reservations are made by the two parties in the Settlement.

[27] Firstly, the respondent will issue within fourteen calendar days of the signing of the Settlement a revised certificate of Canadian citizenship, reflecting the applicant's sex as female, (paragraph 1). Indeed, on February 6, 2015, in anticipation that the applicant would sign the Settlement, the respondent had already mailed the citizenship replacement certificate – that is, four years and two months after the applicant's initiate demand.

[28] Secondly, the respondent will revise their departmental policies, application forms and guides, within one calendar year of the signing of the Settlement, in the following manner:

> 2- The Respondent will revise their departmental policies to remove the current requirement that applicants seeking a change of sex designation on their citizenship certificate provide evidence that they have undergone sex reassignment surgery in addition to providing provincial and territorial documentation reflecting a change of sex or gender. This revision will take place within one calendar year of the signing of this agreement. Application forms for a citizenship certificate for adult and minors (proof of citizenship) along with the corresponding guides to applicants, will be updated to reflect the new requirement under this policy.

[29] In turn, the applicant will, firstly, file a notice of discontinuance of her complaint within five days of the approval of the Settlement by the CHRC (paragraph 4).

[30] Secondly, the applicant will not seek any damages against the respondent as it pertains to this specific case (paragraph 5).

[31] The terms of the Settlement are confidential and shall not be shared by the parties to anybody unless they be formally authorized by both parties or by the *Privacy Act*, RSC 1985, c P-21 (paragraph 6).

[32] Finally, paragraph 7 of the Settlement reads as follows:

> The present Transaction constitute a transaction under section 2631 of the Civil Code of Quebec where the Parties have freely consented without any promise, representation or intimidation of any kind and is made for the sole purpose of reaching a settlement, without any admission of the Parties.

[33] Subsections 48(1) and (2) of the *Canadian Human Rights Act* provide:

48(1) When, at any stage after the filing of a complaint and before the commencement of a hearing before a Human Rights Tribunal in respect thereof, a settlement is agreed on by the parties, the terms of the settlement shall be referred to the Commission for approval or rejection.	48(1) Les parties qui conviennent d'un règlement à toute étape postérieure au dépôt de la plainte, mais avant le début de l'audience d'un tribunal des droits de la personne, en présentent les conditions à l'approbation de la Commission.
(2) If the Commission approves or rejects the terms of a settlement referred to in subsection (1), it shall so certify and notify the parties.	(2) Dans le cas prévu au paragraphe (1), la Commission certifie sa décision et la communique aux parties.

[34] On March 11, 2015, the CHRC approved and certified the Settlement. Upon the filing of a notice of discontinuance, the CHRC closed the applicant's file on April 17, 2015.

Departmental actions taken during the one year timeline

[35] On March 24, 2015, Ms. Rosemarie Redden at CIC NHQ – Operational Management and Coordination (now Program Integrity Branch) sent a document entitled Interim Call Centre Q/A's which was to be sent to all the CIC Customer Call Centre. In this internal document, it was provided that the proof of SRS was no longer required to reflect a change of gender designation on a CIC issued document. On April 15, 2015, David Quatermain, Director of the Program Integrity Division at CIC NHQ – Operational Management and Coordination, sent an email called "Requirements for Change of Sex Designation on a CIC Document/Demande de changement de désignation relative au sexe figurant sur les documents de CIC". Within this internal document, it was underlined that under no circumstances will the applicants be asked to provide evidence of SRS if they have not included it up front with their application.

[36] On April 17, 2015, the respondent publicly announced that new instructions were currently being developed and that they expected their posting by spring or early summer of 2015:

> **Establishing gender for citizenship applications**
>
> **Important notice**
>
> New instructions are currently being developed. It is anticipated that they will be posted by spring or early summer 2015. The current instructions will be amended to remove the requirement for proof of sex reassignment surgery (SRS) and to provide a list of acceptable documentary evidence to support an applicant's request to change the sex designation on a citizenship certificate.
>
> Citizenship and Immigration Canada (CIC) is now accepting provincial or territorial documents such as an amended birth

> certificate showing a new sex designation or a legal/court order recognizing the person under a different sex designation or gender identity. However, CIC is also reviewing what other evidence will be accepted to support a request for a change in sex designation on a citizenship certificate for clients who are unable to obtain a provincial or territorial document.

[37] However, by spring or early summer of 2015, for reasons that were not publicly disclosed at the time by the respondent, application forms for a citizenship certificate for adult and minors (proof of citizenship), along with the corresponding guides to applicants, had still not been revised and updated to reflect the new requirement under this policy, including the alternative evidence that would now be accepted by CIC in cases where a person was unable to obtain provincial or territorial documentation. As explained in the affidavit of Ms. Teny Dikranian, Director, Legislation and Program Policy, Citizenship Branch (CIC), while the Settlement and the initial policy work following the Settlement focused on amending requirements for issuance of citizenship certificates, the respondent decided to initiate a comprehensive review of all their guides, forms and instructions in all its lines of business, more specifically temporary residents, refugees and protected persons, permanent residents and citizenship as a whole. This revision process required review and approval by several branches within CIC, including Program Integrity, Citizenship and Multiculturalism, Citizenship and Passport Operational Coordination, Admissibility, International Region and Case Processing Region and developed new versions of guides and forms like the applicant's kit and the Instruction Guide (CIT0001).

[38] On December 14, 2015, the applicant, which was monitoring the IRCC's website, sent a registered letter to the respondent (received on December 24, 2015) and which was followed by an email reminder (read by the recipient on December 29, 2015) with regards to the upcoming

deadline of February 7, 2016 and insisting on the compliance by the respondent of the engagement mentioned in paragraph 2 of the Settlement that the Application Form, and corresponding Instruction Guide (CIT0001), be updated to reflect the new policy of gender designation. The applicant also sent other reminders, but with no avail, the respondent did not respond.

[39] On February 8, 2016, upon verifying IRCC's website, the applicant noticed that the respondent still had not revised and updated their policies, application forms and instruction guides. The applicant also made different anonymous calls to IRCC Customer Call Service Centre to enquire about the new requirements for a change of gender designation and was informed – at least initially – that she needed to mail to the IRCC Case processing Centre in Sydney the medical statement from the practicing surgeon who had performed the SRS, as well as a declaration from a third party, who knew the applicant.

[40] In her affidavit, the applicant recalled that on February 8, 2016, a year after the signing of the Settlement, she talked with an agent of IRCC which instructed her that she had to mail the medical report of her sex change surgery from the surgeon. After objecting the given information, the agent offered her that she could also mail other documents and a Citizenship Officer would then assess whether those documents could be acceptable. When the applicant insisted for clear information, the agent sent her an email which once again underlined the requirement for a proof of sex change surgery.

[41] As can be seen, despite the internal communications alluded to in Ms. Dikranian's affidavit, even a year after the Settlement, apparently not all the personnel at IRCC were aware of the fact that SRS was no longer a requirement. Since the applicant had executed all her duties and engagements resulting from the Settlement, especially having discontinued her complaint before the CHRT, and considering the refusal of the respondent to correctly and completely execute their engagements as a clear breach of the Settlement, as aforesaid, the applicant filed the present application to homologate and enforce the Settlement on February 10, 2016.

Departmental actions taken after the expiry of the one year timeline

[42] On February 24, 2016, Mr. Quartermain sent an email to persons in charge of various programs to inform them that the new procedures for change of sex designation have now been developed and approved.

[43] On March 24, 2016, an updated document for the interne use of Immigration, Refugees and Citizenship Canada [IRCC] Officers entitled "Identity Management: Change of sex designation for reasons other than a clerical or administrative error" [the March 2016 document] was posted on IRCC's website – that is some six weeks after the present proceeding was commenced by the applicant. However, as of March 24, 2016, the respondent had still not published on the website new versions of guides and forms like the Application Form and corresponding Instruction Guide (CIT001).

[44] As indicated in the Program delivery update – March 23, 2016:

> Instructions for Immigration, Refugees and Citizenship (IRCC) officers outlining when and how to change the sex designation on IRCC documents for citizenship and immigration lines of business have been updated.
>
> IRCC removed the requirement for applicants to provide proof of sex reassignment surgery in order to request a change of sex designation on IRCC documents and in IRCC systems. Therefore, these instructions have been developed across lines of business in order to outline the documentary evidence required to process changes of sex designation.
>
> **Note:** If officers require a copy of any forms listed in *Change of sex designation for reasons other than a clerical or administrative error* prior to their publication, they should contact Program-Integrity. The forms are listed below and will be made available by April 2016.
>
> - *Statutory Declaration – Request for a Change of Sex Designation*
> - *Support for a Change of Sex Designation – Template Letter from a Medical Professional*
> - *Request for New Permanent Resident Card Indicating Sex Designation Other than Sex on Foreign Travel Document*

[45] On April 18, 2016, the respondent published on its website an updated application package comprising an Instruction guide and the forms the applicant need to fill out in the case of an "Application for a Citizenship Certificate for Adults and Minors (Proof of Citizenship) under section 3 (CIT 0001)" [the April 2016 application package], and which incidentally, refers the applicant to the "Statutory Declaration Request for a Change of Sex Designation" (form CIT 0404 (03-2016)).

The current departmental policies on change of sex designation

[46] The March 2016 document provides three options as to which documents can be submitted to request a change of sex designation on documents issued by the respondent.

[47] The first option, under the title "Documents issued by Canadian provinces or territories", refers to three types of documents that may be submitted to obtain a change of sex designation:

(a) Legal document issued by provincial or territorial vital statistics organizations indicating a change of sex designation;

(b) Court order; or

(c) Amended birth certificate indicating a change in sex designation.

[48] This information is consistent with the information provided in the same document under the heading "Further Documentary Evidence required by line of business". Under citizenship, the documentary evidence required is noted as "a document issued by a Canadian province or territory indicating the change of sex designation, or a statutory declaration and a letter from a medical professional if they are unable to obtain a document issued by a Canadian province or territory" (form CIT0552). Thus, no statutory declaration is required if an applicant files the required provincial or territorial document.

[49] The second option, "Proof of sex reassignment surgery", is set forth with a *caveat* that IRCC does not require proof of SRS. However, it is within the purview of an applicant, if he/she so wishes, to "… submit proof sex reassignment surgery (partial or full) from a medical practitioner in good standing with the regulatory body under which they practice." However,

contrary to the March 2016 document, there is no specific mention in the April 2016 package that "IRCC does not require proof of any sex reassignment surgery in order to amend the sex designation on documents."

[50] The third option, "Applicants unable to obtain documents issued by Canadian provinces or territories", provides that applicants unable to obtain the proper provincial or territorial documents must provide a statutory declaration and a letter from an authorized physician who can confirm that the applicant's gender identity does not accord with the sex designation on the IRCC document (CIT0404).

[51] Moreover, where the documentary evidence does not originate from Canada but from a foreign state, the applicant will be asked to provide an acceptable foreign document (such as a legal order or an amended birth certificate) or a statutory declaration and a letter from an authorized physician or psychologist. Curiously, under this section of the 2016 March document, there is no requirement to provide proof of SRS compared to the previous section where documents are originating from Canada.

The present application to homologate and enforce the Settlement

[52] As aforesaid, the Settlement is governed by the rules applicable to contracts in the Province of Quebec and constitutes a "transaction" under article 2631 of the CCQ (paragraph 7). The Settlement – which is binding on the applicant and Her Majesty the Queen in Right of Canada – is indivisible as to its subject (article 2636 CCQ) and "forms a homogeneous unit, the terms of which cannot be split without distorting it's meaning and thus betraying the intention of

the parties" (*Audet v Canada*, 2000 CanLII 15752, [2000] FCJ No 913 (FC) at para 3 referring to *Léonard v Mona Realties Ltd*, [1973] CA 1034 at page 1039).

[53] Every person – either a legal person or State and its bodies – has the duty to honour his contractual undertakings (article 1458 CCQ). In determining the scope of the respective obligations of the parties, the standard approach is set out by the Supreme Court of Canada in *Manulife Bank of Canada v Conlin*, [1996] 3 SCR 415 at paragraph 79:

> The cardinal interpretive rule of contracts is that the court should give effect to the intention of the parties as expressed in their written document… The Court will deviate from the plain meaning of the words only if a literal interpretation of the contractual language would lead either to an absorb result or to result which is "plainly repugnant to the intention of the parties"
>
> [Emphasis added]

[54] In the case at bar, the common intention of the parties was to ensure that the respondent would review, in the one year delay, all their departmental policies, application forms, along with the corresponding guides, in order to remove the additional requirement that applicants seeking a change of sex designation on their citizenship certificate provide evidence that they have undergone sex reassignment surgery (partial or full). It was also the common intention of the parties to ensure that the provincial and territorial documentation indicating a change of sex or gender – such as a legal order, court order or amended birth certificate – would be sufficient, and that, if an applicant was not able to provide same, the respondent would indicate in the amended policies, instructions, applications forms and guides, what other type of evidence would also be accepted as proof of change of sex or gender.

[55] Article 2633 of the CCQ provides that a transaction has, between the parties, the authority of *res judicata*, but that it is not subject to forced execution until it is "homologated". Being the responsible minister involved in this matter, it is the ultimate responsibility of the respondent to ensure that the Crown's obligations under paragraphs 1 and 2 of the Settlement have been or will be fully executed and enforced within the department. In the Province of Quebec, transactions are usually homologated by the courts, which poses the question whether the approval of the Settlement by the CHRC – which is not a court, nor an administrative tribunal (like the Canadian Human Rights Tribunal) – constitutes "homologation" within the meaning of article 2633 of the CCQ.

[56] Traditionally, in a civil law context, the court who is asked to homologate a transaction exercises a supervisory control (Gérard Cornu, *Vocabulaire juridique*, 8^{ième} édition (Presses Universitaires de France, 1987, Paris) page 426). Indeed, article 2632 of the CCQ expressly provides that no transaction may be made with respect to the status or capacity of persons or to other matters of public order. By analogy, the request for registration, recognition or enforcement of a foreign judgment – remember that a transaction has the authority of *res judicata* once homologated – are made to this Court by way of an application made pursuant to Rule 300(h) and Rules 327 to 334. In such a case, the Court exercises a supervising jurisdiction. There must be a significant connection between the cause of action and the foreign court, and if the latter properly took jurisdiction, its judgment will be recognized and enforced in Canada provided that no defences bar its enforcement (*Beals v Saldanha*, 2003 SCC 72 [2003] 3 SCR 416). For a recent discussion of the suppletive application of articles 1378, 1385 to 1387, 1393, 1399 and 1400 of the CCQ in the context of a request made to the Federal Court to homologate a

settlement which was opposed by a signing party on grounds of an alleged default of consent or common intention: see *Beam Suntory Inc v Domaines Pinnacle Inc*, 2016 FCA 212, [2016] FCJ No 951 aff'd 2015 FC 680, [2015] FCJ No 673.

[57] There should be no confusion. A transaction is not an order, but when it is homologated, that for the purpose of enforcement, the transaction is assimilated as an order of the Court. In passing, where under an Act of Parliament, the Court is authorized to enforce an order of a tribunal and no other procedure is required by or under that Act, Rule 424(1) provides that the order may be enforced under Part 12 of the Rules. In such a case, as stipulated by Rule 424(2), such an order shall be filed together with a certificate from the tribunal, or an affidavit of a person authorized to file such an order, attesting to the authenticity of the order. Thus, orders of an administrative tribunal do not need to be homologated. Still, they need to be formally registered in the Court to have the effect of an order of this Court (for example, see section 57 of the *Canada Human Rights Act* and section 66 of the *Canada Labour Code*, RSC 1985, c L-2; *Canada c Human Rights Commission v Warman*, 2011 FCA 297, [2011] FCJ No 1502 and *Canadian Union of Postal Workers v Canada Post Corporation*, 2015 FC 355, [2015] FCJ No 422).

[58] Subsection 48(3) of the *Canadian Human Rights Act* specifically provides:

(3) A settlement approved under this section may, for the purpose of enforcement, be made an order of the Federal Court on application to that Court by the Commission or a party to the settlement.	(3) Le règlement approuvé par la Commission peut, par requête d'une partie ou de la Commission à la Cour fédérale, être assimilé à une ordonnance de cette juridiction et être exécuté comme telle.

[59] As noted in 2000 by the Court in *Canada (Attorney General) v National Indian and Inuit Community Health Representatives Organization*, 2000 15773 (FC), [2000] FCJ No 1083, the *Canadian Human Rights Act* is silent as to how this is to be done other than saying, in the English version of subsection 48(3), that it should occur "on application", while the French version uses the words « par requête ». This is somewhat confusing since, in the Rules, the French word « requête » is usually translated in the English version of the Rules as "motion". While motions are governed by Part 7 of the Rules, Rule 300(b) clearly states that Part 5 (Applications) applies to "proceedings required or permitted by or under an Act of Parliament to be brought by application, motion […]". The Court nevertheless concluded in paragraph 10 of the case cited above, that "an application to the Court to have a settlement made an order of the Court could be made upon motion supported by an affidavit and, at the request of the moving party, could be disposed of upon the written materials without appearance". Be that as it may, the applicant chose to proceed by way of a notice of application, which resulted in a number of additional delays.

[60] Together with her notice of application dated February 10, 2016, the applicant – who is self-represented – joined an authentic copy of the Settlement. In her affidavit dated February 29, 2016, the applicant alleges at paragraph 61:

> […] I have filed on February 10th, 2016 an Application for Enforcement of Settlement pursuing section 48(3) of the *Canadian Human Rights Act*, and I consider my application as urgent as it severely affects the physical integrity of some Canadian citizens which might be urged by Employees of the Respondent to undergo a sex reassignment surgery which is, according to the terms of the Final Settlement, no longer required to update personal documents like a citizenship certificate or consequently, a Canadian passport.

[61] The present application is allowed in part.

[62] In the case at bar, while the respondent has appeared and is opposing the application, there is no allegation that the Settlement presented by the applicant for homologation and enforcement, should not have been approved in this first place by the CHRC, or that the Settlement is null for one of the reasons allowed by law (article 2634 CCQ), or that any of its terms would be illegal or contrary to the public order in some way (articles 2632, 2635 and 2636 CCQ). Consequently, there is no reason why the Settlement should not be homologated, and for the purpose of enforcement, be made an order of the Federal Court.

[63] Being a condition stipulated in a contract having the binding character of a final judgment, it follows that the one year delay mentioned in paragraph 2 of the Settlement could not be revoked or modified by either party except by agreement of the other party (article 1439 CCQ). The applicant did not consent on an unilateral extension of the one year delay, but on the contrary, insisted on the strict compliance of the terms of the Settlement appears from the registered letter and an email reminder sent to the respondent in December 2015. There is also clear evidence on record that, on the date of filing of the present application (February 10, 2016), the respondent was in breach of the Settlement, as the respondent had not fully complied with paragraph 2 of the Settlement. Indeed, both of the parties at the hearing agreed, that on February 6, 2016, a year after the signature of the Settlement, the new policies, instructions to IRCC officers, application forms and kits to help the applicants with regards to change of gender designation in citizenship matters were not fully implemented or publicly advertised or available

to the public despite the efforts done at the internal level and which are outlined in Ms. Dikranian's affidavit.

[64] However, the respondent submits that any default to comply with the one year delay in paragraph 2 of the Settlement should not be determinative. According to the March 2016 document, in cases of a change of sex designation for reasons other than a clerical or administrative error, three options are currently available to an applicant. First, IRCC officers are now accepting documents issued by the Canadian provinces or territories (legal document, court order, amended birth certificate) and no proof of SRS is required in addition to any of these documents (option one). The respondent submits that option one meets the condition mentioned in paragraph 2 of the Settlement. Second, proof of SRS is still required in the absence of acceptable provincial or territorial documentation (option two). And, third for those unable to obtain or is ineligible for the provincial or territorial documents, a statutory declaration from the applicant and a letter from an authorized physician or psychologist will be accepted by IRCC officers but only if the applicants can justify why they cannot provide acceptable provincial or territorial documentation (option one). All three options are clearly stated in the April 2016 package. Accordingly, the Court should refuse to homologate and enforce the Settlement and should refrain from making any declaration or order with respect to the legality of option two (proof of SRS) – which incidentally, has precedence over option three (statutory declaration and letter from an authorized physician or psychologist) where the birth or legal documents originates from Canada (option one).

[65] On the contrary, the applicant submits that the respondent has still not fully complied with paragraph 2 of the Settlement and that same should be homologated and made an order of the Court. The new scheme is in its face discriminatory. The requirement of SRS still exists, albeit as an alternative option, or as one of the documents that may be additionally required by IRCC officers in their discretion if they are satisfied by a statutory declaration and the declaration of a physician or psychologist. Moreover, there is no evidence on the record that the respondent has effectively abrogated or modified subsection 6.6 of the CP 3 Guide to make it compliant with the terms of the Settlement. Furthermore, the present instructions to clients are confusing and may have a chilling effect. Therefore, the applicant not only asks this Court to homologate the Settlement, but she seeks today a number of other remedies which the respondent submits are beyond the scope of the jurisdiction of the Court to enforce the Settlement. In effect, the applicant asks the Court to declare that the respondent has not fully enforced paragraph 2 of the Settlement, and also to order the removal of any requirement for proof of SRS (even as an alternative option) from the Instruction Guide (CIT0001) and from all internal policies or guides used by IRCC officers – including the CP 3 Guide; to order the respondent to publish and update the 2016 application kit, and to add the following note: “IRCC does not require proof of any sex reassignment surgery in order to amend the sex designation on documents”; and to order the respondent to make a donation of $40,000 to a non-profit organization across Canada which offer free psychological assistance to gender-questioning people under the age of twenty-five in distress situations, and to publish the donated amounts and the names of the recipients on their website.

Why today's Court judgment is limited to the homologation of the Settlement

[66] After due consideration of the arguments made by the parties, it is sufficient today to homologate the Settlement and to make it an order of the Court for enforcement purposes considering notably that there is no evidence on the record that the respondent has effectively and officially abrogated or modified subsection 6.6 of the CP 3 Guide to make it compliant with the terms of the Settlement.

[67] In my humble opinion, the other declarations or the remedies sought above by the applicant are beyond the scope of the jurisdiction of the Court in an enforcement proceeding, or otherwise premature as explained below.

[68] On the part of the applicant – and to a certain extent on the part of the respondent as well – there is a fundamental misunderstanding with respect to role of the Federal Court in an application to homologate and enforce a settlement approved by the CHRC pursuant to section 48 of the *Canadian Human Rights Act*. While this Court has examined the Settlement inasmuch to assure itself that it was compliant with the prescriptions of a valid transaction concluded by the parties under the aegis of the CCQ provisions (see paragraphs 52 to 56 of the present reasons), the supervisory role of the Court always remains within a civil law realm. An application to homologate and enforce a transaction does not become some kind of a judicial review application or declaratory proceeding where the Court is asked to make pronouncements on the legality or the reasonableness of the policies or the actions taken by the respondent or its agents, all of which have led to the conclusion of the transaction between the parties.

[69] This Court has no power to amend or alter the terms of the transaction, nor to exempt any party from compliance to the terms of same (by analogy, *International Brotherhood of Electrical Workers, Local Union, No 529 v Central Broadcasting Company Ltd*, [1977] 2 FC 78 [*Central Broadcasting Company*]; *Nauss v International Longshoremen's Association, Local 269*, 1981 CanLII 2787 (FCA)). In homologating and enforcing the transaction, the Court does not take party in favour of one party or the other, but renders its processes of forced execution available in case of non-compliance of same. It follows that the jurisdiction of the Court to examine today the legality or reasonableness of the new policies publicly expressed in the March 2016 document and the April 2016 application package is inexistent.

[70] In this respect, some of the orders presently sought by the applicant are akin to seeking a stand-alone permanent injunction against the Crown under section 44 of the *Federal Courts Act*, RSC 1985, c F-7, to restrain further violations of provisions of the *Canadian Human Rights Act* and/or the Charter. Any declaration of illegality or unconstitutionality of policies or actions purportedly authorized or taken by the respondent or IRCC officers under the presumed authority of the *Citizenship Act* or its regulations may only be obtained through the making of an application under sections 18 and 18.1 of the *Federal Courts Act*. Any additional declaratory or injunctive relief sought by the applicant cannot be granted today by the Court in the guise of homologating and enforcing the Settlement. If the applicant or another interested party desires to raise issues of discrimination or illegality which are outside the scope of the Settlement, they must use the proper procedural vehicle. Also remember that this is an application under the *Canadian Human Rights Act* to homologate and enforce the terms of a valid transaction between the parties; this is not an action in damages against the Crown flowing from a separate cause of

action (*Paradise Honey Ltd v Canada*, 2015 FCA 89, [2015] FCJ No 399 at para 151; *Al-Mhamad v Canada (Radio-Television and Telecommunications Division)*, 2003 FCA 45, [2003] FCJ No 145 at para 3).

[71] How can a settlement approved by the CHRC and made an order of the Federal Court for the purpose of enforcement under section 48 of the *Canadian Human Rights Act*, be legally enforced in practice in case of non-compliance?

[72] Pursuant to Rule 423, all matters related to the enforcement of orders shall be brought before the Federal Court. Part 12 of the Rules, in particular Rules 425 to 432 prescribe the process available in the Court to enforce orders. In addition, section 56 of the *Federal Courts Act* empowers the Court to issue process of the same tenor in effect as may be issued out of the province in which the order is to be executed. The process available to enforce an order varies with the type of order involved and the particular nature of the obligation incumbent on the debtor. That being said, there is no legal basis in Part 12 of the Rules for ordering the respondent to make a donation of $40,000 to a non-profit organization helping the transgender population, as also requested by the applicant in her proceedings. In the case at bar, the remedies that will be available to either party – once the Settlement is homologated by the Court – are fairly limited as explained below.

[73] Firstly, the Settlement provides no payment of money, nor delivery of land, immoveables or personal property belonging to the applicant. This means that once the Settlement is homologated and made an order of the Court for the purpose of enforcement, the applicant

cannot seek a writ of possession, a writ of delivery, a writ of seizure and sale or a writ of sequestration, pursue garnishment proceedings, nor obtain a changing order or the appointment of a receiver (see Rules 424 to 428).

[74] Secondly, the obligations mentioned in paragraph 2 of the Settlement are specific and must be read in light of the fact that there was a one year delay for their execution. The respondent will revise their departmental policies to remove the current requirement that applicants seeking a change of sex designation on their citizenship certificate provide evidence that they have undergone SRS in addition to providing provincial and territorial documentation reflecting a change of sex or gender. This revision will take place within one calendar year of the signing of the Settlement. Application forms for a citizenship certificate for adult and minors (proof of citizenship) along with the corresponding guides to applicants, will be updated to reflect the new requirement under this policy.

[75] Article 1594 of the CCQ provides that a debtor may be in default for failing to perform the obligation owing to the terms of the contract itself, when it contains a stipulation that the mere lapse of time for performing it will have that effect. A debtor may also be put in default by an extrajudicial demand to perform the obligation addressed to him by his creditor, a judicial application filed against him or the sole operation of the law. The serving on the respondent and filing of the present application on February 10, 2016 certainly had the latter effect. Still, the Settlement had not been homologated by the Court when the respondent published on the website the March 2016 document and the April 2016 application package.

[76] There are basically two distinct means of enforcement provided in the Rules to compel a recalcitrant debtor to perform an obligation in nature, or to compel a party which is obliged by an order of the Court to do something specific to obey the Court's order: (1) a committal order (Rules 429(1)(c), 430 and 431); (2) a contempt order (Rules 466(b), 467 to 472). It bears to note that none of these enforcement measures are presently sought by the applicant in her application which would be, in any event, premature.

[77] Orders of committal are exceptional and are not issued as a matter of convenience by the Court. Leave from the Court is required (Rule 429(1)). A number of conditions must be satisfied. The original order must set forth specifically the time within which the act that is ordered to be done must be done (*Central Broadcasting Company* at para 58). Moreover, in the case of a body corporate, the order shall not be enforced against any director or officer unless the order has been personally served on the person (Rule 430).

[78] The primary purposes of sanctions for contempt are to ensure compliance with court orders and to maintain public confidence in the administration of justice (for an interesting recent analysis of the Court on this subject, see *Trans-High Corporation v Hightimes Smokeshop and Gifts Inc*, 2015 FC 1104, [2015] FCJ No 1162). The terms of the order sought to be enforced must be specific. The person who disobeys an order of the Court cannot be found in contempt, unless the person is personally served with an order requiring the person alleged to be in contempt to appear before the Court and be prepared to bear proof of the accusation and to present any deference that the person may have (Rules 466(b) and 467).

[79] In practice, before any enforcement procedure can be taken against the respondent, – and without deciding whether a finding of contempt may be made against the Crown (see *Tahmourpour v Canada (Human Rights Commission)*, 2014 FCA 204, [2014] FCJ No 908 at para 3 (FCA); 2013 FC 1131, [2013] FCJ No 1256 at paras 24 to 32 (Manson J.); 2013 FC 622, [2013] FCJ No 858 at paras 10 to 27 (Prothonotory Tabib)) –, the present judgment would have to be personally served by the applicant to the Honourable John McCallum, Minister of Immigration, Refugees and Citizenship.

[80] For all these reasons, none of the enforcement measures mentioned above are available today.

Costs of this application

[81] The applicant seeks a lump sum of $2,000 in lieu of assessed costs.

[82] Pursuant to subsection 400(1) of the Rules, this Court has full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid. This is one of the special cases where a moderate allowance for the time and effort devoted to preparing and presenting a case should be granted to self-represented litigant (see *Yu v Canada (AG)*, 2011 FCA 42, [2011] FCJ No 162 at para 37; *Air Canada v Thibodeau*, 2007 FCA 115, [2007] FCJ No 404 at para 24; *Sherman v Canada (Minister of National Revenue)*, 2003 FCA 202, [2003] FCJ No 710 at para 46 to 52).

[83] In the present case, I am satisfied that the applicant acted in good faith and was entitled to make the present application since, at the date of filing of her notice of application, on February 10, 2016, the respondent had not fully complied with its obligations under paragraph 2 of the Settlement. Indeed, the applicant had previously sent a registered letter and an email in December 2015 reminding the respondent of the upcoming deadline of February 6, 2016 and of its obligations under paragraph 2 of the Settlement. However, the respondent chose not to respond or to seek the applicant's consent to extend the one year compliance delay. It is also manifest that the applicant dedicated a long amount of time in the preparation of her proceeding. While not being aware of all the intricate procedural rules of the Federal Court, the applicant's presentation was nevertheless clear and helpful. This whole proceeding has also affected the health of the applicant. In a courageous move, the applicant resisted CIC's pressures to provide a proof of SRS and made a complaint to CHRC which was finally settled in February 2015. It turns out that the applicant had nothing to gain personally – an amended citizenship certificate had already been issued to her in February, 2015 – and has made this application for the benefit of a large group of disadvantaged individuals.

[84] All those factors strongly militate for the awarding of reasonable costs to the applicant. Considering all relevant factors – including what the applicant could have otherwise obtained under the Tariff if she had been represented by a lawyer – a lump sum of $ 1,200, inclusive of all disbursements and taxable fees, is a fair compensation in the circumstances.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The style of cause is modified as follows:

   The Minister of Immigration, Refugees and Citizenship Canada is substituted to The Minister of Citizenship and Immigration Canada, as respondent in this proceeding;

2. The application made by the applicant for the homologation and enforcement of the settlement signed by the parties on February 7, 2015 [Settlement] and approved by the Canadian Human Rights Commission on March 4, 2015, is allowed in part;

3. The Settlement attached to the present judgment (being Exhibit "N" referred to in the affidavit of Audrey Chédor dated February 29, 2016) is homologated, and for the purpose of enforcement, is made an Order of the Federal Court; and

4. The applicant is entitled to costs in the amount of $1,200 inclusive of all disbursements and taxable fees.

"Luc Martineau"

Judge

Schedule 1
Document N-1

Federal Court File No.: T-255-16

AS A FINAL SETTLEMENT OF CLAIM BETWEEN THEM BEFORE THE CANADIAN HUMAN RIGHTS TRIBUNAL IN CASE NUMBER T2061/6214, THE PARTIES AGREE THE FOLLOWING:

1- The Respondent will issue the Complainant a revised Certificate of Canadian citizenship, reflecting the Complainant's sex as female, within 14 calendar days of signing this agreement.

2- The Respondent will revise their departmental policies to remove the current requirement that applicants seeking a change of sex designation on their citizenship certificate provide evidence that they have undergone sex reassignment surgery in addition to providing provincial and territorial documentation reflecting a change of sex or gender. This revision will take place within one calendar year of the signing of this agreement. Application forms for a citizenship certificate for adults and minors (proof of citizenship), along with the corresponding guides to applicants, will be updated to reflect the new requirements under this policy.

3- Within 2 working days of signature of this agreement, the Complainant and the Respondent will provide a copy of this agreement to the Canadian Human Rights Commission for approval of the terms of this settlement.

4- The Complainant will file a notice of discontinuance of her complaint upon the Tribunal within five (5) days of the approval of the Transaction by the Canadian Human Rights Commission.

5- The Complainant will not seek any damages from the Respondent as it pertains to this specific case.

6- The terms of this Transaction are confidential and, subject to all provision of laws requiring public disclosure of such information, will not be shared by the Parties to anybody unless they be formally authorized by both Parties or by the *Privacy Act*;

7- The present Transaction constitute a transaction under section 2631 of the Civil code of Quebec where the Parties have freely consented without any promise, representation or intimidation of any kind and is made for the sole purpose of reaching a settlement, without any admission of the Parties.

Schedule 1
Document N-2

Federal Court File No.: T-255-16

IN WITNESS WHEREOF, THE PARTIES HAVE SIGNED:

Montreal, 07 February 2015

Audrey Chrédor

Montreal, 07 February 2015

Himmat Shinhat, duly authorized representative

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-255-16
STYLE OF CAUSE:	AUDREY CHÉDOR v THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP CANADA
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	SEPTEMBER 12, 2016
JUDGMENT AND REASONS:	MARTINEAU J.
DATED:	OCTOBER 31, 2016

APPEARANCES:

Audrey Chédor	FOR THE APPLICANT (ON HER OWN BEHALF)
Me Daniel Latulippe	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Audrey Chédor	FOR THE APPLICANT (ON HER OWN BEHALF)
William F. Pentney Deputy Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT