

rangefindr.ca Sentencing Guide for Transgender Offenders

18 January 2022

by Elinor Ireland¹

This document summarizes material on the sentencing of transgender and gender non-conforming offenders. It is licensed under [CC BY 4.0](#): it may be copied and distributed freely, in whole or in part, if the attribution to rangefindr.ca and the author is intact. Updated versions will appear at www.rangefindr.ca/docs.

Transgender persons are persons who possess diverse gender identities and expressions that differ from stereotypical gender norms.² *Gender identity* is a person's "sense of being a woman, a man, both, neither, or anywhere along the gender spectrum," while *gender expression* is "how a person publicly presents their gender."³ Gender identity and expression are explicitly protected by human-rights legislation⁴ and by the *Criminal Code*.⁵

Effect on moral blameworthiness and mitigation

- In sentencing, an assessment of the offender's moral blameworthiness is necessary to apply the fundamental principle that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.⁶ Evidence of background and systemic factors that affect the offender's moral blameworthiness is admissible and "of importance" in the sentencing of all offenders.⁷
- Transgender persons are "one of the most disadvantaged groups in society."⁸

¹ Of the Ontario bar.

² This use of the term is intended to include persons who identify as gender non-conforming.

³ Ontario Human Rights Commission, "[Gender identity and gender expression](#)" (undated).

⁴ [Canadian Human Rights Act](#), RSC 1985, c H-6, as am. at s [3\(1\)](#). See also the provincial human rights codes.

⁵ [Criminal Code](#), RSC 1985, c C-46, as am. at ss [318\(4\)](#) and [718.2\(a\)\(i\)](#).

⁶ [Criminal Code](#) at s [718.1](#); [R v Ipeelee](#), 2012 SCC 13 at para [73](#).

⁷ [R v Gladue](#), 1999 CanLII 679 (SCC) at para [69](#); [R v Ipeelee](#), supra 6 at para [77](#); [R v Morris](#), 2021 ONCA 680 at paras [87-89](#).

⁸ [AB v Ontario \(Education\)](#), 2018 HRT0 1746 at para [20](#), adopting language from the Ontario Human Rights Commission's "[Policy on preventing discrimination because of gender identity and gender expression](#)" (14 April 2014).

Many suffer violence, harassment, social stigma, discrimination, prejudice, stereotyping, and vulnerability.⁹ Trial courts have cited these systemic and background factors as mitigating a transgender offender's moral blameworthiness.¹⁰

- Incongruence between one's assigned birth sex and gender identity can cause "significant mental health anguish."¹¹ Where this has played a role in a person's offending, gender transition may be a rehabilitative measure that reduces the need for specific deterrence.¹²
- The financial, emotional, or practical impact of transition may be a factor on sentence. Evidence that an offender engaged in illegal drug production to fund gender confirmation surgery has been held to be "unusual circumstances" justifying a departure from the normal sentencing range.¹³

Conditions of imprisonment

- Evidence of pre- and post-sentencing conditions of imprisonment are admissible at sentencing.¹⁴ Difficult conditions faced by a transgender person in pre-sentence custody can mitigate a sentence,¹⁵ and evidence of projected hardship in serving a custodial sentence is admissible as a potentially mitigating collateral consequence of sentencing.¹⁶

⁹ *CF v Alberta (Vital Statistics)*, 2014 ABQB 237 at para 58; *R v Gray*, 2021 ONCJ 668 at paras 19, 46(2); *AB v Ontario (Education)*, ibid at para 20; *EN v Gallagher's Bar and Lounge*, 2021 HRTO 240 at para 27; *Oger v Whatcott (No 7)*, 2019 BCHRT 58 at paras 60-71; Statistics Canada, "A statistical portrait of Canada's diverse LGBTQ2+ communities" (June 2021) *The Daily*.

¹⁰ *R v Pelletier*, 2016 BCSC 2497 at paras 74-77; *R v Gray*, supra 9 at paras 19, 46(2), 48; *R c Letourneau*, 2021 QCCQ 3628 at para 73; *R v Francis*, 2019 NSPC 1 at para 7.

¹¹ *R v Klassen*, 2021 SKQB 22 at para 9; see also *R v Canning*, [2019] OJ No 4846, 2019 CarswellOnt 15167 (CJ) at para 34; *R v Francis*, supra 10 at para 9.

¹² *R v Klassen*, supra 11 at para 67; *R v Tideswell*, [1997] OJ No 3743 (Gen Div) at para 22.

¹³ *R v MacDonald*, 2013 NSSC 255 at para 15.

¹⁴ *Criminal Code*, at ss 723, 726.1; *R v Duncan*, 2016 ONCA 754 at para 6; *R v Kandhai*, 2020 ONSC 1611 at para 7; *R v Cook*, 2010 ONSC 5016 at para 43.

¹⁵ *R v Chumbley*, 2020 ONCA 474 at para 7; *R v Rajmoolie*, 2020 ONCA 791, leave to appeal denied 2021 CanLII 102739 (SCC) at para 65.

¹⁶ *R v Weber*, [2019] OJ No 6952 (CJ) at para 70. Evidence of collateral consequences on the offender is admissible at sentencing hearings: *R v Suter*, 2018 SCC 34 at para 46.

- Imprisonment can be exceptionally difficult for transgender persons,¹⁷ resulting in what is sometimes called “double punishment”¹⁸ and “punishment well beyond imprisonment.”¹⁹ Canadian courts have long recognized the vulnerability of transgender prisoners to harassment and violence from other prisoners, particularly in the case of transgender women placed in men’s prisons.²⁰ That a transgender woman would experience predatory behaviour by male prisoners has been held to be “common sense.”²¹
- Due to transgender women’s vulnerability to violence from men, and to correctional policies that require transgender women to have gender confirmation surgery before they can be housed with other women, it remains common for correctional authorities to house transgender women separately from other offenders, often in segregation.²² The increased severity of this form of imprisonment can in some cases justify a non-custodial sentence.²³
- As with other offenders, transgender persons seeking mitigation of sentence or *Charter* relief on the basis of custodial conditions must lead evidence of their experiences in pre-sentence custody or of the conditions they will experience while serving a custodial sentence.²⁴ In one case it was held to be an error to invalidate a mandatory minimum sentence of imprisonment without “factual proof” that imprisonment would have a grossly disproportionate impact on a transgender woman.²⁵

¹⁷ Y Boyer et al, "[Vulnerable Targets: Trans Prisoner Safety, the Law, and Sexual Violence in the Prison System](#)" (2019) 31:2 Can J Women & L 386 at 388; NA Francisco, "[Bodies in Confinement: Negotiating Queer, Gender Nonconforming, and Transwomen’s Gender and Sexuality behind Bars](#)" (2021) 10:2 Laws 49 at 3; United Nations Development Programme, "[Mapping of Good Practices for the Management of Transgender Prisoners](#)" (Bangkok: UNDP, 2020) at 1.

¹⁸ MC Van Hout & D Crowley, "[The ‘double punishment’ of transgender prisoners: a human rights-based commentary on placement and conditions of detention](#)" (2021) 17:4 Int J Prison Health 439.

¹⁹ *R v Tideswell*, supra 12 at para 41.

²⁰ *R v Carvery*, [1976] NSJ No 367, 14 NSR(2d) 643 (CA) at para 5; *R v Tideswell*, supra 12 at para 41; *R v Forster*, 2012 BCSC 1682 at para 56.

²¹ *R v Forster*, supra 20 at para 56.

²² *R v McNabb*, 2011 MBQB 135 at para 8; *R v HF*, 2021 ABPC 68 at paras 70-76; *R v Chumbley*, supra 15 at para 3.

²³ *R v HF*, supra 22 at para 77.

²⁴ *R v Chumbley*, supra 15 at para 6; *R v HF*, supra 22 at para 76; *R v Whaley*, 2018 ABPC 63 at para 49. The defence must prove disputed mitigating factors on a balance of probabilities: *Criminal Code* at s 724(3)(d).

²⁵ *R v Gerbrandt*, 2021 ABCA 346 at para 69.

Placement in men's or women's prisons

- Transgender prisoners may or may not be housed according to their gender identity or expression. The extent of correctional authorities' discretion to house transgender prisoners according to assigned birth sex is currently unsettled.²⁶
- Federally, before gender identity and expression were added to the *Canadian Human Rights Act* in 2017,²⁷ the Correctional Service of Canada (CSC) required transgender prisoners who had not undergone gender confirmation surgery to be placed in institutions according to assigned birth sex.²⁸ CSC's interim policies now give prisoners the option of being placed according to gender identity "unless there are overriding health or safety concerns which cannot be resolved."²⁹ Based on this exception, CSC continues to place some transgender prisoners in institutions according to their assigned birth sex rather than their gender identity.³⁰
- Provincially, only Ontario, British Columbia, and the Yukon have official policies allowing transgender prisoners to be housed according to gender identity.³¹ Even where such policies are in place, some transgender prisoners in provincial custody report being segregated from other prisoners and denied access to rehabilitative programs because they are transgender.³²

²⁶ [Kavanagh v Canada \(Attorney General\)](#), 2001 CanLII 8496, 41 CHRR 119 (CHRT) (holding that placement according to assigned birth sex is permissible discrimination against sex and disability); [Canada \(Procureur général\) c Boulachanis](#), 2019 CAF 100 (staying an injunction against the placement of a transgender woman in a men's prison); [Sandve v Surrey Pretrial Services Centre](#), 2021 BCHRT 29 (permitting a human rights complaint to continue to trial where a transgender woman was placed in a men's jail).

²⁷ [An Act to amend the Canadian Human Rights Act and the Criminal Code](#), SC 2017, c 13.

²⁸ Correctional Service Canada, "[Guidelines on Gender Dysphoria](#)" (9 Jan 2017) Commissioner's Directive No 800-5.

²⁹ Correctional Service Canada, [Interim Policy Bulletin 584, Bill C-16 \(Gender Identity or Expression\)](#) (27 Dec 2017).

³⁰ [Boulachanis v Canada \(Attorney General\)](#), 2019 FC 456, injunction stayed [Canada \(Procureur général\) c Boulachanis](#), 2019 CAF 100; [Boulachanis c Thibodeau](#), 2020 QCCS 1020.

³¹ M El Fakhry Tuttle, "[Transgender Inmates in Canada](#)," 2021 CanLIIDocs 971, LawNow Magazine 45:3 (Jan 2021) 20.

³² Eg, [R v Chumbley](#), supra 15 at para 3.