

# APPENDIX C

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## The Human Rights Complaint Process for Transgender People in B.C.

**An Out/Law Legal Guide**  
**barbara findlay QC**

*The first thing to know is that there is a six month time limit to file a BC human rights complaint so DO NOT WAIT.*

This booklet will help you

- Understand if the mistreatment you have received is a human rights violation
- Know what the process of filing a human rights complaint will be;
- Get free legal advice about your situation
- Tell you what you can expect to get if you win your human rights complaint

### **Do you have a human rights complaint?**

Transgender people face stigma, prejudice and mistreatment in all parts of their lives.

Is the mistreatment a human rights violation?

All trans people are covered by human rights legislation both provincially and federally. **It does not matter whether ‘gender identity’ has been added to the law.** Trans people are protected from discrimination by the ground ‘sex’.

Human rights protection applies if you are discriminated against in

- Employment, employment ads, and wages

*For example:*

- *an employer says to you in a job interview, we'd like to hire you but we don't have a unisex washroom OR*
- *Our customers would not feel comfortable dealing with a transperson*
- *A co-worker bullies the transperson, and calls them names such as 'tranny' and management takes no steps to correct the situation*
- *Company extended health benefits exclude sex reassignment surgery*

- Membership in a union

*For example:*

- *a union says, 'our membership code applies only to men and women'.*

- Tenancy

*For example:*

- *a landlord says 'we don't rent to sexual minorities'; OR*
- *a landlord sees someone they believe to be male dressing in 'women's clothing' and evicts them.*

- Goods or services customarily available to the public

*For example:*

- *A bus driver makes a remark about someone being a he-she;*
- *A store clerk refuses to give the washroom key that is requested insisting on the other-gendered washroom;*
- *A school board says it cannot accommodate trans students because they do not believe*

*that children should be permitted to transition;*

- *A hospital puts an FtM individual in a ward for women*
- Purchase of property  
*For example:*
  - *A strata council says they won't admit trans people*

Some kinds of mistreatment are not covered by human rights legislation. For example if someone on the street calls you 'tranny' and throws a rock at you – that is not a human rights complaint because the person is not employing you, denying you a service, etc on the ground that you are transgender.

On the other hand their behaviour may be an assault: call the police!

In general, it is not enough to say, "I applied for a job and I wasn't hired – I am sure it was because I am trans". You **must** be able to show some causal connection. Maybe the interviewer said something that made you aware that they were transphobic.

Sometimes an employer/landlord/union/property seller/service provider will say, "There is one rule for everyone! No exceptions! And that is not discrimination." They might say that in response to a complaint to use the washroom of your affirmed gender, for example: 'everyone has to use the washroom of the gender they were born into, no exceptions'.

Having one rule for everyone might seem fair at first. But if it has a disproportionate impact on a group of people – as that rule has on trans people – then the blanket rule cannot stand. The Respondent has a 'duty to accommodate' the rights of people for whom the rule doesn't work.

In this case, the Respondent would either have to permit trans people to use the washroom of their affirmed gender, or change all the washrooms to gender-neutral.

If you are being harassed at work because you are trans, the employer is responsible to stop it – even if the harasser is a coworker. So in a complaint you would name both the coworker and the employer.

There is now legislation about bullying in the workplace. If you are being bullied at work you file a complaint with Worksafe B.C. This would apply for example if the manager was bullying everyone, not because they were queer or a person of colour or a woman or whatever – but just because the manager was a bully.

### **If you have a human rights complaint is it ‘federal’ or ‘provincial’?**

Most human rights complaints are covered by the B.C. Human Rights Code. But some are not.

You must proceed under the *Canadian Human Rights Act* if

- You work for a federal employer such as a bank, airline, etc
- You have been discriminated against by a federally-regulated body such as a bank, an interprovincial trucking firm, etc; or
- You are complaining about mistreatment by a band council under the Indian Act

An easy way to find out if your complaint is covered by the B.C. Code is to phone the B.C. Human Rights Tribunal and ask. Their number is 604 775-2000.

This booklet deals only with provincial human rights cases.

## How to file a complaint

In B.C., you first go to the website of the B.C. Human Rights tribunal: [www.bchrt.com](http://www.bchrt.com) .

Click on 'file a complaint'. Up comes a complaint form. There is help in filling out the form from the same website. The booklet "BRITISH COLUMBIA HUMAN RIGHTS TRIBUNAL GUIDE 2 – Making a Complaint and guide to completing a Complaint Form " is your guide to completing the form correctly.

Make every effort to fill out all the spots, and provide LOTS OF DETAIL about the things that have happened to you. This is because the Tribunal will decide whether you have a chance at winning a human rights case by reading what you have sent them.

## File your complaint on time

Make sure that you file your complaint within six months since the events occurred. If you are already outside that time limit, explain in detail why you are late filing the complaint in the section of the complaint form that asks for your explanation of delay. The Tribunal has a very limited power to accept complaints that are filed late. Typically they do not accept as an explanation that you did not realize you had a human rights complaint, or that you were so traumatized by the discrimination that you could not deal with filing a complaint within the six month period.

You can get help filling out the complaint form

- At the BC Human Rights Tribunal on Mondays, from 9:30 to 4:30, at the drop in clinic run by the B.C. Human Rights Coalition
- At the Catherine White Holman Wellness Clinic on the **fourth** (not the last) Monday of the month from 6:30 to 9:30, at REACH Community Health Clinic, 1145 Commercial Drive, Vancouver.

But: if you are running out of time for the six month time limit, file your complaint and then ask questions. It is easier to request to change the complaint than it is to get permission to file it late.

**After filing the complaint: getting free legal help to act for you**

Once you have filed your complaint, the B.C. Human Rights Tribunal will review it and tell you if it is within their mandate. They will send you a letter.

*As soon as you receive that letter*, make an application through the website of the B.C. Human Rights Coalition for help to represent you with respect to your complaint:

<http://bchrcoalition.org/files/HowtoApplyforRepresentation.html>

NOTE: The Coalition will not consider a request for representation until you have a letter accepting your complaint by the B.C. Human Rights Tribunal.

*And you only have 30 days* from the date of the acceptance letter from the Tribunal.

Since this is the door for the only free legal representation in B.C., make sure you follow their steps. Make sure you understand the conditions the Coalition requires. You must agree that if they think you should settle your complaint, you will. If you don't, they can stop representing you.

The B.C. Human Rights Coalition partners with CLAS, the Community Legal Assistance Society. CLAS appoints free lawyers, within their resource limitations, to act for human rights complainants referred to them by the Coalition. In those cases, the B.C. Human Rights Coalition acts for the Complainant until the time for a hearing. A CLAS lawyer acts for the complainant at the hearing.

## **Sometimes...the Bad News**

Sometimes the Respondent files an 'application to dismiss' your complaint. They may argue that it is past the six month filing date, or that even if you proved all the facts in the complaint you would not succeed in proving discrimination under the Code, or that the issue has already been dealt with in another forum like a grievance procedure, for example.

If that happens to you, you will need to get some legal help to know how to respond. If you already have representation by the B.C. Human Rights Coalition, they will answer this on your behalf. They will also represent you at an Early Settlement Meeting.

## **Early Settlement Meeting**

Do you want an Early Settlement Meeting? This is one of the questions on the complaint form. Your answer is probably 'yes'.

An Early Settlement Meeting (ESM) is a confidential meeting held between you, the Complainant, and the body you are complaining against, the Respondent. There is a mediator appointed by the Tribunal to help parties arrive at a settlement of the complaint.

The service is free. If you do not settle, the complaint continues on to a hearing before the Tribunal.

So you have nothing to lose. More than 90% of all complaints are settled or otherwise dealt with before a tribunal hearing.

At the Early Settlement Meeting you can take a lawyer or representative. The mediator will be able to help you understand what the range of award might be if you went to a hearing at a tribunal. That is helpful because it lets you know whether to settle for a certain amount or not.

At an ESM you can ask for conditions that are not monetary. For example you can ask that an employer who did not respond to bullying have an anti-bullying program at the workplace. All the parts of a settlement must be by agreement. And unless the parties agree otherwise the terms of the settlement are confidential.

Think about what you want to get from the complaint: what your 'optimum' and what your 'minimum' settlement would be.

The proceedings at an ESM are informal. Everyone – you and your representative, the respondent and their representative – meet together with the mediator in a boardroom, at the beginning. The mediator has everyone sign a confidentiality agreement; and then talks about what the process will be like. After that, the Complainant describes what happened, without interruption. Then the Respondent describes what their version of events is. There is usually a chance for each side to ask questions of the other.

Often the mediator will then separate the parties into breakout rooms, and go back and forth to see if they can find a way to settle the complaint that both parties can agree to.

### **Don't be surprised**

Standard features of a settlement include terms

- That the agreement be kept confidential; and
- That the Respondent is not admitting liability

However if you have an agreement that the Respondent will, for example, develop some trans-affirming policies or do some training with its staff, that training obviously will not be confidential.



## **If you Don't Settle**

If you don't settle, you are on your way to a hearing at the human rights tribunal.

As a first step the Respondent has to file a response to your complaint, saying what its position is.

The tribunal will schedule a hearing, typically many months down the road, for a number of days that it thinks will be needed to hear all the evidence. If you are complaining about one incident, the hearing could be as short as a couple of days. If you are complaining about a long series of events over a great period of time, much more time will be required.

## **At the Hearing**

A hearing is held in front of a member of the Tribunal. But it won't be the same tribunal member that you had when you went to the ESM because that member could be biased to one side or the other.

The hearing is held in a board room. It is not recorded. The rules are similar to the rules in a court case.

The complainant goes first. She or he calls the witnesses who will prove their case. For example, suppose the cashier at the drug store you were shopping in for makeup made a transphobic remark. You would testify yourself. If you have a witness who heard the exchange, they would also testify.

After each of your witnesses gives evidence the Respondent has a right to 'cross examine' them: ask questions. It is similar to court room shows you see on tv.

You have to prove every element of your case. Let's suppose your complaint said that the B.C. government should be providing

depilation (facial hair removal or electrolysis) therapy as part of the medical services that are covered in B.C. You would need to prove

- That some people could get depilation therapy covered by MSP – for example, people who have a condition called hirsutism which makes one's whole body hairy;
- That your doctor says that the treatment is medically necessary for you. NOTE: your doctor has to give evidence at the hearing
- That you asked for MSP coverage and they refused

If you neglected to prove that your doctor said you needed electrolysis then you would lose your case!!

When you have called all your witnesses, the Respondent calls their witnesses. You have a right to cross examine each of their witnesses.

You have a right to call witnesses again if the Respondent has brought up a point that you didn't cover the first time. You can only have a 'reply' witness if you could not have anticipated the Respondent's evidence – if you could have, you have to put it in evidence in the first place.

Your witnesses will give evidence both about what happened, and about what the consequences were. You need to prove the consequences of the discrimination because that is what determines how much money you will get.

After all the evidence is heard, you make an argument about why you should win; the Respondent argues why they should win; and you have a right of reply to the Respondent's argument.

You have to argue about how the evidence shows there was discrimination, and about what 'remedy' you should have.

## Remedy

There are three kinds of remedy for discrimination under the B.C. Human Rights Code.

First, the tribunal **must** order the Respondent to cease and desist from repeating its discriminatory conduct. And the Tribunal **may** order the Respondent to take particular steps to remedy the discrimination. If the complaint was about a policy forbidding trans people from using the washroom of their affirmed gender, the Tribunal could order that the Respondent change the policy **and** (for example) make the washrooms gender neutral.

Second, you can be compensated for any money you lost.

- Suppose you were fired because you insisted on using the washroom of your affirmed gender. You have to prove that you looked hard for a replacement job; but if you can show that, you looked hard and there was no work (or no work for a period of time), you will get ‘wage loss’ from the time you were fired till the date of the Tribunal decision. (But if you had EI or welfare benefits during that time you have to pay them back from the award).
- Suppose that someone refused to rent you an apartment because you were transgender, and you could only find a more expensive apartment. You can claim the difference in rent from the time of the event to the time the Tribunal makes its decision.

Third, you can claim for ‘injury to dignity’. This is like “general damages” in a lawsuit. It is a sum of money intended to compensate you for the insult of being discriminated against. You don’t have to prove that you lost a particular amount of money. But you might want to prove for example that you ended up with

PTSD as a result of the employer failing to deal with a transphobic coworker; or that you were so humiliated by the conduct of the bus driver that you haven't been able to get on a bus since.

How much will you get for injury to dignity?

The answer is: not much.

The highest award in B.C. for injury to dignity is \$35,000. An amount in that range might be awarded if for example your boss raped you at work.

For less serious breaches of the Human Rights Code you might get between \$5000 and \$15000. The only way to find out what you might be looking at is to read other cases decided by the Tribunal, all of which are available at [www.bchrt.bc.ca](http://www.bchrt.bc.ca), to see what amounts are awarded in different kinds of cases.

The small size of human rights awards makes it very hard to pursue a human rights complaint. To hire a lawyer to help with your claim will often cost more than the award you get at the end of a hearing, if the matter is not settled at an ESM. In that way, your human rights are really just paper rights, because most people cannot afford to pursue a case. While the B.C. Human Rights Coalition and CLAS offer free help to some people, but they are unable to help everyone who needs it.

### Resources

There are lots of resources for people who want to file a human rights complaint. Some of them are listed below. It is **very** worthwhile to read through the resources before you file your complaint.

B.C. Human Rights	<a href="http://www.Bchrt.bc.ca">www.Bchrt.bc.ca</a>
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Tribunal	
B.C. Human Rights Coalition	<a href="http://www.bchrcoalition.org/">http://www.bchrcoalition.org/</a>
Attorney General of B.C.	<a href="http://www.ag.gov.bc.ca/human-rights-protection/pdfs/EmployerInfo.pdf">http://www.ag.gov.bc.ca/human-rights-protection/pdfs/EmployerInfo.pdf</a>
Canadian Bar Association B.C. Branch	<a href="https://www.cba.org/bc/public_media/rights/236.aspx">https://www.cba.org/bc/public_media/rights/236.aspx</a>
Vancouver Island Human Rights Coalition	<a href="http://vihrc.org/">http://vihrc.org/</a>
Go2	<a href="http://www.go2hr.ca/articles/human-rights-code-made-simple">http://www.go2hr.ca/articles/human-rights-code-made-simple</a>
Justice Education Society	<a href="http://www.justiceeducation.ca/resources/human-rights-in-bc">http://www.justiceeducation.ca/resources/human-rights-in-bc</a>
Smeets law office	<a href="http://smeetslaw.com/human-rights">http://smeetslaw.com/human-rights</a>
University of the Fraser Valley	<a href="http://ufv.ca/hrcro/human-rights-code-of-british-columbia/">http://ufv.ca/hrcro/human-rights-code-of-british-columbia/</a>

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