IN THE MATTER OF THE *HUMAN RIGHTS CODE*
R.S.B.C. 1996, c. 210 (as amended)

AND IN THE MATTER of a complaint before
the British Columbia Human Rights Tribunal

B E T W E E N:

Tawni Sheridan

COMPLAINANT

A N D:

Sanctuary Investments Ltd. doing business as "B.J.'s Lounge"

RESPONDENT

A N D:

Deputy Chief Commissioner,
British Columbia Human Rights Commissioner

REASONS FOR DECISION

Tribunal Member:	Barbara Humphreys
Counsel for the Complainant:	Alison Sawyer
On Behalf of the Respondent:	Stephen Andrew
Counsel for the Deputy Chief Commissioner:	Deirdre Rice

Place and Date of Hearing: Victoria, British Columbia
May 6, 7, 8, 11 and 12, 1998

[1] Tawni Sheridan, the Complainant, filed a complaint (Ex. No. 1) with the B.C. Council of Human Rights in which she alleged that Sanctuary Investments Ltd. doing business as "B.J.'s Lounge", the Respondent, denied her a service or facility customarily available to the public and/or discriminated against her with respect to a service or facility customarily available to the public because of her sex (gender) and/or a physical or mental disability, contrary to section 3 of the *Human Rights Act*, S.B.C. 1984, c. 22 , now section 8 of the *Human Rights Code*, R.S.B.C. 1996, c. 210 (the "*Code*"). I was designated by the Chair of the B.C. Human Rights Tribunal to hear the complaint and determine whether it is justified.

PRELIMINARY DECISIONS

[2] Prior to the commencement of the hearing, several preliminary applications were made and decided.

Complainant's application

[3] The complaint form (Ex. No. 1) filed by the Complainant alleges discrimination because of sex (gender) and/or physical or mental disability. On March 18, 1998, the Complainant applied to the Tribunal to amend her complaint to allege discrimination because of her "gender identity", a ground which is not included in the *Code*.

[4] The Chair of the Tribunal designated Tribunal Member Tom Patch to decide this application. In his decision, Mr. Patch concluded that the Tribunal does not have the jurisdiction to amend a complaint by adding a ground that is not included in the *Code*: see *Sheridan* v. *Sanctuary Investments Ltd. doing business as B.J.'s Lounge* and *The Deputy Chief Commissioner of the B.C. Human Rights Commission* and *The Attorney General of B.C.* (April 28, 1998, unreported).

Respondent's application

[5] The Respondent applied to the Tribunal for assistance in obtaining certain information from the Complainant. The Respondent also applied to the Tribunal to dismiss the complaint without a hearing because of prejudice the Respondent said it suffered due to delay between the time that the B.C. Council of Human Rights received the complaint and the time the Respondent was notified of the complaint.

[6] These preliminary applications were also referred to Tribunal Member Patch to decide. He dismissed them both: see *Sheridan* v. *Sanctuary Investments Ltd. doing business as B.J.'s Lounge* and *The Deputy Chief Commissioner of the B.C. Human Rights Commission* and *The Attorney General of B.C.* (April 24, 1998, unreported). With respect to the delay application, Mr. Patch referred to *Blencoe* v. *British Columbia (Human Rights Comm.)* (1998), 30 C.H.R.R. D/439 (B.C.S.C.) and wrote the following (at para. 7):

> Though section 7 of the *Charter* is inapplicable, based on *Blencoe* and *Watson et al.* v. *B.C.C.H.R. and Egolf*, unreported, February 2, 1994 (B.C.S.C.), I conclude that the Tribunal has authority to decline to hear a case on a preliminary basis where there is evidence of prejudice of a sufficient magnitude to impair the fairness of the hearing.

Mr. Patch concluded that there was no evidence of sufficient prejudice to impair the fairness of the hearing.

RESPONDENT'S SECOND DELAY APPLICATION

[7] On May 12, 1998, at the conclusion of the evidence portion of the oral hearing into this complaint, Mr. Andrew, on behalf of the Respondent, again raised the issue of delay. The B.C. Court of Appeal, on May 11, 1998, had released its decision (*Blencoe* v. *British Columbia (Human Rights Comm.)* (1998), 31 C.H.R.R. D/175) which overturned the B.C. Supreme Court decision. Mr. Andrew submitted that Mr. Patch had "... relied heavily on the [B.C. Supreme Court] *Blencoe* decision" and argued that he should be given the opportunity to review the B.C. Court of Appeal decision and make further submissions on the issue of delay.

[8] I decided to continue the hearing so that the parties could make their final submissions. A schedule was established for written submissions on the issue of delay and the relevance of the B.C. Court of Appeal decision in *Blencoe*

[9] For the purposes of deciding the Respondent's application, I will assume that I have the jurisdiction to reconsider Mr. Patch's earlier decision in light of the Court of Appeal *Blencoe* decision. I agree with the reasoning of Tribunal Member Nitya Iyer that the Tribunal has the jurisdiction to determine whether rights under section 7 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") have been infringed: see *Dahl and Eastgate* v. *True North R.V. and Kummerfield* (September 2, 1998, unreported).

[10] In his written submission dated June 5, 1998, Mr. Andrew, on behalf of the Respondent, stated (at para. 5) that he "... made a new motion to the Tribunal on May 12, 1998 based on the fact that the law concerning delay had changed ... because of the reversal of the *Blencoe* decision by the Court of Appeal of British Columbia."

[11] In my view, the Court of Appeal decision in *Blencoe* does not assist the Respondent for the following reasons. First, section 7 of the *Charter* does not apply to corporations: see *Irwin Toy Ltd*. v. *Quebec (Procureur General)*, [1989] 1 S.C.R. 927, and also *Blencoe* (B.C.C.A.) at D/187. Second, the Court of Appeal found that the stigma and prejudice associated with sexual harassment cases is analogous to the stigma and prejudice which arises in sexual assault cases. I see no analogous stigma arising in the complaints filed by the Complainant which allege discrimination on the grounds of sex and physical or mental disability.

[12] Mr. Andrew's written submissions on this application (dated June 5 and July 10, 1998) raised issues unrelated to his delay application. The reason that I allowed him to make a second delay application was the release of the Court of Appeal's decision in *Blencoe*. In these circumstances, I do not think it is appropriate to consider the additional issues raised in his submissions, and I have not done so.

[13] In conclusion, Mr. Andrew's application that the proceedings against the Respondent be stayed because of delay is dismissed.

EVIDENCE

The Complainant's Case

[14] The Complainant testified that she is a transsexual who had sexual reassignment surgery if February 1998. She started cross-dressing before she was a teenager but did not go out in public in women's clothes until August 1995, when she was twenty-nine years old. Shortly before this time, she had begun to take a friend's birth control pills.

[15] The Complainant testified that she was aware from her research into transsexualism that she was required to live full-time as a woman for an extended period of time before gender reassignment surgery could be performed. She understood that living full-time as a woman included using the washroom designated for women when she was in public establishments. She said that if she used the men's washroom she "... would no longer stand a chance as (sic) having people perceive ...[her] as female."

[16] The Complainant thought nightclubs that catered to the gay and lesbian community would provide her "... with a safe environment to explore ...[her] new identity and [to] socialize." In early August 1995, she twice attended at one gay nightclub in Victoria dressed as a woman with "... moderate success, given the circumstances." She did not experience any problems when she used the women's washroom.

[17] On or about August 25, 1995, she attended at the Respondent dressed as a woman. After a couple of glasses of beer, she used the women's washroom. There was no one else in the washroom at the time. When she emerged from the washroom, Colin Stephenson, whom the Complainant described as the Respondent's "bouncer", told her not to use the women's washroom again or she would be asked to leave.

[18] In October 1995, she went to see Dr. Kadziora, who prescribed a course of hormone treatment. He also provided her with a letter (Ex. No. 7) dated October 26, 1995 explaining that she was a transsexual who was authorized to live and dress as a woman during the pre-operative phase of her treatment. A couple of months later, she switched

from Dr. Kadziora to Dr. van den Berg, whom she described as "... the endocrinologist that transsexuals went to." She was also seeing Dr. Scott, a psychiatrist.

[19] The Complainant said that sometime in the fall of 1995 she again went to the Respondent. The only staff member she saw was the bartender. She had a couple of drinks and used the women's washroom without any problems.

[20] The Complainant decided to attend the Respondent's New Year celebrations on December 31, 1995. She had dinner with her mother, who helped her dress and do her make-up. She arrived at the Respondent at about 11:00 p.m. At the door, Mr. Stephenson asked to see the Complainant's driver's licence, which she showed him. The licence was about two years old; it showed the Complainant as a man. Referring to the picture on the driver's licence, Mr. Stephenson said, "It's not you". He refused her admittance to the Respondent.

[21] The Complainant testified that she then showed Mr. Stephenson the letter written by Dr. Kadziora (Ex. No. 7) which referred to the male name on her driver's licence. She said that, after Mr. Stephenson read the letter, he told her it "meant nothing." The Complainant asked to see the Respondent's manager. Mr. Stephenson refused this request and the Complainant left.

[22] At the beginning of January 1996, the Complainant telephoned Mr. Bruce Winckler, the manager of the Respondent. She asked him why she had not been permitted to speak to him on New Year's Eve and also why she was not permitted to use the women's washroom. According to the Complainant, Mr. Winkler told her that the liquor regulations permitted entry to be refused to anyone who did not match their picture identification. He also told her that there had been complaints from lesbian customers of the Respondent about transsexuals in general, and the Complainant in particular, using the women's washroom.

[23] As a result of this incident on New Year's Eve, the Complainant legally changed her name and obtained a driver's licence in her female name in February 1996. She said

that she had not done this sooner because she could not afford the $125. She borrowed the money from her mother.

[24] **Patricia Scriver** testified that she is a transsexual who began the transition from male to female in 1994. During the summer of 1995, she met Murray, one of the Respondent's bartenders, at a party. She divulged that she was a transsexual who had started transition a year and a half earlier.

[25] About two weeks after the party, Ms. Scriver went to the Respondent with some friends. She said that Murray prevented her from using the women's washroom. She described the incident as follows:

> We were celebrating a birthday party, and we had a wonderful evening up until the point that we got up to leave and I had to use the washroom, and as I walked into the washroom one of the members of the bar staff [i.e., Murray] grabbed me by the arm and physically yanked me out of the door and said, "You can't go in there. You're a man."

[26] Ms. Scriver stated that she had not had any other problems using women's washrooms during the year and a half she had been living as a woman. Her boyfriend, Darwin Foster, attempted to speak to Murray but was told he had gone on a break.

[27] **Mr. Foster** testified that he went to speak to Mr. Winckler the day after Murray had stopped Ms. Scriver from using the washroom. Mr. Foster told Mr. Winkler that Ms. Scriver was "not a guy", that she was on hormones, and "through the gender clinic already." Mr. Foster testified that Mr. Winkler's response was to the effect that "... as long as she has that thing between her legs, she's a guy."

[28] **Ingrid Olson** testified that she is a transsexual who began living full-time as a woman on May 6, 1995. She had sexual reassignment surgery on December 12, 1997.

[29] Prior to May 6, 1995, Ms. Olson attended at the Respondent as a male. She continued to attend at the Respondent after May 6, 1995 dressed as a woman. She used the women's washroom during her transition and never experienced any problems.

[30] After hearing that the Complainant and other transsexuals had been told not to use the women's washroom, Ms. Olson showed Mr. Winckler the letter she had from her psychiatrist explaining that she was taking hormones and in transition. She testified that Mr. Winckler was not "... concerned with the letter, it was whether or not we had had our surgery." Nevertheless, Ms. Olson continued to use the women's washroom at the Respondent without incident. She was not aware of any other customers of the Respondent making a complaint about transsexuals using the women's washroom.

[31] **Dr. Richard Robinow** testified as an expert witness. He has been a psychiatrist on staff at the Vancouver General Hospital since 1979. Since 1986, he has been associated with the Gender Dysphoria Clinic, which became the Centre for Sexuality, Gender Identity and Reproductive Health in 1995. He is a half-time psychiatrist with the Centre.

[32] Dr. Robinow outlined four criteria by which individuals are determined to be male or female. The first criterion is the physical sex of the person. This may be male, female or indeterminate in the case of people with ambiguous genitalia. The second criterion is chromosomal sex. Females are generally XX and males are XY. However, some individuals are missing a chromosome or have an extra one.

[33] The third criterion is " ... the actual differentiation of the brain in subtle ways to express male or female." The fourth criterion is gender identity, which is the person's inner subjective experience of femininity or masculinity.

[34] Dr. Robinow explained that there can be various degrees of congruence between the four different criteria. "It's possible to have a female brain in an externally male body. It's possible to have the body of one sex and a strong gender identity of the other sex." The sex of an individual is objective (except in the case of a person with ambiguous genitalia) while the gender of an individual is subjective. Sexual preference is independent of gender identity.

[35] Gender dysphoria describes the condition of people who are unhappy about an incongruency between their physical sex and their gender identity. The most distressed of gender dysphoric people are transsexuals. They have a complete disassociation between

their gender identity and their physical sexual identity. Medically, transsexuality is considered a specific illness, Gender Identity Disorder, which is defined (Ex. No. 5) in the Diagnostic and Statistical Manual of Mental Disorders, 4th ed. (American Psychiatric Association, 1994) as follows:

> A. A strong and persistent cross-gender identification ....
> B. Persistent discomfort with his or her sex or sense of inappropriateness in the gender role of that sex.
> C. The disturbance is not concurrent with a physical intersex condition.
> D. The disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.

[36] The Harry Benjamin International Gender Dysphoria Association, Inc. is an international research and treatment organization composed of about three hundred specialists from a variety of fields, for example, endocrinology, psychotherapy, plastic surgery. The organization has issued Standards of Care for the hormonal and surgical sex reassignment of gender dysphoric persons (Ex. No. 3). These Standards require, *inter alia,* that an individual seeking sexual reassignment surgery must have two independent psychiatric assessments and must successfully live full-time in the social role of the genetically opposite sex for at least twelve months.

[37] The preoperative phase which consists of psychiatric assessment and hormonal treatment is referred to as "transition". Dr. Robinow described this period of time as follows:

> During the time of transition, the person, by definition, is shifting. Their body is changing externally. Their mind is changing internally. They are acquiring the habits, the ... appearance and ... living in the experience of the other role.

[38] He stated that during transition the person is considered to be in the desired sex rather than the physical sex assigned at birth. Part of living in the role of the desired sex is using the washroom of that sex. Dr. Robinow considered use of the appropriate washroom "significant" and said that being prevented from doing so was a "source of distress" for transsexuals.

[39] Dr. Robinow assessed the Complainant in October 1996 and identified her as a moderate to high intensity transsexual. He was aware that she had seen Dr. Scott in 1995 and that he had diagnosed her as a transsexual. She was recommended to the Medical Services Plan for sexual reassignment surgery in September 1997.

[40] **Gail Owen** testified that she has been a regional representative for the Public Service "lliance of Canada since 1984. She is a human rights advocate for her union and involved in transgendered issues both in her union and the Canadian Labour Congress. She is a transsexual. She has not yet had sexual reassignment surgery.

[41] In her professional capacity, Ms. Owen provides workplace assistance to individuals who are in transition. She negotiates protocols about washroom use and has discussions with coworkers and employers to address any fears they might have about transsexualism.

[42] Ms. Owen outlined four possible solutions to use of washrooms during the transition period. She said the best solution is to allow the individual to use the washroom of his or her choice. A less practical solution in a multifloor building is for the individual to use the washroom of choice on another floor. Another option is to develop a sign to put on the washroom door (for example, a sign that says "occupied") so that the individual can use the washroom of choice in privacy. The final option is to replace urinals with cubicles and have unisex washrooms.

[43] Ms. Owen testified that in her experience coworkers lose interest in which washroom a transsexual uses after about a month.

[44] Ms. Owen stated that it would be very embarrassing and emotionally difficult for her to use the men's washroom when she is dressed as a woman and immersed in living as a woman. She said that she has "... peace of mind going into the women's washroom." She always carries her doctor's letter which explains that she is a transsexual in transition. However, she has never had to produce it during her two years of transition.

[45] Ms. Owen was asked by Mr. Andrew how a service provider (such as the Respondent) should respond to a transsexual who does not have a letter from a doctor and who is not known to the employees of the establishment. Ms. Owen responded as follows:

> ... if they don't have a letter, so be it. They're still there presenting themselves as somebody. They should be accepted for who they are. ... I guess the reasonable thing the bar might say: Look it['s] okay for tonight we understand where you're at, but can you talk to us; can you tell us what this is about so that we have some understanding about it?"
>
> It's just to me it would be common sense to find out about it rather than just take action because a person is using the washroom, and you don't think they should be.

[46] **Deborah Brady** testified that she is a transgendered person who has been active as an advocate for transgendered people since 1994. She was a founding member of the High Risk Project Society which examined the factors responsible for the health and social problems experienced by many transgendered people. She has been a board member of the Vancouver ZENITH Foundation, a nonprofit society which provides education, support and advocacy for transgendered people. She also served on the advisory committee of Finding Our Place: "Transgendered Law Reform Project" (Ex. No. 6). She was qualified as an expert witness on advocacy issues involving transgendered people.

[47] Ms. Brady prefers the term "transgendered" to "transsexual" because the former term includes those individuals who are cross-dressing and cross-living and who are not able to or interested in having sexual reassignment surgery. She stated that drag queens are generally gay males who were born with male genitalia and who identified and were content as men, but whom she still included in the term "transgendered".

[48] Ms. Brady described in a general way the types of discrimination which transgendered people encounter in our society.

The Respondent's Case

[49] **Bryan Wilkinson** has worked in the Liquor Control and Licensing Branch since 1987. He has been a liquor inspector for approximately eight years. About 80% of his time is spent in licencing duties (applications for new liquor licences or for changes to existing licences) and about 20% in enforcement (day and night inspections). Mr. Andrew's application to have Mr. Wilkinson qualified as an expert with respect to the interpretation of the *Liquor Control and Licencing Act* (the "*Act*") was refused; Mr. Wilkinson was qualified as an expert concerning the job of liquor inspector.

[50] Mr. Wilkinson testified that the Respondent was located in one of the most dangerous areas of Victoria because of the drug dealing and prostitution that occur there. He said that no incidents (such as fighting or having a minor on the premises) concerning the Respondent had been reported to him by either the police or another liquor inspector. The Respondent has been successful in its two applications for extensions to its licencing hours.

[51] The *Act* prohibits the selling of liquor to minors, but stipulates that requiring the production of identification is a defence to such a charge. The regulations made pursuant to the *Act* state that approved identification includes a passport, a B.C. identification card or a driver's licence with a photograph. The *Act* also authorizes a licensee to require a person to leave or to forbid entry to a person if the licensee is of the opinion that the presence of the person is "undesirable", as long as the licensee's opinion does not contravene the *Code*. According to the Licensee Program Manual "Serving It Right" (Ex. No. 14), "undesirables" include "problem patrons" and "known troublemakers".

[52] Mr. Wilkinson testified that the primary reason for a strong identification policy at the door of an establishment such as the Respondent is to check for minors. Such a policy also gives patrons the impression that the licensee is well managed. He stated that some licensees have a policy of checking everyone's ID because drug dealers, pimps and prostitutes generally do not carry ID.

[53] Mr. Wilkinson stated that doormen are advised to be firm after making decisions at the door and not to enter into discussions with patrons. He said that the entry to a bar is neither the time nor place for an individual to present a letter to explain why he or she does not resemble the ID presented.

[54] Mr. Wilkinson has inspected the Respondent in the evening about twelve times a year since the Respondent commenced operation. He stated that Colin Stephenson, the doorman at the Respondent, was "... consistently courteous and respectful of patrons..." and that "...among doormen, he's extraordinary." The only complaint he has received about the Respondent was a telephone call from the Complainant in January, 1996.

[55] **Bruce Winckler** testified that he is the owner of the Respondent which is located in the basement of the Carlton Plaza Hotel on Johnson Street in Victoria. The Respondent, which opened in 1993, is a licensed video lounge catering to gay, lesbian, and transgendered individuals. The Respondent manages the liquor licence for Rafiki Properties, the company which owns the Carlton Plaza Hotel. Mr. Winckler began to personally manage the bar in early 1995. In October of 1996, he hired Steven Andrew as manager.

[56] The site of the Respondent was previously occupied by a sports bar. Its hours of operation were restricted due to incidents, such as a shooting and several stabbings. As a result of discussions between Mr. Winckler and the hotel, a metal grate was installed on a ledge to discourage the drug dealers and prostitutes who frequented that area. Increased bicycle patrols by police in the past two years have also helped to reduce the number of "undesirables" in the vicinity. Nevertheless, the area remains very violent. Mr. Winckler testified that there have been two murders in the past year within half a block of the Respondent.

[57] At the times relevant to the complaint, the Respondent had a sign posted at its entrance (Ex. Nos. 15 and 16) stating that picture ID, such as a passport, a driver's licence with a photo, or a B.C. government photo ID, was required.

[58] Mr. Winckler testified that prostitutes were not welcome at the Respondent. Some of the prostitutes in the area were men who dressed in women's clothing.

[59] During the period when he managed the Respondent, Mr. Winckler stated that he received several complaints from female patrons about men using the women's washroom. Asa result of these complaints, he instituted a policy that individuals who were anatomically men were to use the men's washroom and individuals who were anatomically women were to use the women's washroom. It was up to the staff to administer this policy; he did not provide them with any guidelines.

[60] On January 3, 1996, the Complainant telephoned Mr. Winckler. She told him that she was upset with the Respondent's washroom policy and that she had been refused admittance to the Respondent on New Year's Eve. After discussing the incident with Mr. Stephenson, Mr. Winckler was satisfied that he had made the correct decision.

[61] In October 1996, after learning that transsexuals are required to live in the desired sex for a period of time before gender reassignment surgery, Mr. Winckler changed this policy. Patrons are no longer questioned about their choice of washrooms.

[62] **Elizabeth Barker** testified that she is the Human Rights Officer who investigated the Complainant's allegations. The complaint was assigned to her on August 10, 1996 and she completed her investigation on October 22, 1996.

[63] Ms. Barker met with the Complainant on one occasion and spoke with her on the telephone two or three times. Ms. Barker testified that it was her practice to make notes during conversations with any individuals she interviewed. She brought with her the file from the Human Rights Commission which contained her personal notes. There was some information in her notes which was not contained in her investigation report (Ex. No. 17). However, in her notes of her conversations with the Complainant about the incident on December 31, 1995, there was no mention that the Complainant had presented a letter to Mr. Stephenson on that date. Ms. Barker had no recollection of the Complainant referring to a letter.

[64] **Colin Stephenson** testified that he has been a doorman at the Respondent since 1993. He generally worked from 9:00 P.M. until 1:30 A.M. He has approximately ten years experience in this type of work. At the time of the hearing, he was thirty-three years old.

[65] Mr. Stephenson stated that he is familiar with and recognizes about 80% of the Respondent's clientele. When he does not recognize someone, he asks for ID and continues to do so for five or six times until the individual becomes familiar to him. If the individual's appearance changes drastically, he will again ask for ID. Acceptable ID are a BC ID card, a driver's licence, or a passport. The admittance policy of the Respondent is that the face on the ID presented must match the face of the person presenting it.

[66] If the ID presented does not match the face of the person presenting it, then admittance is refused. Mr. Stephenson testified that he does not engage in discussion with individuals to whom he refuses admittance. If the person wishes to discuss the situation, Mr. Stephenson suggests that the Respondent's manager be contacted at noon the next day.

[67] Mr. Stephenson stated that the Respondent's policy with respect to the use of the washrooms was that "men use the men's washroom and women use the women's washroom"; there was no distinction made for transsexuals. He testified that he received complaints from some of the Respondent's lesbian clientele that men were using the women's washroom.

[68] One evening Mr. Stephenson received a complaint about a man in the women's washroom. When he opened the washroom door, he saw the Complainant standing at the sink. He asked her to use the men's washroom; she answered that she was a "pre-operative transsexual" and that she would like to use the women's washroom. He told her what the Respondent's policy was and that she could discuss it the next day with the owner. Mr. Stephenson did not believe that he had been on the door when the Complainant arrived that evening.

[69] Mr. Stephenson said that he refused many people at the door on New Year's Eve. He did not recognize the Complainant when she arrived that evening. He asked her for ID. She presented ID with a male name and a male face. She told him that she was "... the one that had the problems in the women's washroom." He refused her admittance because she did not look like her ID and told her that she could discuss the situation with the owner at noon the next day.

[70] Mr. Stephenson testified that the Complainant did not present a letter or any document to him on New Year's Eve. He stated that, even if she had presented a letter, it would not have mattered what it said because all he is "... instructed to do is check the identification on the ID on the person. Anything else is -- doesn't matter. It's not relevant." He said that on another occasion when he and the Complainant had "an altercation" at the women's washroom she presented a letter that she said was a doctor's note. He thought the Complainant's language during this interchange was inappropriate and he asked her to leave the premises. He did not read the letter. This incident occurred after New Year's Eve.

[71] Mr. Stephenson said that he never saw Ms. Olson, or any other transsexuals, use the women's washroom at the Respondent.

ISSUES

The issues presented in this complaint are as follows:

1. Is discrimination against a transsexual discrimination because of "sex" or because of a "physical or mental disability"?

2. If so, did the Respondent discriminate against the Complainant because of her sex or because of a physical or mental disability contrary to section 8 of the *Code*?

ANALYSIS and DECISION

[73] The relevant portions of section 8 of the *Code* read as follows:

> 8. (1) A person must not, without a bona fide and reasonable justification,
>
> > (a) deny to a person ... any ... service or facility customarily available to the public, or
> >
> > (b) discriminate against a person ... regarding any ... service or facility customarily available to the public
>
> because of the physical or mental disability, sex ... of that person ....
>
> (2) A person does not contravene this section by discriminating
>
> > (a) on the basis of sex, if the discrimination relates to the maintenance of public decency ....

[74] Before addressing these specific issues, I think it is important to briefly review some of the decisions of the Supreme Court of Canada which set out the interpretive approach to be applied when considering human rights legislation.

[75] In *Insurance Corporation of B.C.* v. *Heerspink* (1982), 3 C.H.R.R. D/1163, the Supreme Court of Canada (at D/1166) stated that "when the subject matter of a law is said to be ... 'human rights' ... then ... that law, and the values it endeavours to buttress and protect, are, save constitutional laws, more important than all others." Mr. Justice Lamer (as he then was) went on to say that the human rights legislation in effect in B.C. at that time "is not to be treated as another ordinary law of general application. It should be recognized for what it is, a fundamental law."

[76] Mr. Justice McIntyre reaffirmed this approach in *Ontario Human Rights Commission* v. *Simpsons-Sears Ltd*. (1985), 7 C.H.R.R. D/3102 (S.C.C.) at D/3105 as follows:

> ... it is not, in my view, a sound approach to say that according to established rules of construction no broader meaning can be given to the Code than the narrowest interpretation of the words employed. The accepted rules of construction are flexible enough to enable the Court to recognize in the construction of a human

> rights code the special nature and purpose of the enactment ... and give to it an interpretation which will advance its broad purposes. Legislation of this type is of a special nature, not quite constitutional, but certainly more than the ordinary ....

[77] In *Action Travail des Femmes* v. *Canadian National Railway* (1987), 8 C.H.R.R. D/4210 (S.C.C.) at D/4224, Chief Justice Dickson reiterated the proper approach to be taken to the interpretation of human rights legislation, as follows:

> Human rights legislation is intended to give rise ... to individual rights of vital importance .... We should not search for ways and means to minimize those rights and to enfeeble their proper impact. Although it may seem commonplace, it may be wise to remind ourselves of the statutory guidance given by the federal *Interpretation "ct* which asserts that statutes are deemed to be remedial and are thus to be given such fair, large and liberal interpretation as will best ensure that their objects are attained ....

[78] Section 8 of the *Interpretation Act*, R.S.B.C. 1979 c. 206 contains similar wording. In my view, I am governed by this approach in my interpretation of the *Code*.

[79] I also note section 3 of the *Code* which states that the purposes of the *Code* are, *inter alia*, "to foster a society in British Columbia in which there are no impediments to full and free participation in the economic, social, political and cultural life ..." of the Province and "to promote a climate of understanding and mutual respect where all are equal in dignity and rights".

1. Is discrimination against a transsexual discrimination because of "sex" or because of a "physical or mental disability"?

[80] Counsel for the Complainant and the Deputy Chief Commissioner submitted that "sex" in section 8 can be interpreted to include transsexualism. Mr. Andrew argued that "sex" and gender identity were not synonymous.

[81] The question before me is not whether transsexualism ought to be a protected ground in the *Code*; the question is whether the grounds of "sex" and "physical or mental disability" can be reasonably interpreted to include transsexualism. (I should note that the inclusion of the word "gender" in parentheses after the ground "sex" in the complaint form (Ex. No. 1) carries no legal weight.) There have not been any decisions concerning

transsexuals under the former *Human Rights Act* or the *Code.* Counsel for the Complainant and counsel for the Deputy Chief Commissioner referred me to decisions concerning transsexuals from other jurisdictions.

[82] *P. v. S. and Cornwall County Council* (Case C-13/94, December 14, 1995, European Court of Justice) concerned a male-to-female transsexual who was dismissed from her employment after she informed her employer that she would be undergoing sexual reassignment surgery. The question to be answered by the European Court of Justice was whether the European Community's Directive 76/207/EEC which prohibited discrimination in employment "on the grounds of sex" protected transsexuals from discrimination.

[83] The Court stated that in transsexuals "biological sex and sexual identity fail to coincide." It went on to say that it regarded as

> ... obsolete the idea that the law should take into consideration, and protect, a woman who has suffered discrimination in comparison with a man, or vice versa, but denies that protection to those who are also discriminated against by reason of sex, merely became (sic) they fall outside the traditional man/woman classification ...

and that "... where unfavourable treatment of a transsexual is related to (or rather is caused by) a change of sex, there is discrimination by reason of sex or on grounds of sex ...".

[84] In *Maffei* v. *Kolaeton Industry Inc*., 626 N.Y.S. 2d (Sup. 1995) 391, the plaintiff was a female-to-male transsexual. After he underwent sexual reassignment surgery, he alleged that he suffered harassment at his place of employment. The Supreme Court, New York County, stated that while

> ... a person may have both male and female characteristics, society only recognizes two sexes. In the complaint plaintiff alleges that he is now a male based on his identity and outward anatomy. Being a transsexual male he may be considered part of a subgroup of men. There is no reason to permit discrimination against that subgroup under the broad antidiscrimination law of our City.

[85] The Court concluded that an employer who harasses a transsexual employee violates New York City's prohibition against discrimination based on "sex".

[86] On July 2, 1998, the Quebec Human Rights Tribunal released its decision in *C.D.P. (M.L.)* c. *Maison des jeunes* ... (T.D.P.Q. Montreal, No. 500-53-000078-970). (By letter dated July 30, 1998, counsel for the Deputy Chief Commissioner brought this decision to my attention and to the attention of Ms. Sawyer and Mr. Andrew.)

[87] *C.D.P.* concerned a male-to-female transsexual who was dismissed after she informed her employer that she was a transsexual in the process of undergoing a sex change. The Tribunal considered the meaning of the protected ground of "sex" contained in section 10 of the *Charter of Human Rights and Freedoms*, R.S.Q., (1977) c. C-12, as amended:

> Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on ... sex ....

[88] The Tribunal concluded (at para. 111) that "... le sexe non seulement s'entend de l'état d'une personne mais encore comprend le processus même d'unification, de transformation que constitue le transsexualisme" ("... sex does not include just the state of a person but also the very process of the unification and transformation that make up transsexualism") (unofficial translation provided by the Quebec Human Rights Tribunal).

[89] The Tribunal went on to say (at para.114) that discrimination based on the process of unification of disparate and contradictory sexual criteria could also constitute sex-based discrimination.

[90] As part of its findings, the Tribunal declared that "... le transsexualisme ou le processus d'unification des critères disparates est inclus dans l'expression 'sexe' de l'article 10 de la *Charte des droits et libertés de la personne du Québec*" ("transsexualism or the process of unification of disparate sexual criteria is included in the scope of the

term 'sex' in section 10 of the *Charter of Human Rights and Freedoms*") (unofficial translation provided by the Quebec Human Rights Tribunal).

[91] Society in general, and the law in particular, assumes that sex is a bipolar characteristic and that an individual is either a male or a female. In British Columbia, legislative acknowledgement of transsexualism is found in section 27 of the *Vital Statistics Act*, R.S.B.C. c. 479, which allows a transsexual, after sexual reassignment surgery, to change the sex designation on his or her birth certificate.

[92] The medical profession is more able to address the complexity of the male-female continuum, perhaps because it is a profession which deals with human beings as they actually are, with all their ambiguities and contradictions. Dr. Robinow's evidence made it clear that in some individuals there is a lack of congruence between the various indicators of sex. In the case of transsexuals, there is a complete disassociation between their physical sex and their subjective experience of their masculinity or feminity.

[93] In my view, given the large and liberal interpretation which the Supreme Court of Canada has emphasized must be applied to human rights legislation, I am satisfied that discrimination against a transsexual constitutes discrimination on the basis of sex. Whether the discrimination is regarded as differential treatment because the transsexual falls outside the traditional man/woman dichotomy (as in *P v. S., supra*), or because male-to-female transsexuals are regarded a subgroup of females (and vice versa) (as in *Maffei, supra*), the result is the same: transsexuals experience discrimination because of the lack of congruence between the criteria which determine sex.

[94] Therefore, I conclude that discrimination against a transsexual constitutes discrimination because of "sex".

[95] Dr. Robinow testified that transsexuals are the most distressed of gender dysphoric individuals because of their complete disassociation between their gender identity and their physical sexual identity. Gender Identity Disorder is defined in the Diagnostic and Statistical Manual of Mental Disorders (American Psychiatric Association, 1994).

[96] The Complainant was being treated by Dr. van den Berg, an endocrinologist, and Dr. Scott, a psychiatrist. In October 1996, Dr. Robinow assessed her as a moderate to high intensity transsexual. She subsequently had sexual reassignment surgery.

[97] In these circumstances, I conclude that discrimination against a transsexual constitutes discrimination because of "physical or mental disability".

2. Did the Respondent discriminate against the Complainant becaue of her sex or because of a physical or mental disability contrary to section 8 of the *Code*?

[98] The Complainant has given evidence about two incidents which, she alleges, constitute discrimination on prohibited grounds. The first occurred on August 25, 1995 when Mr. Stephenson told her not to use the women's washroom at the Respondent. The second happened on December 31, 1995 when Mr. Stephenson refused her admittance to the Respondent.

[99] With respect to the washroom incident, Ms. Scriver gave evidence that she was physically prevented from using the women's washroom at the Respondent by one of its employees, even though she had informed him that she was in transition. Mr. Foster testified that, when he spoke to Mr. Winckler about this incident the following day, he was told that "... as long as she has that thing between her legs, she's a guy." Ms. Olson's evidence was that she had spoken with Mr. Winckler about transsexuals in transition but that the critical factor for him was whether surgery had taken place.

[100] Mr. Winckler testified that the Respondent's policy was that individuals who were anatomically men were to use the men's washroom and vice versa. Because of this policy, Mr. Stephenson asked the Complainant to leave the women's washroom even though she informed him that she was a "pre-operative transsexual". He suggested that she talk to Mr. Winckler the next day. Mr. Stephenson said that on another occasion (in 1996) the Complainant showed him a letter from her doctor but he did not read it.

[101] Both the Harry Benjamin International Gender Dysphoria Association, Inc., and the medical profession in British Columbia require a transsexual, before sexual

reassignment surgery, to live in the desired sex for a period of time. The Complainant was aware of this requirement and she began to appear in public as a woman in August 1995, shortly after beginning to take female hormones. Dr. Robinow testified that during this transition phase the individual is considered to be in the desired sex, rather than the physical sex assigned at birth. He further stated that part of living in the role of the desired sex is the use of the washroom of that sex.

[102] The Respondent's policy with respect to use of washrooms was a neutral policy which clearly had an adverse effect on transsexuals in transition. Therefore, the Respondent had a duty to accommodate transsexuals in general, and the Complainant in particular, to the point of undue hardship. (For an analysis of direct and adverse effect discrimination, see *Central Alberta Dairy Pool* v. *Alberta (Human Rights Comm.)* (1990), 12 C.H.R.R. D/417 (S.C.C.) at D/433 to D/437. For an analysis of the duty to accommodate, see *Central Okanagan School Dist. No. 23* v. *Renaud* (1992), 16 C.H.R.R. D/425 (S.C.C.) at D/431 to D/440.)

[103] While the Complainant did not specifically bring her need for accommodation to the attention of an employee of the Respondent, I find that her failure to do so is not fatal to her complaint. The testimony of Ms. Scriver, Mr. Foster, Mr. Winckler and Mr. Stephenson makes it evident that there were to be no exceptions for transsexuals to the Respondent's policy. Furthermore, I find that, given the immediate nature of the service required, if Mr. Stephenson did suggest that the Complainant discuss her situation with Mr. Winckler the following day, this suggestion did not constitute reasonable accommodation.

[104] Both Mr. Winckler and Mr. Stephenson testified that they had received complaints from female patrons of the Respondent about men using the women's washroom. However, the preference of patrons is not a defence to a complaint of discrimination: *Hajla* v. *Nestoras (Welland Plaza Restaurant)* (1987), 8 C.H.R.R. D/3879 (Ont. Bd. Inq.) at D/3882.

[105] While Ms. Olson testified that she had used the women's washroom at the Respondent, I find that this was a slip in the implementation of the Respondent's policy rather than an exception or accommodation.

[106] Section 8(2) of the *Code* allows an exemption from section 8(1) if the discrimination on the basis of sex "... relates to the maintenance of public decency...". It is well established that statutory exceptions to human rights legislation are to be narrowly construed: *Zurich Insurance Co*. v. *Ontario (Human Rights Comm.)* (1992), 16 C.H.R.R. D/255 (S.C.C.) at D/263. The onus is on the respondent to prove the statutory exception or exemption on the balance of probabilities.

[107] Based on Dr. Robinow's evidence, I find that transsexuals in transition who are living as members of the desired sex should be considered to be members of that sex for the purposes of human rights legislation. Taking this view, the Complainant, on August 25, 1995, was a woman and, therefore, her choice of the women's washroom was appropriate. The Respondent did not lead any evidence to establish that the use of women's washrooms by a male-to-female transsexual interfered with the "maintenance of public decency".

[108] The fact that transsexuals are to be considered members of the desired sex for the purposes of human rights legislation does not mean that they will necessarily be considered members of the desired sex for the purposes of other legislation. I note that a similar situation arises with respect to independent contractors and volunteers, who are generally considered to be in an employment situation for the purposes of human rights legislation even though the same result does not hold for the purposes of employment or taxation legislation: see *Price* v. *British Columbia (Ministry of Social Services and Housing*) (1991), 15 C.H.R.R. D/11 (B.C.C.H.R.) at D/16 to D/18; *Skelly* v. *"ssist Realty (No. 1)* (1991), 16 C.H.R.R. D/1 (B.C.C.H.R.) at D/3 to D/4; *Canada ("ttorney General) v. Rosin* (1990), 16 C.H.R.R. D/441 (F.C.".) at D/449 to D/453; *Thambirajah* v. *Girl Guides of Canada* (1995), 26 C.H.R.R. D/1 (B.C.C.H.R.) at D/16.

[109] Clearly, use of the Respondent's washrooms is a service or facility customarily available to that portion of the public admitted to the Respondent's premises, which, on August 25, included the Complainant.

[110] As transsexuals are protected on the grounds of sex and physical or mental disability, I conclude that the Respondent's washroom policy discriminated against the Complainant on both these grounds, contrary to section 8 of the *Code.*

[111] I note that the Respondent has since changed its policy concerning the use of its washrooms. While there was evidence that some customers were displeased, there was no evidence of undue hardship. I would add that, if any inquiries by an employee of the Respondent need to be made to verify that an individual is a transsexual in transition, such inquiries must be made in a dignified, private, and non-confrontational manner, keeping in mind the immediate nature of the service required.

[112] The second incident of alleged discrimination occurred on December 31, 1995 when Mr. Stephenson refused admittance to the Complainant because she did not look like her ID.

[113] Considerable evidence was presented on behalf of the Respondent concerning the area in which it is located, its record with respect to its operation, and the necessity for its strong identification policy. I am satisfied that there was a reasonable basis for the Respondent's policy requiring ID and refusing to admit individuals who did not resemble their ID. I find that the Complainant was refused admittance because she did not resemble her ID.

[114] The evidence is clear that the Complainant changed her name, obtained a new driver's licence, and, after February 1996, was admitted to the Respondent after presenting that ID while she was still a transsexual in transition. There was no evidence that the Complainant was prevented from borrowing money from her mother to secure new identification in August of 1995, or sometime before December 31, when she was living as a woman and using a female name.

[115] In these circumstances, I do not think that the Respondent's policy of requiring correct ID can be said to have an adverse effect on the Complainant because she had amplte time to obtain new ID. While the situation might possible be different for transsexual who has not had suffiicient time to obtain new ID, in the Complinant's circumstance I do not think she can reasonably expect to be accomdated by having the Respondent consider her ID in light of the letter from Dr. Kadziora when, in my view, there was no nexus between her failure to obtain and present correct ID and the fact that she is a transsexual. In these circumstances, it is not necessary for me to determine whether or not the Complainant did, in fact, present the letter from Dr. Kadziora to Mr. Stephenson on December 31, 1995.

[116] I also find that that transsexuals were not singled out for different treatment with respect to admittance to the Respondent. I am satisfied that, on December 31, 1995, Mr. Stephenson did not treat the Complainant differently than he did other patrons who did not resemble their ID. Many people were denied admittance that evening.

[117] I conclude, therefore, that the Respondent's refusal to admit the Complainant on December 31, 1995 was not discrimination because of sex or because of physical or mental disability.

REMEDY

[118] Having found that the complaint is justified in that the Respondent discriminated against the Complainant contrary to section 8 of the *Code* because of sex and physical or mental disability, I am required by section 37 (2) (a) to order the Respondent to cease the contravention and to refrain from committing the same or a similar contravention. I so order.

[119] The Complainant testified that, when she was told by Mr. Stephenson on August 25 not to use the women's washroom, she experienced a "feeling of failure". She said the incident was "upsetting and hurtful" and she was "humiliated and disappointed". She filed her human rights complaint on February 1, 1996.

[120] I note that the Complainant testified that she returned to the Respondent several times between March and May 1996, even though she knew the washroom policy had not been changed.

[121] Section 37 (2) (d) of the *Code* authorizes me to order the Respondent to pay the Complainant "an amount that the member considers appropriate to compensate ...[her] for injury to dignity, feelings and self-respect ...." In my opinion, an order for the amount of $2000 is appropriate compensation in the circumstances of this complaint.

Barbara Humphreys, Tribunal Member

Victoria, British Columbia
January 8, 1999