NO. L021846
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

VANCOUVER RAPE RELIEF SOCIETY

PETITIONER

AND:

KIMBERLY NIXON, BRITISH COLUMBIA HUMAN RIGHTS COMMISSION and BRITISH COLUMBIA HUMAN RIGHTS TRIBUNAL

RESPONDENT

ARGUMENT OF THE PETITIONER

I. THE FACTS

A. The Petitioner

(1) The Petitioner's Status and Political Beliefs

1. The Petitioner is a non-profit charitable organization devoted to fighting violence against women. Its objects reflect this primary purpose (Appendix "O" to the Petition) The Petitioner works through providing rape crisis services to women, and transition house services to women and their children. Its political belief, summarized in its "Basis of Unity" is that women's oppression is a social order in which men by birth rule women, that women should organize as peers, and that women who suffer men's sexist violence will be assisted by receiving peer counselling services. (Appendix "N" to Petition) Its political belief is that sexism, racism and classism are oppressions which are experienced from birth, and in that way differ from other disadvantages, such as those relating to disability and sexual orientation. (Lakeman, Direct, Dec. 19, p. 11, L. 10-37)

2. The Petitioner is about concrete aid and political organizing which operates as a small, non-profit collective with a charitable tax number (Lakeman, Direct, Dec. 19, p. 4, L. 11).

In 1995, there were roughly a dozen collective members. (Cross, Dec. 20, p. 79, L. 27-28) As of 2000, there were 28 collective members. (Direct, Dec. 20, p. 38, L. 39-40).

3. The Petitioner is a feminist service political group with the following fundamentals of feminist process:

   (a) includes consciousness-raising;
   (b) includes democratic practice;
   (c) includes feminist ideology which would work at being open-ended not closed;
   (d) it would always locate the work within the wider women's movement;
   (e) it would always locate women's liberation within the human struggle for freedom;
   (f) historically, it has been non-violent;
   (g) it is extra-governmental;
   (h) it implies a very serious level of honesty; and
   (i) it is more consensual than voting democracy (Lakeman, Cross, Dec. 21, p. 111, L. 23-42).

4. The Petitioner actively participates in the women's equality movement. Each victim who calls the Petitioner for assistance is seen as a potential ally in the struggle for equality and, hence, the end to men's sexist violence. The Petitioner hopes that, as each victim struggles with the impact of men's sexist violence on their own lives, she will become willing to assist in another woman's struggle (Lakeman, Direct, Dec. 19, p. 14, L. 32-40).

5. In essence, the Petitioner's collective members agree that women's oppression is a result of a social order in which men, from birth, because of their place in the social order, control women. Further, they believe that men's sexist violence is perpetuated and accepted in our society because of that social order. In order to fight men's sexist violence, the Petitioner's collective members believe that women should organize as peers. One of the ways of doing that is to assist women victims of men's sexist violence to understand why the violence occurred and that they are not to blame for it. They reach this understanding through group peer counselling sessions using a support, education, and action model. (Appendix "O" to Petition)

(2) The Work of the Petitioner

6. The work of the Petitioner is co-ordinated and for the most part carried out at the Petitioner's premises (the "Premises"). The transition house operated by the Petitioner is also located at the Premises (Cormier, Direct, p. 4, L. 16-21). The house shelters between 100 and 150 women per year, not including their children (Lakeman, Direct, Dec. 20, p. 38, L. 27-33). The house has a stated capacity of ten persons, but often holds as many as 22 users (p. 30, L. 14-18).

7. The Petitioner deals with all forms of men's sexist violence against women. The Petitioner was especially interested in overriding Social Services' delivery categories around incest, wife assault and rape. The Petitioner thought the political similarity was more important. The political similarity is that it is men who are attacking women and women as a group need to resist (Lakeman, Direct, Dec. 20, p. 71, 26-32).

8. The Petitioner operates as a collective of unpaid volunteers and paid staff members (Nixon, Cross, Dec. 12, p. 90 L. 1-3). Every member of the collective is required to do "crisis work": answering the telephone lines; answering personal calls to the Premises; assisting callers in person; working at the transition house; assisting women in crisis with such tasks as bathing, attending medical and legal appointments including the provision of abortion services and babysitting; facilitating counselling sessions; liaising with the media; training medical and legal personnel; and representing the Petitioner at various public fora (Lakeman, Direct, Dec. 20, pp. 57-58) .

9. The Petitioner receives between 70 and 90 telephone calls per day. Of those calls, on average, five calls are from women in crisis who have no previous contact with the Petitioner (Lakeman, Direct, Dec. 20, p. 67, L. 36-38).

10. There are a number of reasons for this: the importance of doing things, like feeding and bathing, that could be called women's work; the rejection of a hierarchy of more or less impressive work; and the importance of everyone understanding the stories of women (Lakeman, Direct, Dec. 20, pp. 57-58). Every member is expected to be able to do any of the work of the collective, although some tasks are assigned for periods to particular collective members. Trainees are permitted to attend a few collective meetings at which

they have a voice but no vote, but ultimately must either ask each member of the collective to accept them into the collective or leave (p. 53, L. 31-32).

11. The Petitioner offers a rape crisis telephone line 24 hours a day which is answered by collective members or trainees. (Lakeman, Direct, Dec. 19, p. 6, L.7-17) Two individuals from the Petitioner are involved in every call. If a caller wants to be accompanied to the hospital or police or wants face-to-face counselling, the two individuals who answered the initial call will provide that service. The Petitioner works that way for several reasons: so women do not have to keep telling their stories until they become devoid of terror, pride, generosity and human colour; so it is clear the Petitioner's workers won't "dump" the caller when the going gets tough or conditions change; and to maintain a personal political relationship, rather than reducing the relationship to a simply political one, or reducing it to a therapeutic relationship (pp. 30-31). The Petitioner also operates a transition house for women and their children who are escaping male violence. The Petitioner seeks to maintain contact with callers for 18 months, because women leaving abusive male partners are at particular risk of being killed during that period (p. 29, L. 45 – p. 30, L. 6).

12. The services provided by the Petitioner to callers are often highly intimate and private. Callers sometimes ask the Petitioner people to be present during internal medical examinations. Callers often disclose secrets (such as abortion history or HIV status) or the effects of abuse (such as self-mutilation scars or battering injuries) (Lakeman, Direct, Dec. 19, pp. 26-27). Callers' secrets often relate to their sexual history, such as a history of sexual abuse. The Petitioner's collective members and trainees share common experience of the oppression of women through discussing their personal experiences (p. 15, L. 23-35).

(3) Training of Volunteers

13. The Petitioner advertises publicly for volunteers to attend their training program. The Petitioner solicits its volunteers through print and media advertising and through its clients (Lakeman, Direct, Dec. 20, p. 48, L. 7-18). Following advertising, a volunteer

typically telephones the Petitioner and the Petitioners' receptionists are instructed to encourage everyone who phones to attend an interview night (p. 48, L. 19-22).

14. At the interview night, the Petitioner screens candidates for attitude (Lakeman, Direct, Dec. 20, p. 48, L. 28-29). The Petitioner asks a series of questions (p. 48, L. 29-30) which require a political commitment and a lot of emotional discourse. Typical questions revolve around a willingness and a commitment: not to blame women for the violence done to them (p. 48, L. 32-34); to work against racism (p. 48, L. 47 – 49 L. 1); to assist a client to obtain an abortion (p. 49, L. 16-17); and to fight for women's rights to love whoever they will (p. 49, L. 26-27). Those candidates who are successfully screened attend an onerous, structured training program of some weeks in duration (pp 49, L. 39-44, 50 L. 8-14), during which the Petitioner's beliefs are further explored and the participants are provided with the skills the Petitioner believes are necessary to its work. (Lakeman, Direct, Dec. 20, pp. 48-49)

15. Many women who initially express interest in their training program fail to complete it. Typically, out of 40 or 45 volunteer trainees who start the program, only about two become collective members (Lakeman, Direct, Dec. 20, p. 54, L. 7-11). Those who become collective members have taken a lecture series, performed a 3 month practicum (p50, L29-30), and worked for about 3 more months (and sometimes longer)(p. 50 L. 46 – p. 51, L. 2) before making a request for membership in the collective (pp. 50-51).

16. The training program consists of weekly three-hour lectures for either six or twelve weeks (the length of the lecture portion was changed at some point; Lakeman, Cross, Dec. 21, p. 104, L. 32-34) and a large amount of assigned and self-directed reading (p. 50, L. 13-14). Volunteer trainees engaged in some role-playing and small group exercises during the lecture portion of the program (Direct, Dec. 20, p. 50, p. 51 L. 39-47 – p. 52, L. 1-7).

17. In addition to the lecture portion, volunteer trainees are required to complete a practicum consisting of crisis telephone work and work in the transition house (p. 105, L. 27-30). The amount of time spent in the practicum increased when the Petitioner reduced the number of training sessions (Lakeman, Cross, Dec. 21p. 105, L. 47- p. 106 – L. 6). The

general requirement was one shift a week over a period of three months (p. 106, L.10-12). Shifts consisted of four hours during the daytime and eight hours at night (p. 106, L. 15-17). The volunteer trainee attended from two to four orientation shifts and the balance of the practicum was done under the direction of a collective member (p. 50, L. 17-21). Trainees engaged in some role playing and use of self-education tools during the practicum. (pp. 105-106, p. 51, L. 39 – p. 52 L. 2)

18. After three months of practicum, the Petitioner would advise the trainee volunteer of the Petitioner's formal agreements, such as the Basis of Unity, and would discuss the responsibility of becoming a collective member. The trainee volunteer would then request to become a member of the collective. The process from the initial interview to becoming a member of the collective is approximately one year (Lakeman, Direct, Dec. 20, p. 53, L. 12-15).

(4) The Petitioner's House Funding Committee

19. The Petitioner's House Funding Committee, which has male members, is an active volunteer committee, primarily focused on fundraising for the Petitioner (Complainant, Dec. 11, Direct, p. 24, L. 13-21). Men do not provide any of the Petitioner's peer counselling services and in fact the Petitioner has a policy of not allowing men on the Premises (Lakeman, Direct, Dec. 19, p. 32, L. 19-20).

20. The Petitioner does not consider a person who has lived as a man to be a "peer" to an individual treated throughout her life as a girl and woman and accordingly does not accept such individuals into its peer-based program (Cormier, Cross, p. 56, L. 43, p. 57 L. 2-10). This is not because of any stereotyped belief about the characteristics of such individuals, such as a belief that they lack empathy.

(5) The Role of Transgendered People

21. It is the Petitioner's political belief that the disadvantages suffered by transgendered persons are different in nature from those suffered by persons who have been treated as women all or most of their lives (Lakeman, Direct, Dec. 20, p. 73, para. 25-31, 36-40) (all forms of disadvantaged treatment deserving their own distinctive analysis). The Petitioner also recognizes that there is an on-going debate about the most appropriate approach to eradicating disadvantages suffered by transgendered people, for example, with respect to the ethics of sex reassignment surgery. (Cross, Dec. 21, p. 139, L. 26-27, L. 35-38)

22. The Petitioner cannot conceive of how its work will not be utterly impossible if it does not get to make the decision about whether to accept trainees who did not have the life experience of being treated exclusively as girls and women (Lakeman, Direct, Dec. 20, p. 73 L. 5-10, 36-43).

B. <u>Peer Counselling/Consciousness Raising</u>

23. The Petitioner has chosen to organize its counselling programme on the model of peer counselling/consciousness raising. The Petitioner uses the tool of consciousness raising

based on life experience to formulate and advance its political ideology (Lakeman, Jan 8. p. 28, L. 18-21, p. 29 L. 11).

24. The basic tenet of peer counselling/consciousness raising is one individual helping another on the basis of commonality of experience (Pacey, Direct, p. 39, L. 13-25). Support groups are to equalize power and to offer guidance and support from personal experiences (Pacey, Cross, p. 15 L. 20-26).

25. "Consciousness raising groups" began in the 1960s and 1970s when women got together in groups to talk about their lives in what were termed "consciousness raising groups." Men were excluded for three reasons. First, women, by meeting together, were able to identify common experience. Second, women got to know other women. Third, women might be more inclined to speak out. (Rebick, Direct, pp. 4-5) "Consciousness raising groups" and the concept of acting on common experience is at the centre of the women's movement, and reflects a different philosophy of knowledge, of "common sense" not "experts." (p. 7, L. 30-33)

26. The Petitioner runs groups for women, but they are not simply therapy groups. They are "Support, Education and Action groups", the name demonstrating the political technique of working collectively to end men's sexist violence. One of the most important things about grouping women was connecting them, and an important part was educating them relative to other women's experience, which can lead to viewing the violence as being not about them personally, "it's us", now determine what to do, to put the event in the larger context of women's oppression (McIntosh, Cross, p. 110, L. 23-35).

27. It is a central insight of feminism that the attributes of gender are socially constructed, and the Petitioner agrees with that. It is a central tenet of feminism that the actual and various lived experiences of women should be privileged as a source of information about their lives, and that is why the women's movement has organized with consciousness-raising groups (Lakeman, Cross, Jan. 8, p. 28, L. 18-21; p. 29, L. 11).

28. The primary issue for the individual with gender identity disorder is that of gender identity, with the concomitant problems of growing up being treated according to anatomical gender only. (Pacey, Direct, p. 35, L. 41-p. 36, L. 3)

29. It is not appropriate to include individuals from both of these two groups in group counselling/consciousness raising with respect to men's sexist violence:

    (a) individuals who grew up being treated as girls and then women; and

    (b) individuals born anatomically male, treated into adulthood primarily as male, and diagnosed at some time with gender identity disorder. (Pacey, Direct, p 47 L. 29-35)

30. Such groups have very different needs after assault. The two groups do not share the same life experience, and if the two groups are brought together the type of peer counselling/consciousness raising offered by the Petitioner would not satisfy the needs of either group. (Pacey, Direct, p. 47, L. 7-27)

31. In a crisis situation, when the client is very vulnerable, traumatized, afraid, and confused, the client needs calm, safe, easily accessed, non-confusing care which will promote her well-being (Pacey, Direct, p. 41 L. 31-35). After male violence this needs most often to be a woman without ambiguity, since the male gender may be experienced as threatening. (p. 47, L. 29-42)

C. <u>Distressed Callers to The Petitioner</u>

32. Callers to the Petitioner can be highly traumatized and typically suffer great fear, guilt and shame. They need a safe and supportive environment. In fact, the Petitioner's contract with the Provincial Government for providing transition house services requires that the Petitioner provide a "safe and supportive living environment" for abused women, mothers, and their children. (Appendix "P" to the Petition)

33. Women who have been raped suffer a high level of distress and absolute horror and fear after a sexual assault, including an extraordinary vulnerability, and a feeling that the person's whole life is being turned upside down. Basic assumptions about personal

safety, the safety of the world, and the safety of men, all get challenged by assault and particularly by rape (Pacey, Direct, p. 28, L. 30-40).

34. Women who have been raped may suffer "Post-traumatic Stress Disorder" ("PTSD") (TAB 8, Affidavit of J. Peter Dowsett sworn November 1, 2002, Exhibit "B", ("Dowsett") TABS 17 and 19). Women suffering from PTSD may display feelings of horror and fear and dread and lack of safety. Flashbacks related to the rape can return in the days and nights afterwards, which can go on for months (Pacey, Direct, p. 29, L. 2-9). Women suffering PTSD may "persistently re-experience" the traumatic event in ways including suffering "intense psychological distress at exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event" (Exhibit 17). The cues for such episodes can be men in general (p. 30, L. 8-30) and can include having a severe reaction to even seeing a man, displaying extraordinary fear, calling out, shaking and huddling under a chair (p. 30, L. 35-45). Some women may avoid all male company for prolonged periods of time (p. 35, L. 7-8).

35. It is the experience of young girls and women that they are physically vulnerable, that oppression exists in this culture, and that they are objectified, and the assault reminds her of that (Pacey, Direct, p. 31, L. 31 – p. 32, L. 8). Most women live with the fear of male violence, and when it happens, therapeutic needs centre on dealing with the attack the woman has suffered. After the assault there is typically a profound sense of the world as unpredictable and dangerous and a profound mistrust of men. After sexual assault the pseudo-sexual nature of the attack makes gender relevant: it is not the entire world which seems untrustworthy; it is primarily the male part of the world (Exhibit 16, p. 1; Pacey, Direct, p. 31, L. 22-26). All men are now on trial. Therapy needs to be safe, non-threatening, supportive and unambiguous, i.e. she needs no mixed or confusing messages from her counsellor. She generally needs a female therapist, especially in the period following the attack. There is significant danger that a male counsellor, someone who may still have some male characteristics though dressed as female or a man disguised as a woman will be disturbing to someone already extremely disturbed and afraid. In this situation the counsellor becomes an issue, when the woman needs her own feelings and situation to be the issue (Exhibit 16, p. 2; Pacey, Direct, p. 33, L. 26-36). It is not

therapeutic to have someone feeling uncomfortable in a group that is geared towards treatment of sexual abuse.

D. Nixon

36. Nixon identifies as female. Nixon was born physically male (Nixon, Direct, Dec. 11, p. 3, L. 5), grew up as a male and, while appearing as male, studied Physical Education at university and qualified and worked as a pilot (Dec. 12, p. 57, L. 17-18). Nixon had sexual reassignment surgery on November 5, 1990 at the age of 33 (Cross, Dec. 12, p. 73, L.45 and p. 85, L. 4). Nixon's birth certificate, which was issued on February 1, 1991 now shows her sex as "female" (Appendix "Q" to Petition).

37. Nixon wrote an article in which she said that "for male to female transsexuals this reality of violence against women suddenly becomes a factor that we may have to deal with in our lives." (Appendix "R" to Petition) Nixon referred to the reality of violence against women "suddenly" becoming a factor for transsexuals because they suddenly begin presenting as female. Nixon testified that she had the fear of rape when, in her twenties, she started going out in public dressed as a female, demonstrating that it was not a factor for her in her life when she was treated as a boy and man (Nixon, Cross, Dec. 12, p. 84, L. 2-9).

38. In late 1993, Nixon sought services from Battered Women's Support Services ("BWSS"). She made a call to a telephone support line in which she revealed she was a transsexual. BWSS gave her support in that initial call, followed by about eight months of one-on-one counselling ending in May, 1994 (Nixon, Cross, Dec. 12, p. 85, L. 37-47). Following that, Nixon dropped in to group counselling sessions until about June 1995 (p. 86, L. 1-9). She felt her healing was complete in about May or June 1995. She knew that BWSS had a policy that a person should not volunteer until at least one year after completing her own healing and the policy was for the benefit of people receiving volunteer services (Direct, Dec. 11, p. 21, L. 21-23; Cross, Dec. 12, p. 87 L. 45 – p. 88, L. 7 and p. 91, L.7). In Nixon's view, she was ready to be a counsellor, and so she chose to seek volunteer training at the Petitioner with the "goal" to get into the BWSS volunteer training program (Direct, Dec. 11, p. 21, L. 27; Cross, Dec. 12, p. 89, L. 22).

E. The Incident Which Gave Rise to the Human Rights Complaint

39. On August 29, 1995, Nixon went to Britannia Community Centre seeking to attend her first training lecture for potential unpaid peer counsellor volunteers of the Petitioner (Nixon, Direct, Dec. 11, p. 22, L. 27-30). All three collective members present noticed Nixon and concluded that she had lived as a man (Cormier, p. 5, L. 33-37, Sawatzky p. 65, L. 29-32, McIntosh p. 103, L. 5-6). At a break one member, Danielle Cormier, asked to speak to Nixon in private (Nixon, Direct, Dec. 11, p. 24, L. 32-34; Cormier, Direct, Dec. 13, p. 7, L. 7-9). They went to a remote area of the courtyard to speak (Nixon, Direct, Dec. 11, p. 24, L. 39-41; Cormier, Direct, Dec. 13, p. 7, L. 9-11).

40. Cormier asked Nixon how long she had been a woman (Dowsett, TAB 14). Nixon said that Cormier's questions were "ignorant", and she didn't think she had to answer the question if this was leading to her not being in the training group. Cormier said, yes, that was where she was going, but she did want to talk about it. Nixon described having been beaten and obtaining assistance from BWSS. Cormier said she was sorry and didn't believe anyone deserves that treatment, she was glad Nixon found someone to respond, and that it was likely the Petitioner would have responded in the same way and stood beside her in the fight against this man (Cormier, Direct, pp. 7-8).

41. Cormier attempted to clarify that the Petitioner organizes among women, responding to male violence against women, and Nixon had the experience of being treated as a man in the world, and Cormier did not, so she did not consider the two of them to be peers (Cormier, Direct, p. 8, L. 43 – p. 9, L. 2) .

42. Cormier said that decision was not personal in any way but was based on a political decision about how to organize as woman to eventually end violence by men against women. (Cormier, Direct, p. 9, L. 15-20)

43. Cormier resorted to metaphors to try to explain the position and used an example involving gay men. Nixon became offended, not accepting the metaphor, but instead

saying she was not a gay man (Cormier, Direct, p. 10, L. 7-16). Nixon left saying they'd all see their names in the paper (L. 31-33).

44. The other two collective members agreed that it was not appropriate for Nixon to take the training (Sawatzky, Direct, p. 66, L. 26-33). Cormier repeated that this was not personal but based on a political view. All three collective members referred to the Petitioner's political theory of organizing as peers who had experienced male oppression from birth, and to Nixon being ineligible for the training because she had lived being treated as a man and was not a "peer" to women who had not (Sawatzky, Direct, p. 68, L. 23-27; L 40-41; McIntosh, Direct, p. 95, L. 43 – p. 96, L. 2). Karen Sawatzky understood that Nixon identified as a woman, but had experience as a man (Sawatzky, Cross, p. 91, L. 40-42). Sawatzky told Nixon that she appreciated Nixon willingness to work against violence and it was not that they did not believe Nixon is a caring person (p. 84, L. 8-14). The collective members explained that the Petitioner's position is not about genitals or equipment, but about the experience of growing up female, and conditioning generally (Cormier, Direct, p. 8, L. 28-29; Sawatzky, Direct, p. 67, L. 37-42).

45. Nixon addressed the training group and advised that she had been asked to leave, said that she thought it was blatant discrimination, and she wished them good luck. She left the room and building, after threatening one last time to call the media. (Cormier, Direct, p. 13, L. 1-7)

46. Nixon intermittently returned to the drop-in support groups at BWSS for a period of approximately six months (Nixon, Direct, Dec. 11, p. 31, L. 32-34).

47. For a short period in the Spring of 1998, Nixon worked as a relief worker at Peggy's Place. Peggy's Place is a transition house for women dealing with mental health issues and escaping violence (Nixon, Direct, Dec. 12, p. 66 L. 23-27). Peggy's Place attempts to integrate a medical model of treatment, a psychosocial rehabilitation model, and a feminist model of treatment for its residents (Jones, Direct, p. 3, L. 33-38). At times, Peggy's Place has had men working in the house, and has served men as residents of the house (p. 11, L. 20-29).

F. Events Following August 29, 1995

48. In the fall of 1996 Nixon joined the BWSS training program for volunteers but left before completion (Nixon, Direct, Dec. 12, p. 44, L. 8-32).

49. The Petitioner has been in serious discussion about the Complaint since it occurred. Many, many books and papers have been circulated. The Petitioner went to the public library, bookstores, and asked among other political people, other human rights activists, other sources like that. The Petitioner has also canvassed through informal networks whether other women's groups have more advanced analyses on this question (Lakeman, Cross, Dec. 21, p. 138, L. 19-45).

50. The Petitioner has made significant efforts to inform itself and accept debate on the issue which is the subject of the Complaint. It tried to discuss its politics seriously and open-mindedly. It has made itself available for public criticism at a conference and on the internet. It has been in informal discussion with feminists across and beyond North America, read what books have been listed as feminist materials and periodicals on the subject (Lakeman, Cross, Jan. 8, p. 24, L. 4-11).

G. Political and Therapeutic Groupings based on Life Experience

51. The technique of working in groups having a common life experience is found both inside and outside the women's movement. For example, the Zenith Foundation limits active membership and trustees to those who are subject to an identifiable gender dysphoric condition. Supporting members, who are excluded from voting for trustees, can be a person possessing "a professional, spiritual, or other definable and supportive role of benefit to the gender dysphoric community." The Zenith Foundation limits attendance at support groups to members and invited guests, and requires that they must be known to a group leader or other responsible member or interviewed beforehand (Appendix "S" to Petition).

52. The Gender Identity Clinic runs groups for people dealing with gender identity disorder (Nixon, Cross, Dec. 12, L. 13-14).

H. Other Opportunities

53. Men and those who may not volunteer as a counsellor may assist the Petitioner through working on the Petitioner's House Funding Committee (Cross, Direct, p. 2, L. 6-32).

54. Those who participate in the Petitioner's off-site activities, such as the House Funding Committee, are supportive of the Petitioner's commitment to organizing against male violence and oppression as a group of women with the common life experience of girls and women only. The dignity of those who participate in other ways is not challenged by the Petitioner's political position (Cross, Direct, p. 4, L. 11-27).

55. Women Against Violence Against Women ("WAVAW"), a "lesbian, gay, transgender friendly" organization, would assess any transgendered woman volunteer on the same basis as any other volunteer. However, WAVAW is not aware of any request from a transgendered person to be a staff member or volunteer for WAVAW (Glattstein, Direct, p. 3, L. 20). In any event, the self-description of the organization suggests that it contemplates the participation of gay men (p. 2, L. 18-19).

56. WAVAW is the largest sexual assault centre in British Columbia. It operates a 24-hour crisis line, support groups, court, hospital and police accompaniments, one-to-one counselling, advocacy, public education (Glattstein, Direct, p. 1, L. 35-42). WAVAW does accept transgendered clients (p. 2, L. 20-21).

57. BWSS is an organization fundamentally concerned with counselling in cases of partner assault, but does not a operate a transition house (Lakeman, Direct, Dec. 20, p. 76, L. 39-43). It did take crisis calls from men, but did not offer any of its services to men beyond that (Jaffer, Cross, Dec. 18, p. 19, L. 9-14). It did not have a policy regarding the participation of transgendered people as counsellors in 1995 (Dowsett, TAB 48).

58. The Petitioner is not aware of any situation in which transgendered women were rape crisis counsellors in women's autonomous organizations or individual feminist organizations (Lakeman, Cross, Jan. 8, pp. 13-14).

I. The Human Rights Complaint

59. Nixon filed a Human Rights Complaint on August 30, 1995 (Exhibit 1). In the Complaint, Nixon alleged that the Petitioner discriminated against her, on the basis of sex, in two respects. First, Nixon alleged that the Petitioner discriminated against her with respect to a service and/or facility customarily available to the public contrary to what is now s. 8 of the *British Columbia Human Rights Code*, R.S.B.C. 1996, Chap. 210, as amended (the "*Code*") TAB 40E. Second, or in the alternative, Nixon alleged that the Petitioner refused to employ her because of her sex contrary to what is now s. 13 of the Code.

60. The hearing of the Complaint (the "Hearing") took place on December 11-15 and 18-22, 2000; January 8, 15-19 and 31, 2001; and February 20-23, 2001.

61. The Decision was issued on January 17, 2002. The award of $7,500 in damages is the highest award made by the Tribunal in respect of that particular head of damages (Appendix "A" to Petition).

62. The Tribunal ignored the following evidence:

(a) the highly integrated structure of the Petitioner, in deciding whether accommodation is possible;

(b) the work carried out by volunteers and employees and the importance of such an integrated approach in fulfilling both the peer counselling service and the political purpose of the Petitioner; and

(c) the Petitioner's right to employ and protect a counselling/consciousness raising model which meets its objectives.

II. THE ISSUES

63. The issues are as follows:

A. The Tribunal Erred in Finding a Prima Facie Case of Discrimination.

B. The Tribunal Erred in its Interpretation of Undue Hardship.

C. The Tribunal Erred Regarding the Petitioner's Primary Purpose.

D. The Tribunal Erred in Awarding $7,500 in Damages for Injury to Dignity, Feelings and Self-Respect.

III. THE STANDARD OF REVIEW

A. The Standard of Review Generally

64. In *Law Society of New Brunswick* v. *Ryan*, 2003 SCC 20 ("*Ryan*") (TAB 20), the Supreme Court of Canada affirmed that there are only three standards of judicial review of the decisions of administrative bodies or tribunals: correctness, reasonableness simpliciter, and patent unreasonableness (para. 24). The standards are fixed points on the spectrum of curial deference to be afforded the decision of a tribunal by the reviewing court.

65. In *Ryan*, Iacobucci J. adopted Major J.'s statement in *Canada (Deputy Minister of National Revenue)* v. *Mattel Canada Inc.,* [2001] 2 S.C.R. 100 (TAB 6) that the standards "range from patent unreasonableness at the more deferential end of the spectrum, through reasonableness simpliciter, to correctness at the more exacting end of the spectrum" (para. 24). (*Ryan*, para. 45).

66. In *Pushpanathan* v. *Canada (Minister of Citizenship and Immigration),* [1998] 1 S.C.R. 982 ("*Pushpanathan*") (TAB 27), the Supreme Court of Canada considered the factors to determine what standard should be applied to review a decision of an administrative body. The Court set out four factors to assist courts in a "pragmatic and functional" analysis to determine the standard of review:

(a) privative clauses;
(b) expertise;
(c) purpose of the Act as a whole and the provision in particular; and
(d) the "nature of the problem": a question of law or fact?.

67. **Privative Clause:** the Court cited *Pasiechnyk* v. *Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890 at para. 17 (TAB 26) when it defined a "full" privative clause as "one that declares that decisions of the tribunal are final and conclusive from which no appeal lies and all forms of judicial review are excluded" (at para. 30). The nature of the privative clause, or absence thereof is an indicator of the deference to be accorded the decision-maker.

68. **Expertise:** the Court stated at para. 32:

> If a tribunal has been constituted with a particular expertise with respect to achieving the aims of an Act, whether because of the specialized knowledge of its decision-makers, special procedure, or non-judicial means of implementing the Act, then a greater degree of deference will be accorded. (TAB 27)

69. The Court did acknowledge that expertise is a relative concept which must be evaluated by the court by considering a characterization of the tribunal's expertise, the court's own expertise as compared to that of the tribunal, and the nature of the specific issue requiring the tribunal's expertise (at para. 33). Further, the Court acknowledged that more deference must be accorded when the decision-maker is interpreting its own enabling statute (at para. 34) (TAB 27).

70. **Purpose of the Statute:** the Court stated that the purpose of the Act or provision in question often overlaps with a consideration of the expertise of the decision-making body as the less a body is concerned with establishing rights, but more with balancing between different constituencies, "the appropriateness of court supervision diminishes" (at para. 36). The courts are to be more restrained where a multiplicity of parties is concerned because courts are established to deal with adversaries on a one-on-one basis. Where the purpose of the administrative body is to act more as a judicial body, the courts will have a greater capacity for review. (TAB 27)

71. **Nature of the Problem:** the Court determined that courts should be less deferential of decisions which are pure determinations of law as they have the expertise to deal with these matters most effectively, though specialized boards may be called upon to make difficult findings of both fact and law (at para. 37) Where the decision-maker is facing a question of law, this will be a factor tending to indicate a correctness standard of review (*Ibid*.). Where the courts are dealing with a question of fact, the standard of patent unreasonableness will normally be applied. Where the question is of mixed fact and law, the standard is not entirely clear and depends upon the factors outlined above. (TAB 27)

72. In *Canada (Director of Investigation and Research, Competition Act)* v. *Southam Inc*., [1997] 1 S.C.R. 748 ("*Southam*") (TAB 7), Iacobucci J., referring to the *Competition Tribunal Act*, stated that it contemplated a "tripartite classification of questions before that Tribunal into questions of law, questions of fact, and questions of mixed law and fact". He further explained that:

> [Q]uestions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests. (para 35)
>
> If the Tribunal did ignore items of evidence that the law requires it to consider, then the Tribunal erred in law. Similarly, if the Tribunal considered all the mandatory kinds of evidence but still reached the wrong conclusion, then its error was one of mixed law and fact…(para 41)(TAB 7)

73. The reasoning of Iacobucci J., in combination with previous decisions of the Supreme Court of Canada (*Mossop TAB 5, Bell Canada*, and *Pezim*), in setting out the factors that constitute the pragmatic and functional approach to judicial review can be summarized by the following chart.

Standard of Review Analysis and Spectrum

Did the legislator intend the question to be within the jurisdiction conferred on the tribunal?

To answer: employ "pragmatic and functional analysis" by examining:

- Wording of statute
- Purpose of statute
- Reason for tribunal's existence
- Area of expertise
- Nature of problem

Correctness	**Reasonableness Simpliciter**	**Patent Unreasonableness**
- non-specialized tribunal	- no privative clause	- specialized tribunal
- low policy orientation	- statutory right of appeal	- high policy orientation
- non-complex regulatory scheme	- specialized tribunal	- complex regulatory scheme

scheme		scheme
- non-expert composition	- squarely within area of specialization	- squarely within area of specialization
- limited powers/discretion		- non-jurisdictional question
- outside area of specialization		- true privative clause
- jurisdictional question		- no statutory right of appeal
- no privative clause		- expert composition
- statutory right of appeal		-broad powers/discretion

74. Where the standard of review is correctness, the tribunal must have arrived at the "right" conclusion and it will be fairly clear that there is a "right" conclusion to be drawn. The reviewing court is permitted to undertake its own reasoning process to arrive at the result it judges correct (*Ryan*, para. 50) (TAB 20).

75. The unanimous decision of the Supreme Court of Canada in *Southam* named, for the first time, the "reasonableness simpliciter" test for judicial review of tribunal decisions. Iacobucci J. defined an unreasonable decision as one that, "in the main, is not supported by any reasons that can stand up to a somewhat probing examination" (para 56). He went on to provide that the difference between "unreasonable" and "patently unreasonable" lies in the immediacy or obviousness of the defect: if the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable, but if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable. (TAB 7)

76. Iacobucci J., writing for the Court in *Ryan* further clarified this distinction in stating that the question the reviewing court must consider is "whether the reasons (of the tribunal), taken as a whole, are tenable as support for the decision" (*Ryan*, para. 55).

This analysis will consider the fact that, when balancing objectives, no particular trade-off may be superior to all others (*Ibid*. para. 51). (TAB 20)

77. In contrast, a patently unreasonable decision will be one for which the defect may be explained "simply and easily, leaving no real possibility of doubting that the decision is defective." A patently unreasonable decision will be deemed so flawed that no amount of curial deference can justify letting it stand (*Ibid*. para. 52). (TAB 20)

B. Standard of Review for Human Rights Tribunals

78. The British Columbia Court of Appeal in *Oak Bay Marina* v. *British Columbia (Human Rights Commission)* (2002), 2002 BCCA 495 ("*Oak Bay Marina*") (TAB 24) stated:

> However, the law at present seems clear: a human rights body such as the Tribunal must be accorded some deference in its fact-finding role as it relates to determinations of discrimination, even though in this case (unlike Ross) the legislation provides no privative clause. On questions necessitating general legal reasoning and statutory interpretation, on the other hand, on which such tribunals have no particular expertise, the standard is correctness or something approaching it. (para. 20)

79. In *Oak Bay Marina*, the Court of Appeal used the correctness standard and determined that the Tribunal erred in law in ignoring evidence relating to the employer's assessment of its ability to accommodate the complainant's disability.

80. The superior expertise of a human rights tribunal relates to fact-finding and adjudication in a human rights context. It does not extend to general questions of law. These are ultimately matters within the province of the judiciary, and involve concepts of statutory interpretation and general legal reasoning which the courts must be supposed competent to perform. The courts cannot abdicate this duty to the tribunal. They must, therefore, review the tribunal's decisions on questions of this kind on the basis of correctness, not on a standard of reasonability. See *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 (TAB 5), at 585, quoted with approval and applied in *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571 (TAB 13), (1996), 133 D.L.R. (4th) 449 (*"Gould"*), at paras. 3 and 46.

81. In addition, while the courts customarily defer to human rights tribunals with respect to questions of fact, where the issue is what inferences should be drawn from the facts, the policies favouring deference are attenuated (*Gould*, at para. 4)(TAB 13).

82. On the basis of the foregoing, Petitioner submits that the appropriate standards of review to be applied by the Court in considering decisions of the Tribunal are:

(a) "correctness" where the court must consider an error of law;

(b) "reasonableness simpliciter" where an error of mixed fact and law is alleged; and

(c) "patent unreasonableness" where the petitioner seeks to overturn a finding of fact.

IV. ARGUMENT

A. The Tribunal Erred in Finding a *Prima Facie* Case of Discrimination.

83. The Tribunal considered the issue of whether there was a *prima facie* case of discrimination in alternative ways. The Petitioner submits that both were incorrect in law.

(a) The Tribunal erred in holding that "the elements of a *prima facie* case under the *Code* do not extend to requiring proof of injury to dignity." (*Nixon* at para. 124)

(b) The Tribunal then erred in rejecting, even if her "conclusions about the elements of a *prima facie* case are wrong" (para. 133) "Rape Relief's argument that [the] exclusion…does not have a discriminatory impact" (para. 133)

(1) What Are The Elements Of A *Prima Facie* Case Of Discrimination Under Human Rights Law?

84. Section 8 of the *Code* states that a person must not …

> (a) deny to a person…any service…, or
> (b) discriminate against a person….regarding any service…. because of…sex.

85. Section 13(1) states that a person must not….

> (a) refuse to employ a person …, or
> (b) discriminate against a person regarding employment… because of ….sex.

86. Section 1 says " 'discrimination' includes the conduct described in section 7, 8(1)(a), 9(a) or (b), 10(1)(a), 11, 13(1)(a) or (2), 14(a) or (b) or 43". (TAB 42)

87. The Tribunal held that "it is self-evident that [the exclusion of Nixon] is *prima facie* discriminatory."

88. The Tribunal, the Petitioner submits, correctly stated the issue as being whether the constitutional analysis of discrimination, as reflected in *Law* v. *Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 571 (TAB 19) ("*Law"*) is applicable to

the human rights context. The Tribunal's rejection of the applicability of the constitutional jurisprudence is now inconsistent with the decision of the British Columbia Court of Appeal in *British Columbia Government and Service Employees' Union* v. *British Columbia (Public Service Employee Relations Commission)*, [2002] B.C.J. No. 1911, 2002 BCCA 476 ("*Reaney"*) (TAB 3).

89. In a unanimous decision, the Court of Appeal in *Reaney* stated at para. 12:

> In my opinion, the same analytical framework [as that in *Law* governing whether there has been a violation of s.15 of the *Charter*] must govern the determination of whether there has been a violation of s.13 of the *Human Rights Code* of British Columbia. (TAB 3)

90. The issue in *Reaney* was whether treating adopting mothers less generously than biological mothers constitutes discrimination (on the ground of family status) under section 13 of the *Code*. Ms. Reaney was an adoptive mother who sought to challenge the leave provisions of her collective agreement as discriminatory because she was entitled to a lesser leave than biological mothers. In a grievance brought on her behalf, she argued the leave provisions amounted to discrimination under section 13 of the *Code*. (TAB 3)

91. The arbitrator would have upheld her argument but for the decision of the Ontario Court of Appeal in *Schaefer et al. and Attorney General of Canada; Adoption Council of Ontario et al., Interveners* (1997), 149 D.L.R. (4th) 705 (Ont. C.A.) ("*Schaefer*") (TAB 32). Applying the decision in *Schaefer*, the arbitrator held that there was no discrimination.

92. On appeal the arbitrator's decision in *Reaney* was upheld by the Court, which applied a purposive analysis to the leave provisions of the collective agreement, stating at para. 16: "The precise question in this appeal then is what is the *purpose* of the Maternity Leave and Maternity Allowance provisions." (TAB 3)

93. The Court held that the difference between adopting and biological mothers was not discriminatory because the purpose of the provisions

> when seen in their context, is not the encouragement of family formation but, rather, protecting the health and well being of pregnant women and new biological mothers, (not simply new parents), while undergoing the health and other stresses of giving birth and recovering from giving birth, so that they can effectively return to the work force. (TAB 3)

94. Further, the Court concluded, at para. 20, quoting *Schacter* v. *Canada*, [1992] 2 S.C.R. 679 (TAB 31) at p. 727, that the Supreme Court "has repeatedly stated that Parliament may constitutionally attack one problem, or part of a problem, at a time."

95. Applying *Reaney*, the Petitioner submits that the Tribunal's error lies in its rejection of the need to take a contextual and purposive approach, as set out in *Law*, to the issue of discrimination. Nixon's transsexuality was not the "cause" of the denial or refusal, any more than Reaney's status as an adoptive mother caused certain leave provisions to be targeted to pregnant women and biological mothers. (TAB 3) Rather the "cause" was the Petitioner's purpose in targeting, in the context of its therapeutic and political goals, its services to women with the life experience of being treated as girls and women. The evidence was uncontested that the Petitioner screened out many people, including men and women. See paragraphs 14 and 19 of the Facts.

96. The extensive, and evolving, jurisprudence on the meaning of the equality provisions in section 15 of the *Canadian Charter of Rights and Freedoms* ("*Charter*") has in general adopted an understanding of equality which is substantive and focused on the experience of disadvantage in the world rather than a formal understanding of equality focusing on mere distinctions. While *Law* is the Supreme Court of Canada's unanimous attempt to reconfigure and synthesize equality law, it reflects the principle established in the famous case of *Andrews* v. *Law Society of British Columbia* (1989), 56 D.L.R. (4^{th}) 1 (S.C.C.) ("*Andrews"*) (TAB 2). that a distinction is not necessarily discrimination, as quoted by Iacobucci J, for the Court, in *Law*, at para. 27. (TAB 19)

97. A discriminatory burden or denial of a benefit, McIntyre J. stated [in *Andrews*, at pp.180-81], is to be understood in a substantive sense and in the context of the historical development of Canadian anti-discrimination law, notably the human rights codes: 'The words "without discrimination"…are a form of qualifier built into section 15 itself and

limit those distinctions which are forbidden by the section to those which involve prejudice or disadvantage'. (TAB 2)

98. *Law* sets out a 3-step test:

> (a) Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?
>
> (b) Is the claimant subject to differential treatment on the basis of one or more enumerated and analogous grounds?
>
> (c) Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect and consideration? (para. 88) (TAB 19)

99. Human rights cases in which the interests of equality-seeking complainants are pitted against equality seeking groups are rare. However, the Tribunal's decision is also inconsistent with another of these rare cases, *Keyes* v. *Pandora Publishing Ltd*., [1992] N.S.H.R.B.I.D. No. 1 ("*Keyes"*) (TAB 17), in which an approach to discrimination reflecting the constitutional jurisprudence was adopted.

100. This case involved a complaint by Gene Keyes against Pandora Publishing Association, a women-only group which published a newspaper, Pandora, for, by and about women. Keyes had a particular interest in the issue of custody. He had been involved in protracted legal proceedings respecting custody of and access to his children and was not satisfied with the results of those proceedings. He wished to have Pandora publish a letter on the subject and was advised that under no circumstances would his letter be published because he was a man. Keyes then complained to the Human Rights Commission that he had been discriminated against because of his sex. (TAB 17)

101. The Board of Inquiry addressed the question of the meaning of discrimination and whether the human rights meaning should be consistent with section 15, by referring to *Andrews*, quoting as follows:

> … It must be recognized, however, as well that the promotion of equality under s. 15 has a much more specific goal than the mere elimination of distinctions. If the *Charter* was intended to eliminate all distinctions, then there would be no place for sections such as 27 (multicultural heritage); 2(a) (freedom of conscience and religion); 25 (aboriginal rights and freedoms); and other such provisions designed to safeguard certain distinctions. Moreover, the fact that identical treatment may frequently produce serious inequality is recognized in s. 15(2), which states that the equality rights in s. 15(1) do "not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups ..." (*Andrews*, at p. 171, (TAB 2) quoted in *Keyes* at p. 156. (TAB 17))

102. The Board noted, at p.171, that McIntyre, J, in *Andrews*, was satisfied that "identical treatment may frequently produce serious inequality". The problem was that the wording of the legislation did not appear to give the Board any interpretative leeway. However, Pandora argued in *Keyes* that discrimination must be construed consistently with the *Charter* as a matter of law. While the Board was conscious of the limitations in the application of the *Charter* to human rights legislation, it did not see that those limitations applied when the issue is the legal content of the prohibition against discrimination. In the Board's opinion, the provisions of the Act must be interpreted and applied so as to permit the making of distinctions between classes of individuals if the distinction is part of an activity or programme that has as its object the amelioration of conditions of disadvantaged individuals or groups. (TAB 17)

103. The Board concluded, at p.159:

> Accordingly, I am satisfied that in law women may form single sex organizations for the purpose of promoting equality. I am further satisfied as a general statement, of the law, that such organizations may prefer or advantage women even if the effect of that is to discriminate against men (as a group or individually) on the basis of sex, without violating the anti-discrimination provisions of the Act. (TAB 17)

104. Further, the Board did not need to find it absolutely necessary for all women's newspapers to have a policy of excluding all material which is not written by women in

order for Pandora to justify its letter to the editor policy. It need only be a policy that might reasonably be adopted in the circumstances. The Board stated at p. 160**:**

> [R]easonable women might take different views as to whether or not a women's newspaper should limit itself to letters and articles written by women only. I can also accept that women might reasonably conclude that such a policy is appropriate to one women's publication having regard to the circumstances and objectives of that publication and that it is not appropriate to another having regard to its circumstances and objectives. (TAB 17)

105. In rejecting the complaint, the Board thus adopted an approach to discrimination influenced by the constitutional understanding that affirmative action is consistent with equality and positive to equality-seeking groups.

106. Both judicial and human rights rulings require that discrimination be analyzed consistently in the human rights and constitutional fields. There are other factors which support this consistency.

(i) Inconsistency has a Disparate Impact.

107. In the rare cases where both complainants and respondents ground their arguments in the concept of equality, an approach which treats discrimination as self-evident rather than the subject of a *Law* analysis, has a disparate impact on members of disadvantaged groups who seek to form organizations reflecting their understanding of their disadvantage for equality-seeking purposes. In this sense the ruling of the Tribunal that *Law* does not apply to discrimination in the human rights field is inconsistent with section 15, and in particular in this case, inconsistent with the equality rights of women with the life experience of being treated as girls and women.

(ii) Inconsistency May Lead to a Reverse Discrimination Backlash

108. An important reason for the *Law* approach to discrimination, as compared to leaving analysis of targeted programs to analysis under section 15(2) of the *Charter*, was stated in *Lovelace* v. *Ontario,* [2000] 1 S.C. R. 950 ("*Lovelace"*) (TAB 21):

> Colleen Sheppard…pointed out that interpreting s.15(2) as an exemption or defence requires the courts to inappropriately frame equity programs as constituting *prima facie* violations of s.15(1). Such a view is inconsistent with the substantive equality analysis and encourages a negative approach to ameliorative programs. In this regard, she stated, at p.2:
>
> > …equity programs should be understood as integral to, and consistent with, legal guarantees of equality for historically disadvantaged groups in society, thereby rejecting the view that affirmative action is a source of discrimination. Thus, affirmative action is presented as an expression of equality, rather than an exception to it. (*Lovelace*, at para. 101, emphasis added, quoting *Litigating the Relationship Between Equality and Equity* (1993), study paper prepared for the Ontario Law Reform Commission.)

109. The interpretation of the human rights legislation should not invite the stigmatizing of affirmative action as discrimination. More broadly stated, having two parallel, but different, approaches to discrimination may lead to the undermining of the constitutional approach to discrimination, which reflects the view that a contextual, respectful, recognition of difference can be basic to the anti-discrimination norm.

(iii) Defences Do Not Fill the Gap Left by The Non-Application of *Law* to Discrimination.

110. The Tribunal did not require attention to dignity at any stage in the analysis (although it "may" occur at the defences stage). This absence of a requirement of human dignity analysis means that a respondent, including an equality-seeking group, can be found to have breached human rights legislation, and ordered to pay damages for injury to dignity, without any analysis of whether there was any actual injury to dignity, as dignity is understood in the constitutional jurisprudence.

111. This raises the question of whether human rights defences incorporate the elements of the *Law* analysis so that it can be said that the bottom line determination of a breach of human rights legislation reflects overall consistency with the *Charter*. What role do defences play?

112. The BFOR/BFJ defences, discussed below, play a role that is somewhat similar to section 1 arguments under the *Charter*, allowing the argument that discrimination occurred but

for a good reason (reflected in the rational connection and reasonable necessity tests). Attention to impact on dignity is not an element.

113. Affirmative action defences can be seen as playing a role similar to that of section 15(2). In the constitutional context the issue is resolved by approaching section 15(2) as confirmatory of the substantive equality approach to section 15(1), although leaving open the possibility that it might also have some independent role.

114. With respect to group exemptions, it may be helpful to consider the underlying values at stake and the different types of group which might claim exemption. For instance, the group exemption provision in British Columbia, section 41, is drafted in terms which do not distinguish between equality-seeking and other groups. The Petitioner submits that the ideal approach is to analyze targeted programs, where equality interests are in tension, under the concept of discrimination, leaving section 41 for groups whose nature simply pits freedom of association against the non-discrimination norm. In this latter situation, exclusion would be inconsistent with human dignity but justified (under narrow circumstances) by the right to associate.

115. Narrow requirements for successful group exemption arguments and the placement of the burden of proof on respondents seem more appropriate for non equality-seeking groups than for equality-seeking groups. Again, the group exemption defence does not require attention to impact on dignity.

(iv) Refusal to Apply *Law* to the Issue of Discrimination Misplaces the Burden of Proof

116. The Tribunal's approach to discrimination, coupled with defences placing the burden of proof placed on respondents, means that doubt, with respect to the facts of a case having to do with the context of a distinction, is managed in favour of complainants. In the vast majority of cases, this may, and should mean that doubt is resolved in favour of human rights. However, in cases such as this where the respondent is an equality-seeking group, there is no public interest in favour of managing doubt in a way that disadvantages the respondent.

117. "Facts" in such cases are very different from "who did what to whom, when and where?" Fact-finding may involve such value-laden, and under-researched issues as how women are disadvantaged, how transgendered persons are disadvantaged, and whether raped women may be traumatized by encountering people they perceive as male in a women-only space. Placing a burden of proof on a women's group in a world without socially-validated sources of information about women is an exercise in discrimination in itself. The effect of such an allocation might be to label women's groups as discriminatory and force them to prove some defence, relying on knowledge that may not be recognized as existing, such as respected feminist psychiatric knowledge, and research into the impact on abused women of unexpectedly encountering people without the life experience of women.

(v) Refusal to Apply *Law* leads to Different Discrimination Test for Private Programs than Government Programs.

118. In an era of increasing privatization of what would otherwise be government programs, and thus increasing fuzziness of the public/private distinction, different discrimination tests for "private" programs versus government programs are inappropriate.

119. The result of inconsistency between constitutional law and human rights law may be to hold equality-seeking respondents liable for discrimination where governments would not have been found to have acted contrary to section 15.

(vi) Refusal to Apply *Law* to the Issue of Discrimination Tends to Neglect the Interests of Third Parties.

120. The *Law* analysis is flexible enough to permit attention to the interests of third parties. One way of stating the issue in this case is how to be attentive to the human rights of both transgendered persons and raped and beaten women seeking help from a women-only space.

(2) Applying Law*, Was a* Prima Facie *Case of Discrimination Established?*

121. This issue can be seen as one of mixed fact and law. However, the Petitioner does not take issue with the finding that Nixon felt, on a subjective level, that the denial of the opportunity to train to volunteer with the Petitioner was an injury to her dignity. Leaving that aside, the Tribunal erred in law in failing to carry out the purposive, contextual analysis required by *Law*, in reaching its alternative ruling that there was a impact on dignity. Were such an analysis to be carried out, the only reasonable conclusion is that no *prima facie* case of discrimination was established.

122. The Petitioner submits that this case is so similar to *Reaney* (TAB 3), *Law* (TAB 19) and *Lovelace* (TAB 21*)* that the only reasonable conclusion is that there was no *prima facie* case of discrimination.

123. In *Reaney*, the Court of Appeal found that it is not discriminatory to target a subgroup of women defined by pregnancy and childbearing. (TAB 3) Similarly, it is not

discriminatory to target the services offered by the Petitioner to women with the life experience of being treated as girls and women.

124. *Lovelace* involved a claim by aboriginal people not registered as bands. The claimants argued their exclusion from an agreement concerning casino proceeds between Ontario and aboriginal people registered as bands was discrimination. It was held that this was not discrimination as it did not stereotype the claimants, there was a fit with the actual situation of the individuals affected and the exclusion did not undermine the ameliorative purpose of the program. While the claimants' needs corresponded to the needs addressed by the casino program, the Supreme Court of Canada held that more than a common need is required. The claimants had very different relations to land, government and gaming. The program was targeted at ameliorating the conditions of a specific disadvantaged group, and a targeted program is less likely to be associated with stereotyping or stigmatization. (TAB 21)

125. The Supreme Court of Canada held that the program in *Lovelace* is consistent with section 15, and the exclusion of the claimants was not discrimination as it was not associated with a misconception of their needs, capacities and circumstances. The Court came to that conclusion even though the two groups have overlapping and largely shared histories of discrimination, poverty and systemic disadvantage which cry out for improvement. The project supported the journey of the bands toward empowerment, dignity and self-reliance. While the project was not designed to meet similar needs in the other aboriginal communities, its failure was held not to amount to discrimination. It was held that, when viewed from the perspective of the reasonable individual, the appellants had failed to demonstrate that the exclusion from the casino program had the effect of demeaning the appellants' human dignity. (TAB 21)

126. *Law* arose in relation to denial of survivor's benefits under the Canada Pension Plan on the basis of age. The Supreme Court of Canada held that the age distinction does not violate the human dignity of younger persons, or suggest they are of less value as human beings. They are not stereotyped, as the law is functioning not by the device of stereotype but by distinctions corresponding to the actual situation of individuals:

> The differential treatment does not reflect or promote the notion that [young people] are less capable or less deserving of concern, respect, and consideration. Nor does the differential treatment perpetuate the view that people in this class are less capable or less worthy of recognition or value as human beings or as members of Canadian society. (para. 102) (TAB 19)

127. Further, the unanimous Court said that "Parliament is entitled… to premise remedial legislation upon 'informed generalizations' without running afoul of s.15(1) of the *Charter* and being required to justify its position under s.1". (para. 106) (TAB 19)

128. All these cases illustrate the practical application of an analysis that avoids the pitfalls of a formalistic approach. A further example is *Weatherall* v. *Canada (Attorney General*), [1993] 2 S.C.R. 872 ("*Weatherall"*) (TAB 39) which illustrates that the larger historical, biological and sociological context (of violence) make some gender-based distinctions (in that case between men and women, and having to do with strip searches in prison) non-discriminatory.

129. The *Law* analysis involves a focus on the core value protected by the anti-discrimination norm, that of dignity, which is harmed by the imposition of disadvantage and stereotyping. It is not enough "simply to assert, without more, that dignity has been adversely affected". (*Law* at para. 59) (TAB 19) Drawing a distinction based on life experience does not involve harm to dignity or stereotyping. A disagreement about the political and therapeutic significance of the experience of being treated as female permits both parties to such a disagreement a place of dignity.

130. As recognized by the Tribunal, the test of whether dignity has been harmed is both subjective and objective (*Law* at para. 88) (TAB 19). It is therefore necessary to look at the context from the perspective of a reasonable person in the circumstances of a complainant.

131. Who is this reasonable person? The reasonable person is one who shares the values in the *Charter*, which includes the values of privacy, security of the person, freedom of association and freedom of thought and expression. For example, in *R*. v. *R.D.S.,* [1997] 3 S.C.R. 484, (TAB 28) L'Heureux-Dubé and McLachlin, JJ (La Forest and Gonthier, JJ

concurring) stated, at para. 50 (para. 48), that the "reasonable person [in the context of assessing bias] is an informed and right-minded member of the community, a community which, in Canada, supports the fundamental principles [of the *Charter*]". Similarly, in *Minister of Indian and Northern Affairs Canada et al* v. *Corbière et al* (1999), 173 D.L.R. (4th) 1 (S.C.C.) ("*Corbière"*) (TAB 22) L'Heureux-Dubé, J. (Gonthier, Iacobucci and Binnie JJ, concurring) stated, at para. 65:

> I would emphasize that the "reasonable person" considered by the subjective–objective perspective understands and recognizes not only the circumstances of those like him or her, but also appreciates the situation of others. Therefore, when legislation impacts on various groups, particularly if those groups are disadvantaged, the subjective-objective perspective will take into account the particular experiences and needs of all of those groups.

132. Applying *Law* and *Lovelace*, it is submitted that a reasonable person would take into account the needs of disadvantaged groups to understand their own experience and to organize on that basis, as well as the fact that others are excluded from a particular group. Thus in *Nixon*, Nixon shared with the majority of British Columbians the lack of opportunity to volunteer with the Petitioner. She fell into a group which included men, pro-life women, women who do not agree that women should be free to love whom they will, women who are not willing to work against racism, women with other political differences with the Petitioner, and others in the gender continuum without the life experience of being treated as girls and women.

133. The Tribunal did not engage in a full *Law* analysis. While the Tribunal stated that it was adopting the appropriate subjective-objective perspective to the overarching issue of impact on dignity, its analysis did not include the objective component. It is submitted that while the evidence is clear that from a subjective perspective the complainant experienced what happened as an injury to her dignity, any reasonable person in the same situation would not have taken that view.

134. Indeed, the Tribunal found that the Complainant was "unable to understand the challenge to her participation in the training in any but a personal way and as a challenge to her status as a woman." (para. 30). This suggests that the Complainant was unable to look at the situation objectively. This inability was not taken into account with respect to the

impact on dignity. In the Charter context, the claimant must "provide a rational foundation for her experience of discrimination in the sense that a reasonable person similarly-situated would share that experience." *Lavoie* v. *Canada* (2002), 2002 SCC 23, [2002] S.C.J. No.24, at para. 47 (TAB 18).

135. Most of the analysis of the Tribunal focused on discrimination against transsexual persons in society generally, rather than on the specific point that there was no harm to dignity through exclusion from a group which excludes most British Columbians, and that the Complainant was treated in the same way as the majority of British Columbians would be. That majority of British Columbians would also include people susceptible to discrimination in society generally, including violence, such as gay men and men of colour (*Nixon* at para. 144). The fact that transgendered persons experience discrimination in society generally is not conclusive with respect to the question of whether exclusion from one particular group impacts upon dignity. **"**There is no principle or evidentiary presumption that differential treatment for historically disadvantaged persons is discriminatory." (*Law*, at para. 67.) (TAB 19)

136. Further, in the analysis of the impact on the Complainant with respect to damages, a purely subjective approach was utilized, thus suggesting a misunderstanding of the legal test of impact on dignity. Paragraphs 241-243 exclusively focused on a description of the Complainant's feelings and experiences, in a case where conflicting constitutional values were at issue, and where the needs of victims of male violence were also significant.

(i) <u>The *Law* Factors</u>

137. The reasonable person should rationally take into account the open-ended list of "contextual factors" in *Law*. The Tribunal erred by focusing on the disadvantaged position of transsexual and transgendered persons, to the exclusion of the objective component of the dignity analysis and the contextual factors set out in *Law*. All of these factors support the conclusion that the purpose of serving persons with the life-long experience of being treated as a girl and woman is a non-discriminatory "cause" for excluding a male to female transsexual from a rape crisis centre and women's shelter. The list includes the following factors.

(a) Pre-existing disadvantage

138. The Tribunal erred in law in treating the pre-existing disadvantage of transgendered and transsexual persons as conclusive concerning whether a distinction is "discrimination". *Lovelace* states that this factor does not require claimants to engage in a "race to the bottom". There, the Supreme Court of Canada acknowledged "the disadvantages suffered both by the claimants [non-band aboriginals] and the comparator group [band aboriginals]". The Court said, at paras. 59, 60 and 69 (no actual quote from para. 69) (TAB 21):

> In short, beyond the unseemly nature of the relative disadvantage approach… its narrow focus is inconsistent with the fullness of the substantive equality analysis;

and

> While it is often true that distinctions may produce discrimination, there are many other situations where substantive equality requires that distinctions be made in order to take into account the actual circumstances of individuals as they are located in varying social, political and economic situations.

139. It is submitted that it is clear on the face of the Tribunal's analysis of the evidence (in paras. 134-142) that the disadvantages suffered by male to female transsexuals are different in nature from those suffered by persons who have been treated as women all or most of their lives (all forms of disadvantaged treatment deserving their own distinctive analysis).

140. At the time Nixon was growing up being treated as male, a social experience reflected quite simply in the fact that it is possible for such an experience to be meaningfully spoken or written, other people were growing up being treated as female. This was reflected in evidence called by both Nixon and the Petitioner in *Nixon*.

141. For instance, Dr. Ross, a sociologist called as an expert by Nixon, testified about the "enormous pressure on individuals, almost from birth, to conform to society's view of what is acceptable male or female behaviour." (*Nixon* at para. 135.) Thus, while Nixon was experiencing pressure to conform to societal expectations of the male gender, girls were experiencing pressure to conform to societal expectations of the female gender.

Growing up as a girl *is* an experience, obviously a varied one, but nevertheless an experience that can be the subject of research, conversation, and judicial notice.

142. More fundamentally, the conflation of growing up being treated as male/female casts doubt on whether girls and women exist at all, including as subjects of, and actors in, a political movement such as the women's movement. It rejects the freedom of individuals and groups to organize around their own understanding of oppression, even if they cannot, on a literal level, point to one defining biological factor, such as menstruation or pregnancy, or social experience, such as being paid less than men, or being particularly vulnerable to sexual assault, or of lacking credibility when called as a witness in a legal proceeding, or even of the common experience of not being recognized by human rights legislation.

143. As well, it is distinctive to the experience of being transsexual that there is an on-going debate about the most appropriate approach to eradicating disadvantage, for example, with respect to the ethics of sex reassignment surgery. However, *Lovelace* encourages the avoidance of an "unseemly" argument about the relative disadvantage of women who grew up being treated as girls and women, and people whose gender identity has always been female but who have lived being treated as boys and men.

(b) Correspondence

144. *Law* analyzes "correspondence" as the relationship between the ground of discrimination and the characteristics or circumstances of the group being excluded and the group being included. (TAB 19) However, *Lovelace* expresses this factor as correspondence to needs, capacities and circumstances. So this can be conveniently referred to as the "correspondence factor". Both cases say that where there is a high level of correspondence, the distinction is unlikely to be "discrimination." (TAB 21)

145. The Petitioner submits that the Tribunal erred in not fully considering the correspondence factor.

146. It is submitted that it is clear from the evidence that the level of correspondence in the present case is high. Attention to life experience in the context of offering peer

counselling is attention to capacities and circumstances. Attention to needs resembles the attention to purpose required by *Reaney*.(TAB 3) While the Tribunal did not address the correspondence factor in the analysis of discrimination, she did discuss purpose with respect to the BFOR/BFJ defences. Here the Tribunal concluded that:

> a general goal or purpose of providing a safe and supportive environment for the women who seek their services is rationally connected to the work of Rape Relief… a standard generally designed to ensure that victims of sexual assault are able to openly communicate their experience, with an attendant guarantee of privacy, is rationally connected to Rape Relief's work. (para. 191.)

147. Furthermore, in *Lovelace*, at para. 75, the Court accepted that the different aboriginal communities face the same social problems and have the same needs, but despite that, held that there was not "discrimination". More than a common need is required. It must be possible to target programs by paying attention to the unique circumstances and capabilities of potential program beneficiaries. (TAB 21)

148. If the need of a particular male to female transsexual person is to help victims of male violence, the evidence was that that need can be meet through membership in the House Funding Committee. If the need of a particular individual is validation as a woman without distinction as to life experience, a need that might be described as a need for formal equality, then those rape crises centres and women's shelters which target their services at women with the life experience of being treated as girls and women are not in a position to meet that need consistent with the needs of their service users and political objectives.

149. The childhood socialization of women, and their experience of developing the social status associated with womanhood, is relevant to the work of rape crisis centres and women's shelters. That work can be both therapeutic and political. The anti-discrimination norm does not require people to be treated as interchangeable individuals rather than as members of groups with distinctive and meaningful life experiences and with political perspectives on those life experiences. Being attentive to diverse social locations and political beliefs is not stereotyping individuals and is not discrimination.

(c) Ameliorative purpose or effects

150. Where the exclusion relates to the ameliorative purpose or effects, it is unlikely to be "discrimination." This factor does not focus on "a simplistic measuring or balancing of relative disadvantage" or on the fact that, as in *Lovelace,* the two groups are equally disadvantaged. Instead, the focus is on the fact that a program is "targeted at ameliorating the conditions of a specific disadvantaged group rather than at disadvantage potentially experienced by any member of society." The Supreme Court of Canada also held that "exclusion from a targeted…program [consistent with the equality goals of section 15] is less likely to be associated with stereotyping or stigmatization or conveying the message that the excluded group is less worthy of recognition and participation in the larger society." (*Lovelace*, at paras. 85 and 86.) (TAB 21)

151. The Tribunal erred in not considering ameliorative purpose or effects. It is submitted that the evidence is clear that requiring volunteer trainees to have the life experience of being treated as girls and women is not associated with stereotyping or conveying the message that the excluded group is less worthy of recognition and participation in the larger society. The Petitioner also excludes men from participation, not because they are thought to lack personal empathy or to have any other negative characteristics, but because they are not peers to people who have grown up with the life experience of the social subordination of women.

(d) Nature of interest affected

152. The Supreme Court of Canada cases require a consideration of the nature of the interests affected, both the complainant's and others', in considering whether the distinction amounts to "discrimination." Does the exclusion restrict access to a fundamental social institution, affect a basic aspect of full membership in Canadian society, or constitute complete non-recognition of a particular group?

153. The Tribunal did consider the nature of the interest, taking the view that in restricting the operation of the *Code* to certain spheres of activity, employment and housing for example, the nature of the interest is implicitly taken into account. (para. 122). However,

the Tribunal erred in failing to analyze the nature of the interests affected. The Tribunal had already given such a broad interpretation to both employment and service, that it fell into error by not considering the nature of the varied interests covered by the *Code*. For instance, the inability to volunteer at one women's group out of several does not affect as significant an interest as the inability to earn a living. Similarly the inability to act on a desire to volunteer, seen as a service to oneself, does not affect as significant an interest as those of the women who seek help from the Petitioner. The Petitioner is simply one women's group which focuses on shelter for women in danger and on political self-determination for women treated as members of a disadvantaged group all their lives. The ability to volunteer does not affect the meaning of membership in Canadian society, nor does it constitute complete non-recognition of a particular group. In contrast, the nature of the interest affected for callers to the Petitioner includes privacy and security of the person, and for both callers and the Petitioner's staff and volunteers, freedom of association.

(ii) Other factors to be Considered.

154. It is submitted that not only should the factors discussed above have been taken into account, the following factors are relevant to the application of the objective aspect of the test:

(a) A reasonable person in Nixon's position would respect the existence of a range of types of women's groups in a pluralist society.

(b) A reasonable person would take into account that there are opportunities to volunteer at other organizations which are open to male to female transsexuals.

(c) A reasonable person would take into account the needs, including privacy, equality and security of the person, of women seeking service from the petitioner. In *Corbiére*, L'Heureux-Dubé, J. (Gonthier, Iacobucci and Binnie JJ, concurring) stated, at para. 65:

> I would emphasize that the "reasonable person" considered by the subjective–objective perspective understands and recognizes not only the circumstances of those like him or her, but also appreciates the situation of others. Therefore, when legislation impacts on various groups, particularly if those groups are disadvantaged, the subjective-objective perspective will take into account the particular experiences and needs of all of those groups. (TAB 22)

(d) A reasonable person would take into account the range of debate in transgendered communities. The Petitioner submits that respect for the dignity of transsexual persons does not necessarily mean acceptance of any particular political viewpoint. Without adopting this view, the Petitioner points, by way of example, to Kate Bornstein, in her book *Gender Outlaw: On Men, Women and the Rest of Us*, where she states:

> I know I'm not a man - about that much I'm very clear, and I've come to the conclusion that I am not a woman either, at least not according to a lot of people's rules on this sort of thing. The trouble is, we're living in a world that insists we be one or the other - a world that doesn't bother to tell us exactly what one or the other *is*.

Dr. Ross testified that it was a fair description of Bornstein's view that

> it is not really possible for a transsexual to become a man or a woman" and that the medicalization of transsexuality "has actually created a great deal of pain and suffering for transgendered people, and distorted their sense of their own life histories and desires. (Ross, Cross, p. 24, L. 40 – p. 25, L. 2)

(e) A reasonable person would take into account the equality-seeking nature of the Petitioner, as well as its associational rights. The *Code*, in section 41, protects the right to associate in groups without being discriminatory, with the inevitable exclusion of persons not included in the definition of the group. All British Columbians, including many who may experience severe discrimination in society generally, can thus be excluded from many groups without an adverse impact on dignity.

(iii) A reasonable person who supports the exclusion of others from a group (in this case, men) would recognize that this can be done without any harm to dignity. In this case, men would recognize that they may be excluded without harm to their dignity, as Brian Cross testified he did as he understood the Petitioner's need to organize on the basis of the common experience of women's oppression (Cross, Direct, p. 4, L. 12-28). No reasonable male to female transsexual person would feel affronted by being excluded from an employment or service opportunity where the exclusion is shared by others and is integrally tied to the legitimate organizational purpose of serving women who have been women with the life experience of being treated as girls and women.

B. The Tribunal Erred in its Interpretation of Undue Hardship

(1) Findings made by the Tribunal

155. After finding that there was a *prima facie* discrimination, the Tribunal then considered whether there was a *bona fide* occupational requirement upon which the Petitioner could rely to justify its exclusion of Nixon from the training program.

156. The Petitioner submits that in making such a determination, the Tribunal recognized that Nixon is different from the other members of the Petitioner and accommodation must be considered because of that difference.

157. The Tribunal applied the test outlined in *British Columbia Government and Service Employees' Union* v. *Public Service Employee Relations Commission et al*. (1999), 176 D.L.R. (4th) 1 (S.C.C.) ("*Meiorin*") (TAB 4) and upheld in *Grismer Estate* v. *British Columbia Council of Human Rights et al*. (1999), 181 D.L.R. (4th) 385 (S.C.C.) ("*Grismer*") (TAB 14):

> (a) has the employer adopted the standard for a purpose rationally connected to the performance of the job?
>
> (b) has the employer adopted the standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose?
>
> (c) is the standard **reasonably** necessary to the accomplishment of that legitimate work-related purpose? In other words, is it impossible to accommodate individual employees sharing the characteristics of the complainant without imposing undue hardship on the employer? [Emphasis added].(*Meiorin*, para. 54) (TAB 4)

158. The Tribunal determined that the standard to be met for prospective volunteers is that they must have been born and raised as girls and women and not have experienced what it is like to have lived as a man in the world.

159. The Tribunal found that the standard was rationally connected to the purpose: the purpose being to provide a safe and supportive environment for women seeking the services of the Petitioner (*Nixon* at para. 191). The Tribunal also found the standard was adopted in good faith (para. 195). The Petitioner does not challenge either finding.

160. The Tribunal, however, found that the Petitioner did not establish that its standard was reasonably necessary to its goal or purpose: the Petitioner did not meet its obligations to accommodate Nixon to the point of undue hardship (para. 207).

161. The Tribunal made the following findings in support of its decision:

(a) The Tribunal held that the only criteria the Petitioner has in place for its volunteer trainees is that they accept the four basic principles on which the Petitioner operates, and that **they are not men**. (para. 202) Nixon accepted the four basic principles and is not a man. The Petitioner submits that such a finding is an obvious error in light of the Tribunal's finding first that gender is not binary and second that the standard for being included in the volunteer training program is that the candidate must have been born and raised as a girl and woman without the experience of being treated as a man, a concept which is different from that of simply being a man.

(b) The Tribunal held that the Petitioner led no evidence that they considered and rejected other accommodation options with respect to the inclusion of Nixon. The only accommodation that Ms. Cormier and the Petitioner considered was with the House Funding Committee (para. 203).

(c) The Tribunal held that the individual capabilities of Nixon were not considered (para. 203).

(d) The Tribunal held that the Petitioner failed to establish that it made any gesture towards finding a way of including Nixon in the training program (para. 204).

(e) The Tribunal found that other women's groups, such as BWSS, accommodated Nixon both as a client and as a volunteer trainee. Peggy's Place employed Nixon as a live-in support worker. WAVAW is a rape crisis organization providing many of the same services as the Petitioner, and has a policy of accepting transgendered women as both clients and volunteers (para. 205).

(f) The Tribunal relied on the evidence of Lynn Jones that in her career as a placement officer in mental health facilities she placed pre-operative male to female transsexuals in women's care facilities without incident (para. 206).

(2) The Test for Accommodation

Central Okanagan School District No. 23 v. *Renaud*

162. In *Central Okanagan School District No. 23* v. *Renaud,* [1992] 2 S.C.R. 970 ("*Renaud"*) (TAB 9), the Supreme Court of Canada held that:

> [T]he extent to which the discriminator must go to accommodate is limited by the words "reasonable" and "short of undue hardship". These are not independent criteria but are alternate ways of expressing the same concept. What constitutes reasonable measures is a question of fact and will vary according to the circumstances of the case. (at 984)

163. The Court upheld the following as factors, relying on *Central Alberta Dairy Pool* v. *Alberta,* [1990] 2 S.C.R. 489 at 521 (TAB 8):

> financial cost, disruption of a collective agreement, problems of morale of other employees, interchangeability of work force and facilities. The size of the employer's operation may influence the assessment of whether a given financial cost is undue or the ease with which the work force and facilities can be adapted in the circumstances. Where safety is at issue both the magnitude of the risk and the identity of those who bear it are relevant considerations.

164. The Court found that the factors to be applied will vary from case to case. The objection of employees based on well-grounded concerns that their rights will be affected, however, is a factor that must be considered.

165. Finally the Court recognized that the search for accommodation is a "multi-party inquiry" in which the complainant is obliged to participate and assist in securing an appropriate accommodation.

Meiorin

166. In determining whether accommodation constitutes undue hardship the Supreme Court of Canada employed the following questions:

> Has the respondent investigated alternative approaches that do not have a discriminatory effect, such as individual testing against a more individually sensitive standard?
>
> If alternative standards were investigated and found to be capable of fulfilling the respondent's purpose, why were they not implemented?
>
> Is it necessary to have all individuals meet the single standard for the respondent to **accomplish its legitimate purpose** or could standards reflective of group or individual differences and capabilities be established?
>
> Is there a way to do the job that is less discriminatory while still accomplishing **the respondent's legitimate purpose**?
>
> Is the standard properly designed to ensure that the desired qualification is met without placing an undue burden on those to whom the standard applies?
>
> Have other parties who are obliged to assist in the search for possible accommodation fulfilled their roles? (para. 65 Emphasis added.) (TAB 4)

167. The third step of the *Meiorin* test was considered by the Ontario Court of Appeal in *Entrop* v. *Imperial Oil Ltd*. (2000), 50 O.R. (3d) 18 (TAB 11). The Court stated:

> This third step of the *Meiorin* test focuses on the means Imperial Oil has used to accomplish its purpose. The question is whether Imperial Oil has shown that the alcohol and drug testing provisions of the policy are reasonably necessary to identify those persons who cannot perform work safely at the company's two refineries, because they are impaired by alcohol or drugs. To meet this third requirement Imperial oil must show that it cannot accommodate individual capabilities and differences without experiencing undue hardship. The phrase "undue

> hardship" suggests that Imperial Oil must accept some hardship in order to accommodate individual differences.
>
> An employer's workplace rule may fail to satisfy the third step of the *Meiorin* test in several ways. For example the rule may be arbitrary in the sense that it is not linked to or does not further the employer's legitimate purpose; the rule may be too broad or stricter than **reasonably** necessary to achieve the employer's purpose; the rule may **unreasonably** not provide for individual assessment; or the rule may not be reasonably necessary because other means, less intrusive of individual human rights, are available to achieve the employer's purpose. [p. 53, paras. 96-97 Emphasis added].

168. In *Meiorin*, the Supreme Court of Canada held that Courts and Tribunals should be sensitive to the ways in which individual capabilities may be accommodated. In addition the Court held that the possibility that there may be different ways to perform the job while still accomplishing the employer's legitimate work-related purpose should be considered *in appropriate cases*. [para. 64, Emphasis added.] (TAB 4)

169. Accordingly, the Petitioner submits that the Supreme Court of Canada acknowledges that changing the work practices of individual employers and individual assessment are not always appropriate.

<u>*Grismer*</u>

170. The decision in *Grismer* indicates that human rights cases involving blanket exclusions are not about the right to do the thing prohibited but the right to be considered as a candidate. (TAB 14) Thus, it may be argued that the present case is about the failure to consider Nixon as a candidate for peer counsellor training, rather than permitting her to become a peer counsellor.

171. Furthermore, *Grismer* held that common sense and intuitive reasoning are "not excluded from the consideration, but in a case where accommodation is flatly refused there must be some evidence to link the outright refusal of even the possibility of accommodation with an undue safety risk" (para. 43) (TAB 14).

172. Finally, the Supreme Court of Canada held that "those who provide services subject to the *Human Rights Code* must adopt standards that accommodate people with

disabilities where this can be done **without sacrificing their legitimate objectives <u>and</u> without incurring undue hardship.**" (para. 45) (TAB 14)

173. The Court provided that there are at least two ways in which a respondent can pass the "reasonably necessary" (i.e. accommodation) portion of the *Meiorin* test:

(a) by showing that no one in the particular group being discriminated against could ever meet the desired objective; or

(b) by showing that accommodation is unreasonable because testing for exceptional individuals who could meet the objective is impossible short of undue hardship. (para. 32) (TAB 14)

Oak Bay Marina

174. In *Oak Bay Marina*, in a concurring judgment, Saunders J.A. made the following comments:

> The *Human Rights Code*, R.S.B.C. 1996, c. 210 is, as my colleague observes, applicable to both public and private employers, large and small. Some employers have considerable internal resources and some have only the business and practical acumen acquired in a life time. Given the breadth of the legislation's application and its intimate effect upon the essential operations of the workplace, it is important, in my view, to acknowledge that the legislation does not require that issues be referred to professional experts, not always readily accessible in this vast province. Where, as here, a decision may be based upon personal observation and a general understanding of attendant risks, I would not preclude the decision maker from supporting its view of the risks with after-acquired knowledge, to the extent it may be able to do so. This necessarily means that mere failure to investigate is not, itself, a breach of the legislation, although clearly an employer who seeks more comprehensive knowledge when faced with a decision is less likely to base a decision upon unsupportable impressions.
>
> The value of human rights legislation is great and the courts accord more than usual deference to decisions of human rights tribunals. Human rights legislation, however, fits within the entire legal framework within which enterprises must function. That framework includes other standards that also reflect deep values of the community such as those established by workers' compensation legislation prohibiting an employer from placing an employee in a situation of undue risk, and the standards of the law of negligence, for example the standard that applies to Oak Bay Marina Ltd. for its clients. Even as full adherence must be given to the standards of human rights, a human rights tribunal must be mindful of the fuller legal framework regulating an enterprise when it assesses the occupational requirements asserted by that enterprise, and decide in a fashion harmonious with that framework in order not to force non-compliance with some legal obligations in exchange for compliance with the human rights legislation. (at paras. 33-34) (TAB 24)

175. Based upon the foregoing, the Petitioner submits that the following principles apply to and form part of the test for determining whether the standard is reasonably necessary:

(a) an employer is entitled to protect its legitimate objectives;

(b) the question is to be determined on an objective basis: the standard of "reasonableness" applies to the consideration;

(c) individual assessment is not a requirement in every case but only in appropriate cases;

(d) the transference of personal risk to third parties should be a consideration.

(3) The Standard of Review

176. As noted above, what constitutes undue hardship is a question of fact, in respect of which the standard of review is that of "patently unreasonable". However, the failure to consider relevant evidence is a question of law in respect of which that standard is "correctness".

177. The Petitioner submits that the Tribunal erred in law in the following ways:

(a) The Tribunal erred in law by failing to consider the Petitioner's "legitimate purpose" and, in particular, the threat to the integrity of the Petitioner should it be required to accommodate those who do not meet the standard. In the alternative, the Tribunal erred in law by ignoring evidence relating to the Petitioner's "legitimate purpose".

(b) The Tribunal ignored the evidence regarding the nature of the Petitioner's physical operations and the effect thereof on the Petitioner's ability to accommodate Nixon.

(c) The Tribunal failed to consider that individual assessment is not always appropriate. In the alternative, the Tribunal erred in law by ignoring the evidence regarding the assessment which was made of Nixon and ignoring evidence regarding Nixon's conduct.

(d) the Tribunal erred in law by failing to consider the effect on third parties of accommodation. In the alternative, the Tribunal erred in law by ignoring the evidence of such effects.

178. In addition to the foregoing, the Petitioner submits that the Tribunal also erred in law by considering irrelevant evidence regarding Nixon's subsequent work.

179. In general, the Petitioner submits that this case is unlike other situations which may be resolved by equipment, money, training or reorganization of work.

(4) The Tribunal Erred in Law by Failing to Consider, or in the Alternative, Ignoring Evidence Regarding the Petitioner's Legitimate Purpose.

180. In *Grismer*, the Supreme Court of Canada recognized that an employer must be free to pursue its "legitimate purposes". (TAB 14) In the present case, the legitimate purpose of instituting the standard has been defined as providing a safe and supportive environment to victims of male violence.

181. Consideration must be given to the choice of peer counselling as the fundamental method of achieving that purpose.

182. The Petitioner submits that by accepting the difference of Nixon, the Tribunal must be found to have implicitly accepted that Nixon is not a peer. Consequently, any accommodation of those who are not peers, would require a change in the fundamental nature of the organization.

183. The Petitioner submits that integral to providing a safe and supportive environment for victims of male violence is the goal of working towards ending male violence. That goal is achieved by empowering women through the consciousness raising which occurs during peer counselling sessions (Pacey, Cross, p. 15, L. 20-26, Lakeman, Jan 8., p. 28, L. 18-21, p. 29, L. 11).

184. In other words, the counselling of victims of male violence also has a purpose beyond therapy. The Petitioner chose the model of peer counselling not only for therapeutic reasons but also as a form of consciousness raising among women (Lakeman, Jan. 8, p. 28, L. 18-21, p. 29, L. 11). Without peer counselling, the political aspects of the Petitioner's work could not be achieved. Removing peer counselling would fundamentally alter the organization.

185. Consequently, two aspects of the Petitioner must be considered:

(a) the choice of peer counselling as a therapeutic model of counselling victims of male violence; and

(b) the political nature of the Petitioner in organizing women as peers in a struggle to end male violence and the part that peer counselling plays in meeting that role.

186. The Petitioner submits that the Tribunal, in particular, ignored the political nature of the Petitioner.

187. One can consider that rape crisis and sexual assault services exist on a continuum with varying degrees of a medical or political approach. At one end of the continuum are services which approach the work and the therapy from a solely medical/therapeutic basis. While the prevailing view is that such services should be women-only at least in the early stages, some women might be willing and able to obtain assistance from, for example, a male therapist. Further along the continuum would be organizations with some political basis in addition to the medical/therapeutic basis. The Petitioner may be considered to be at the political end of such a continuum, with an approach that includes a significant consciousness-raising aspect. The Petitioner's approach is integrated and blended with its political belief that women suffer oppression from birth and should resist male violence by working together with others who are peers in their experience of that oppression. This approach is apparent in the consistency between the way the Petitioner works and its political beliefs, such as its offering of "Support, Education and Action" groups.

188. The different approaches may be seen from the evidence of the work carried out by other groups. For instance, each of BWSS, WAVAW and Peggy's Place operate different modes of counselling. The evidence of BWSS was that it had not reconciled the issue of its membership and clientele (Leavitt p. 5, L. 12-15: mixed feelings about transgendered presence), while WAVAW's objects indicated that it is open to those who are not born and raised as female (Glattstein, Direct, p. 2, L. 18-19). Peggy's Place represents an

organization which is more closely aligned to the therapeutic model since it had at least one male resident and used the services of at least one male counsellor (Jones, Direct p. 11, L. 20-29).

189. Life experience of the social subordination as a girl and woman (and no experience of enjoying male privilege) is reasonably necessary for the Petitioner's work for at least the following reasons:

(a) Male violence against women, and particularly sexual assault, is gendered. A male presence can trigger Post Traumatic Stress Disorder (as agreed by both Drs. Pacey and Watson) (Pacey, Direct, p. 30, L. 8-30, Watson, Cross, Jan. 31, p. 44, L. 15-17).

(b) Women may be fearful of men and of people that they think are men (Watson, Cross, p. 44, L. 36-43).

(c) Women who have suffered male violence should be entitled to maintain the privacy of their stories and to choose to whom they tell their stories (Nixon, Dec. 11, p. 42, L. 2-4). Insisting that a group alter its mode of counselling deprives victims of male violence of their choice of therapy.

(d) At this stage it is simply experimental to have a transsexual providing services in an autonomous woman-only rape crisis service. The evidence of the volunteers from BWSS indicates that women's organizations are struggling with the issue (Jaffer, Cross, pp. 44-45, p. 45, L. 13-28, Leavitt p. 5, L. 12-15). The Petitioner submits that it is not appropriate for it to be ordered to experiment, particularly when the result may be to silence women (Watson, Jan. 31, p. 42, L. 13-20: women may be silenced by the presence of men) and is inconsistent with Rape Relief's political beliefs.

(e) Consciousness-raising by groups of people with a common life experience can help women deal with the trauma following an experience of male violence, as described by Lakeman in connection with "politicized" women (Lakeman, Dec. 20, p. 69, L. 12-27).

(f) Consciousness-raising by groups of people with a common life experience promotes open discussion by people who may otherwise be silenced, which was one of the main reasons for consciousness raising groups in the women's movement. Women, for instance, can be silenced by the presence of men (Watson, Jan. 31, p. 42, L. 13-20).

(g) Discussion of common life experience can expand knowledge and inform political and other action. One of the products of the Petitioner's work is the information about women's experience with male violence, and that informs all its work. (Lakeman, Dec. 19, p. 15, L. 23 – p. 16, L. 2) Similar products would likely result from groups of transgendered people or other people with a common life experience.

(h) The question of whether a person with a different life experience should be included in a consciousness-raising type of group should depend on the nature of the group and its subject matter. The Petitioner says that because its work is focussed on working with peers in lifelong sexist oppression to fight that oppression, it is not appropriate to include a person who has been treated as a man. The Petitioner does not have an opinion about people being rape crisis counsellors in other situations. The Petitioner has an opinion about its own political service group, and by logical extension, about autonomous women's groups.

(i) The Petitioner's work clearly includes the production of knowledge (through information gained from callers, often in a consciousness-raising type of situation) and the dissemination of that knowledge (through local, national, and international consultations and representations, as well as to individual women) (Lakeman, Direct, Dec. 20, p. 68, L. 3-13). In that way, the Petitioner is similar to research and educational institutions like universities. The Petitioner submits that it is apparent from the nature of political work based on grassroots experiences that including a person with different experiences would change the work. Just as the medical profession ought to be able to study the effect of a drug

> on people born with ovaries, so too the Petitioner ought to be able to engage in consciousness-raising with people of a relevant similar life experience, undiluted by the experience of male privilege. Of course, transgendered people ought to be able to do the same if it is relevant to the nature of their work.

190. The Petitioner operates on the basis that each victim is a potential ally in its struggle for equality and an end to male violence; that each woman may become a democratic force (Lakeman, Dec. 19, p. 14, L. 32-34). Peer counselling is the main avenue through which such work is accomplished. Through peer counselling women are empowered by each other (Pacey, Cross, p. 15, L. 20-26).

191. It is therefore integral to the Petitioner's goal that the peer counselling model should be that of women *choosing* to come together to empower each other and that is what occurs.

192. The Petitioner submits that given the inextricable link between the use of peer counselling as both a means of therapy and a politicising force, any change in the method of counselling would profoundly alter the nature of the organization. In addition, the changing of the mode would deprive clients of their choice of therapy.

(5) The Tribunal Ignored the Evidence Regarding the Nature of the Petitioner's Physical Operations.

193. In *Oak Bay Marina*, the complainant worked as a fishing guide on a seasonal basis. He developed bipolar affective disorder following which he was not rehired by the respondent, a small operation which operated in a dangerous stretch of water. The Tribunal found that the respondent had failed to assess what accommodation could have been arranged, such as monitoring the complainant's medication and assessing the risk to passengers or considering a gradual return to work. (TAB 24)

194. The Tribunal criticized as insufficient the steps the respondent took before deciding not to rehire. The respondent had supervised the complainant on one fishing trip during the period in which the complainant was struggling with a manic episode. (TAB 24)

195. The Court of Appeal held that the Tribunal erred in law by ignoring the evidence of the steps the respondent took to assess the complainant and remitted the matter back to the Tribunal for a reconsideration of that evidence. On the issue of assessment and the steps required of an employer, the Court of Appeal commented in *obiter*:

> I do not read any of the authorities to which we were referred as going so far as to impose a "process" of investigation on an already informed employer. If, as McLachlin C.J.C. suggested in *Grismer* (at para. 43) and *Meiorin* (at 35-6), the question of accommodation is to be approached with some "common sense", it seems to me that the employer's, as well as the complainant's, circumstances would have to be considered carefully in imposing such an obligation. What is "possible" for one employer - e.g., a government with entire departments and volumes of information available to it - may not be possible for a private company that has to make a decision amid operational pressures posed by scheduling, customer relations, profitability and legal liability. (Certainly the Tribunal member gave no consideration to whether OBM would have been under a "duty to warn" its guests of the risks posed by using Mr. Gordy's services.) Similar considerations bear on the other aspects of accommodation - whether the employer can in fact fit in a gradual return to work or place the employee elsewhere, or can actively supervise him or her or "monitor" his or her medications. These are more subtle and difficult questions that were overshadowed in this case by the member's assumption that direct experience could not be considered by OBM in making its decision. (at para. 26) (TAB 24)

196. Accordingly, it is important to consider the size and nature of the Petitioner's operations and its ability to investigate and accommodate.

197. The Petitioner is a small, charitable organization (Lakeman, Direct, Dec. 19, p. 4, L. 11). In 1995, there were 12 members of the collective (Lakeman, Dec. 20, p. 79, L. 27-28). The work of the Petitioner, for the most part, is carried out at the Premises (Cormier, p. 4, L. 16-21). As may be seen from Dowsett, TAB 23, the Premises is a physically small building. The Premises serves as the transition house for victims of male violence and also the base for the Petitioner's day-to-day operations, including the crisis line. Contact with victims of violence cannot be avoided.

198. The work of the Petitioner is highly integrated. Every member of the collective is required to do "crisis work": answering the telephone lines; answering personal calls to

the Premises; assisting callers in person; working at the transition house; assisting women in crisis with such tasks as bathing, attending medical and legal appointments including the provision of abortion services and babysitting; facilitating counselling sessions; liaising with the media; training medical and legal personnel; and representing the Petitioner at various public fora (Lakeman, Direct, Dec. 20, pp. 57-58).

199. There are a number of reasons for this, which fit with the political ideals of the organization: the importance of doing things, like feeding and bathing, that could be called "women's work"; the rejection of a hierarchy of more or less impressive work; and the importance of everyone understanding the stories of women (p. 57, L. 36 – p. 58, L. 1).

200. Two individuals from the Petitioner are involved in every call to the crisis line. The individuals who receive the telephone call will remain with that caller throughout the relationship (Lakeman, p. 30, L. 23-27). The relationship is both personal and political (L. 29-35). The individuals will, when required, accompany the caller to the hospital, lawyers or police, provide counselling, and assist the caller physically at the transition house (p. 57, L. 34-41). The Petitioner works that way for several reasons: so women do not have to keep telling their stories until they become devoid of terror, pride, generosity and human colour (p. 31, L. 29-34); so it is clear the Petitioner's workers won't "dump" the caller when the going gets tough or conditions change (p. 31, L. 12-17); and to maintain a personal and political relationship, rather than reducing the relationship to a simply political one, or reducing it to a therapeutic relationship (p. 30, L. 29-34). The Petitioner seeks to maintain contact with callers for 18 months, because women leaving abusive male partners are at particular risk of being killed during that period (p. 29, L. 45 – p. 30, L. 6).

201. The same process applies to women who go to the Premises seeking services rather than calling the crisis line. It is therefore extremely important that such women, who are frightened and desperate, feel safe and receive automatic assurance from the person who opens the door. Such instances are not the time to introduce difference to the client (Pacey, p. 47, L. 31-35).

202. The services provided by the Petitioner to clients are often highly intimate and private. Clients sometimes ask the member/volunteer to be present during internal medical examinations. Clients often disclose secrets (such as abortion history or HIV status) or the effects of abuse (such as self-mutilation scars or battering injuries) (Lakeman, Dec. 19, p. 26, L. 35-46, p. 27, L. 7-32). Callers' secrets often relate to their sexual history, such as a history of sexual abuse.

203. Given the highly integrated structure and model of peer counselling, particularly in the limited physical confines of the Premises in which the Petitioner operates, it would be impossible to segregate and segment the work of the Petitioner without damaging the integrity of the peer counselling model.

204. Any change in the personnel handling a call may lead to a victim being forced into the dehumanizing role of having to repeat her story. The initial connection between a victim and counsellor would also be lost, at a time when the victim needs to feel safe (Pacey, p. 47, L. 31-35). Changing personnel undermines the personal aspect of the personal/political relationship and breaks the "continuation of care" concept (Lakeman, p. 31, L. 4-8, L. 12-17).

205. Accordingly, segmenting the relationship between a victim and a counsellor may increase the harm to the victim at the expense of the rights of the prospective trainee.

206. The Tribunal also ignored the steps the Petitioner has taken to recognize the contributions of those who do not meet the standard. The house funding committee is open to all such people and counts men among its members. Accordingly, the Petitioner submits that it has taken steps to accommodate and that such accommodation is reasonable.

207. The Petitioner submits that the only other possible accommodation would be to permit Nixon to be trained as a counsellor, which would involve practicum work with clients, and which for the reasons outlined above would change the fundamental nature of the Petitioner.

208. By accommodating Nixon in such a manner, the Petitioner will lose its integrity as a peer counsellor and force for political change. Those women who seek out peer counselling as a method of coming to terms with the violence they have suffered will lose the availability of that service.

(6) The Tribunal Failed to Consider that Individual Assessment is not Always Appropriate.

209. The Petitioner submits that the Tribunal erred in finding that individual assessment is required. Individual assessment is only required in **appropriate circumstances**.

210. The undue hardship required by individually assessing Nixon again is based upon the integrity of the Petitioner as providing "peer counselling" services to female victims of male violence. The goal of individual assessment in the present case would be to permit Nixon to train for the position of peer counsellor. Accordingly, even beginning the process of individual assessment leads to a sacrifice of the Petitioner's legitimate objectives.

211. Again, reviewing the factors to be considered in determining whether Nixon could be individually assessed leads to the conclusion that individual assessment is not possible. The issues of personal safety and integration are appropriate.

212. This case is unlike the facts in *Meiorin* and *Grismer* where both complainants had been successfully carrying out the prohibited conduct for several years at the time of making the complaint. In *Meiorin* the complainant had been a firefighter for three years before failing the impugned test. (TAB 4)

213. In *Grismer*, other people with disabilities were individually assessed without difficulty. Therefore, there was already a culture of accommodating others. This is not the situation in the present case. Furthermore, in *Grismer* there was evidence that other jurisdictions would not have excluded the complainant. (TAB 14)

214. Based on the foregoing comments, the requirement for individual assessment must be placed in the context of the structure and size of the organization. Consequently,

individual assessment as contemplated by the Tribunal in this case is not appropriate in the context of the organization.

(7) In the Alternative, the Tribunal Ignored the Evidence Regarding the Assessment Which was Made of Nixon and Ignored Evidence Regarding Nixon's Conduct.

215. In *Oak Bay Marina* the Court of Appeal recognized that failure to investigate the nature of the complainant's difference is not a violation of the *Code* in and of itself. The Court of Appeal further held that such assessments must be viewed in the wider context of the size of the organization and its wider legal obligations (at para. 26). (TAB 24)

216. The Court of Appeal specifically recognized that the level of assessment required of a small, private organization could not possibly be as rigorous as the level of assessment required by a government or large organization.

217. The Petitioner submits that, in the light of the Court of Appeal's comments, the Tribunal erred in law by ignoring the evidence of the actual assessment carried out by the Petitioner.

218. Accordingly, when viewed in context, the Petitioner submits that Nixon was individually assessed. Nixon was excluded not solely because of her appearance but because her appearance indicated that she had lived at least a part of her life as a man, an indication which is accurate. The conclusion reached by Cormier was that Nixon had not been born as a girl and treated as a girl and woman, and she had lived at least part of her life as a man (p. 5, L. 33-37). The conclusions reached by the Petitioner are and, therefore, were not baseless perceptions.

219. Cormier conducted an investigation, in private, to determine whether Nixon met the standard (Cormier, p. 7, L. 9-11, Nixon Dec. 11, p. 24, L. 39-41, Dowsett TAB 41). After an assessment was made by Cormier that Nixon had not been born as a girl and had been treated as a man, Cormier advised Nixon of the Petitioner's position and offered the only accommodation available: membership of the house funding committee (Dowsett TAB 41).

220. Accordingly, even though a lengthy, exhaustive formal assessment was not carried out, the Petitioner submits that Nixon was sufficiently assessed. Furthermore, the Petitioner submits that even if a lengthy, formal assessment as envisaged by the Tribunal had been conducted, the result would have been the same.

221. Furthermore, the Tribunal ignored the role Nixon would be required to play in the accommodation. The Petitioner submits that even if it had engaged in a discussion regarding possible accommodation, it is clear from the evidence and Nixon's reaction to Ms. Cormier's question that the only accommodation Nixon would accept would have been full inclusion as a trainee counsellor. Anything else would have been unacceptable to Nixon.

(8) The Tribunal Erred in Law by Failing to Consider the Transference of Risk to Third Parties

222. Transference of personal risk from the complainant to third parties is a factor to be considered in the determination of undue hardship: *Pannu* v. *Skeena Cellulose*, [2000] B.C.H.R.T.D. No. 56 (*"Pannu"*). (TAB 25)

223. In *Pannu*, the Tribunal held:

> I conclude that most adjudicators have found job requirements justified as BFORs if allowing the complainant to perform the job would represent a real and significant increase in the magnitude of risk to the complainant and others. *Meiorin* and *Grismer* established risk is not an independent justification but merely one factor in the analysis of undue hardship. In this case, the change to risk entailed by accommodating Mr. Pannu includes some increase in the magnitude of risk and, more significantly, a complete shift of that risk from Mr. Pannu to the Utilityman. (at para. 108) (TAB 25)

224. In that decision, the Tribunal found that Skeena had established undue hardship.

225. The Petitioner submits that a similar transference of risk occurs in the present case Unlike other cases, the Complainant bears no risk from being accommodated. However, again unlike other cases, the risk of potential harm will be borne directly by

the clients of the Petitioner. The harm suffered by the clients may be increased significantly by permitting the accommodation.

226. Dr. Pacey gave evidence regarding the need of peer counselling and the effect of introducing a non-peer. The potential harm of introducing a non-peer into a counselling session where clients have specifically chosen a peer counselling model, combined with the lack of research on the ability of transsexuals to operate effectively as a peer counsellor to female victims of male violence, the amount of debate and uncertainty within both the feminist and transgendered movements regarding whether Male to female transsexuals are truly peers, should outweigh any potential harm arising from being excluded from the Petitioner.

(9) The Tribunal Erred by Considering as Relevant Evidence Regarding Nixon's Subsequent Work.

227. The Petitioner submits that it is not relevant to consider what work Nixon carried out after being excluded from the Petitioner or, in the alternative, the Tribunal gave undue weight to such evidence.

228. As of August 1995, the time when the Petitioner considered Nixon, Nixon had not carried out any volunteer work for either BWSS, Peggy's Place or WAVAW. Indeed, there was a policy specifically prohibiting Nixon from being a volunteer at BWSS, because of her having recently received counselling from BWSS. Accordingly, even if the Petitioner considered an individual accommodation for Nixon, the result may have been the same.

229. Undue weight was placed upon Nixon's interaction with BWSS. First there was no evidence that BWSS was an organization which was identical to the Petitioner. In fact, the evidence shows that they were not comparable organizations (Lakeman, Direct, Dec. 20, p. 70, L. 26-34, p. 70 L. 6-41). The Tribunal recognized that there was no written policy in place at the Petitioner regarding the treatment of transsexuals simply because the organization had not had to face the situation of a transsexual wishing to volunteer. Notwithstanding the lack of a written policy, all of the

witnesses from the Petitioner were able to articulate their shared belief that the Petitioner is formed by and for those who were born and raised as girls and women. There was no evidence that BWSS was formed upon that same principle and the evidence shows that BWSS struggled with whether transsexuals should be permitted to become counsellors.

230. A further area of difference between BWSS and the Petitioner is in whether counselling was available to transsexuals. The evidence outlined that the Petitioner did not provide counselling to transsexuals, referring them instead to organizations that specifically cater to the issues facing transsexuals (Cormier, p. 4, L. 37-38). Cormier testified that on one occasion she assisted a transsexual caller but took special precautions such as meeting with the caller away from the Premises (p. 4, L. 7-22). In contrast, BWSS did provide counselling services to transsexuals without taking any special measures (Nixon, Direct, Dec. 11, p. 15, L. 34-40).

231. For the same reasons, the Petitioner submits also that the Tribunal erred in considering the evidence relating to Peggy's Place and WAVAW. With respect to Peggy's Place, the evidence established that peer counselling was not the therapeutic model employed by Peggy's Place: it was more medically based (Jones, Direct, p. 3, L. 33-38). In addition, Peggy's Place permitted at least one male resident and had at least one male worker so therefore was not a proper comparison (Jones, p. 11, L. 20-29).

232. With respect to WAVAW, it is self-described as a "lesbian, gay, transgender friendly" organization (Glattstein, p. 2, L. 18-19), would assess any transgendered woman volunteer on the same basis as any other volunteer (Glattstein, Direct, p. 2, L. 28-32). However, WAVAW is not aware of any request from a transgendered person to be a staff member or volunteer for WAVAW (p. 3, L. 18-21). In any event, the self-description of the organization suggests that it contemplates the participation of gay men.

233. For the foregoing reasons, it was not appropriate to use such organizations as comparators for determining whether Nixon could have been accommodated by the Petitioner. Each women's organization should be considered as a separate entity. The principles

applying to each organization differed slightly. What one organization considered to be appropriate was not necessarily appropriate for the others.

234. In addition, the Petitioner submits that using such organizations as comparators once again ignores the political nature of the Petitioner and denies women the choice of their method of organizing.

C. The Tribunal Erred in Holding that the Petitioner Did Not Have a Primary Purpose of Providing Services to Women in the Political Sense Understood by the Petitioner.

235. The reason given by the Tribunal for holding that the Petitioner was not "entitled to rely on the exemptions contained in section 41 of the *Code* was that "Rape Relief is not, and never has been, an organization that has as its primary purpose the promotion of [the interests of] women with a shared life experience, or the promotion of the interests of women who have never experienced male privilege" (para. 221). The Petitioner submits that this ruling was in error and thus the Tribunal erred in denying it the protection of section 41.

236. The Petitioner's position is that its purpose is properly and ideally considered under the rubric of the discrimination analysis. However, in any event, it submits that it is entitled to the protection of section 41.

237. There are two ways in which any group could be denied the protection of section 41:

(1) On the legal basis that the respondent group in question (here a group of what the tribunal referred to as "non-transsexual women" (para. 222) is not entitled to exist under section 41. The decision does not reject the defence on that basis.

(2) On the evidentiary basis, assuming such a group is entitled to exist in law the respondent is not such a group. The Tribunal appeared to rest its conclusion on such an evidentiary basis. It is with respect to this conclusion that the petition submits the Tribunal fell into error.

238. The Tribunal's conclusion with respect to (2) appears to be a finding of fact. However, the Petitioner submits that it was grounded in propositions of law, subject to review for

correctness. In any event, to the extent that the reasoning involved mixed law and fact, it is unreasonable.

239. Section 41 states:

> If a charitable, philanthropic, educational, fraternal, religious or social organization or corporation that is not operated for profit has as a primary purpose the promotion of the interests and welfare of an identifiable group or class of persons characterized by a physical or mental disability or by a common race, religion, age, sex, marital status, political belief, colour, ancestry or place of origin, that organization or corporation must not be considered to be contravening this *Code* because it is granting a preference to members of the identifiable group or class of persons. (TAB 42)

(1) The "Rights-Granting" Nature of Section 41

240. The Tribunal recognized that section 41 is a "rights-granting provision, [and so] it is not subject to a restrictive interpretation", citing *Caldwell and Stuart* (1984), 15 D.L.R. (4th) 1 (S.C.C.) (*Caldwell*) (TAB 30) at pp. 19-20, as authority. (para. 211) (SCR at 628). The Petitioner submits that the Tribunal then erred in giving the concept of a primary purpose a restrictive interpretation, confining the protection of section 41 to those organizations which meet some unidentified standard of attentiveness to novel legal arguments, and to formal policy formation and screening processes, in reflecting their primary purposes.

241. The law requires more than lip-service to the idea of giving section 41 a liberal interpretation, respectful of its rights-granting status. In *Caldwell*, the unanimous Supreme Court of Canada agreed, at p. 19-20 with Seaton J.A. in the Court of Appeal where he stated:

> This is the only section in the Act [s.22, a predecessor to section 41] that specifically preserves the right to associate. Without it, the denominational schools that have always been accepted as a right of each denomination in a free society would be eliminated. In a negative sense s.22 is a limitation on the rights referred to in other parts of the *Code*. But in another sense it is a protection of the right to associate. Other sections ban religious discrimination; this section permits the promotion of religion. (SCR at 626) (TAB 30)

242. It is submitted that the section thus advances the purposes of the *Code*, as set out in s.3, in that a restrictive view of freedom of association and of religion would be an "impediment to full and free participation in the…life of British Columbia" (s.3(a)), and would not "promote a climate of understanding and mutual respect" (s.3(b)). As well, it ensures that the *Code* reflects the constitutional values of freedom of association and religion. (TAB 42)

243. Seen from the Petitioner's perspective as a "feminist organization whose mandate is to provide services to women victims of male violence and to fight violence against women" (para. 17), and as an active participant in the women's equality movement (para. 19), section 41 has a more significant function. While it is the Petitioner's position that it did not contravene ss. 8 and 13 at all, it sees section 41 as confirming and reinforcing the anti-discrimination sections of the *Code* in that it protects the right of all women to form equality-seeking groups. A restrictive interpretation of section 41 therefore restricts the right of women to seek equality by organizing together and is inconsistent both with the purpose of the *Code*, as set out in s.3, to "eliminate persistent patterns of inequality" (s.3(d)), and the constitutional commitment to equality as set out in section 15 of the *Charter*.

244. More specifically, given that the Petitioner's mandate is to provide services to women victims of male violence, a restrictive interpretation which is unresponsive to a diversity of organizational structures limits women's ability to do such work and is inconsistent with women's constitutional right to security of the person, as set out in section 7 of the *Charter*.

245. In summary, it is submitted that the Tribunal erred in giving a restrictive interpretation to section 41, a section which should be interpreted so as to promote the association, equality and security of the person rights of women.

(2) What Was the "Identifiable Group or Class of Persons"?

246. The "primary purpose" in section 41 must relate to an "identifiable group or class of persons". (TAB 42) It was uncontested that the Petitioner was a women-only group. The

evidence was consistent that the Petitioner understood that to mean it was an organization limited to persons assigned to the category "female from birth".

247. The Tribunal, with respect to the BFOR/BFJ standard, clearly identified the operation of this understanding in practice at paragraph 143 of the Argument. The Tribunal then held, in error, that "Rape Relief is not, and never has been, an organization that has as its primary purpose the promotion of [the interests of] women with a shared life experience, or the promotion of the interests of women who have never experienced male privilege" (para. 221).

248. The evidence of the standard applied and the evidence of the group whose interests are promoted by the Petitioner is the same evidence, and can be summarized as contained in the Objects of the Petitioner, the Basis of Unity, the understanding of the members of the collective as to a consistent interpretation of this shared understanding that a person who was male at birth was not eligible for training, and the Petitioner's choice to organize on the basis of the shared experience of growing up as a girl and woman.

249. The original Objects of the Petitioner are set out in Appendix "N" to the Petition. See 2 A) a): "To provide emotional support to women who are victims of rape in times of crisis, during medical and/or legal procedures and in general during the period of stress subsequent to the rape." The Petitioner's Certificate of Incorporation, (Appendix "N" to Petition), shows that the society was incorporated on June 25, 1975.

250. Lakeman testified that the Basis Of Unity was the Petitioner's articulation of its common political agreement, and was in use in 1995. (Appendix "O" to Petition). Under the heading "Our Shared Understanding of Women's Oppression", it states "We mean by women's oppression a social order in which men by birth rule women (females)." (Lakeman, Direct, Dec. 19, p.7 L. 29-33, p.8 L. 40-43)

251. The evidence of the members of the Petitioner who were present at the time of the events giving rise to the complaint showed a consistent interpretation of this shared understanding that a person who was male at birth was not eligible for training. Thus Cormier identified the Complainant as someone "who may not have been born female"

(Cormier, Direct, p. 5 L. 34-36). Cormier explained that the Petitioner organized among women, and the Complainant had the experience of being treated as a man in the world (p. 8, L. 43 - p. 9, L. 2). In cross-examination, she stated as the basis for exclusion that the Complainant "has had the experience of being a man in the world and that that experience is certainly different from how women are treated in the world, acknowledging that we are not yet equal essentially, and that due to the fact, I didn't consider us peers." (Cross, p. 29, L. 23-29). "The analysis is based on the inequalities between men and women and of the fact that women are born into this condition." (p. 56, L. 38-40). When asked if this view was shared by other members of the Petitioner, she answered "Yes. Most certainly." (p. 57, L. 7), and that it was fair to say it is a belief shared by the collective.(p. 57, L. 8-10).

252. Sawatzky testified that the Petitioner had chosen to organize as women based on "our common experience as women". (Sawatzky, Direct, p. 68, L. 38-41). Further, she testified her position was based "on my understanding of how we worked at Rape Relief, which was as women organizing around our experience as women, that a transgendered woman – person would not fit that definition, and that's why I made the response that I made." (p. 90, L. 26-31) This understanding came from both the Petitioner and other places. (p. 92, L. 34-38)

253. McIntosh testified that she "agreed with Danielle (Cormier) that as an organization we had an agreement to organize with women who were oppressed by the nature of being born women. We had a collective agreement." (McIntosh, Cross, p. 101 L. 31-37) "Because it was one of our agreements upon joining the collective, that we organize based on this, that as women we have a shared understanding of women's oppression because of our place at birth". (p. 101-2, L. 46-3)

254. Lakeman was not present at the actual events giving rise to the complaint, but testified about the political understanding of the Petitioner. She testified that it was that people are born into their class, race and sexual/gender position. "And born into was a way of expressing the difference between other kinds of things that we took seriously but were not for these purposes in the same political category, for instance, disability or

heterosexism [or] other kinds of disadvantage. We see the – these three that we described as oppression as worldwide and total for lack of a better word. And at your birth many, many, many of the conditions of your life are described by which of those categories you're born into." (Lakeman, Direct, p. 11, L. 20-31) While she would have said there was no formal policy at the time, she testified there was a policy "based on the basis of unity point that women are oppressed from birth, that women are born into the oppression women." (p. 72, L. 12-14, 31-35)

255. This evidence shows a consistent understanding of the "identifiable group" from the time of incorporation. The Petitioner's understanding of women in 1975 was consistent with the use of the phrase in such sentences as "Women were denied the vote in British Columbia until 1917." "The Supreme Court of Canada held in 1928 that women were not persons qualified to be appointed to the Senate."

256. The 1979 incorporation predated section 27 the *Vital Statistics Act,* R.S.B.C. 1996, c. 479 (TAB 44), which permitted some transsexual persons to obtain a new birth certificate. The Petitioner's incorporation also predated human rights case law which related to discrimination against transsexual persons but did not resolve the issues before this court.

257. The Tribunal was unreasonable in ignoring the evidence that all the Petitioner's witnesses, when faced with a new situation testing the Shared Understanding of Women's Oppression, came to the same conclusion about that application. While there was no specific and formal policy addressing the application of the Shared Understanding to male to female transsexual persons, it was clear that, in the context of the Petitioner, there was a consistent response demonstrating that the training program was only available to women oppressed as women from birth.

258. The unreasonable inference was drawn that if the Petitioner had not changed its Objects, and adopted a policy and a screening process, that it "is not, and never has been, an organization that has as its primary purpose the promotion of [the interests of] women with a shared life experience, or the promotion of the interests of women who have never experienced male privilege" (*Nixon* at para. 221).

259. It is unreasonable to prefer formal policies about specific applications over shared understandings of principles. Many organizations, including equality-seeking organizations which should properly be given the protection of section 41, do not have Objects and formalized policies. An inexact analogy is that of preferring written documents over the oral histories of First Nations people. This preference is recognized as no longer valid.

260. "Notwithstanding the challenges created by the use of oral histories as proof of historical facts, the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents." (*Delgamuukw* v. *British Columbia*, [1998] 1 C.N.L.R. 14, at 49-50 (S.C.C.)) (TAB 10)

261. Here the oral history of a collective of women was rejected based on a preference for formal policies and processes. This is both inconsistent with freedom of association, in diverse styles, and with political belief in the benefits of collective consciousness raising for women. Lakeman testified about the aspiration of most feminist organizations to be collectives, the constant process of consciousness raising, and the role of self-definition in caucuses, e.g. a caucus defining itself as lesbian, as made up of those who support sexual autonomy, or as made up of those not living under the protection of a man. (Lakeman, Cross, Dec. 21, pp. 114-115) In order to determine the "identifiable group" for a lesbian caucus, it would be necessary to examine their discussion and practice.

262. Valuing evidence of formal policies over evidence of practice is inconsistent with the rights-creating nature of section 41. In order to give the Petitioner the full protection of section 41, the Tribunal should have paid attention to the evidence of their practice and a stable collective understanding applied to a novel situation.

263. An illustration of the nature of the collective operation at the Petitioner can be found in the testimony of Lakeman with respect to her designation as spokesperson or instructing client with respect to the complaint (Lakeman, Cross, Dec. 20, pp. 77-78). There is an "oral history", without decisions always being formal and recorded.

264. The Tribunal erred in assuming that, in order to identify itself, a women's group, rather than develop shared understandings, must adopt official policies and screening processes in a form more suitable to a bureaucracy than a feminist collective.

265. In any event, the evidence shows that all the women who had contact with the Complainant acted on the same understanding of the Petitioner's beliefs and that an effective screen (screening about personal background being crucial (Lakeman, Cross, Dec. 20, p. 84, L. 3-9) was in place.

(3) What Legal Assumptions Underlie the Tribunal's Rejection of the Applicability of Section 41?

266. The Tribunal's rejection of the section 41 exemption was grounded in underlying assumptions properly seen as matters of law. It is submitted that the reason why the Tribunal failed to give proper or any weight to the extensive evidence about the Petitioner's self-understanding is that several mistaken legal assumptions were brought to the task.

267. In summary, the Tribunal erred, in law;

(a) in not applying a contextual approach to when male-to-female transsexuality is a relevant differentiating characteristic in identifying a group for the purposes of section 41 (the transsexuality issue);

(b) in assuming that women's groups are required to spell out the exclusion of male to female transsexuals in their Objects and policies, in effect, requiring women's groups to adopt a explicit policy of exclusion rather than a policy of inclusion (the explicit exclusion issue); and

(c) that, in order for a group to have a primary purpose of promoting the interests and welfare of an identifiable group, there had to be evidence of a shared life experience.

(a) <u>The transsexuality issue</u>

268. The Tribunal found that "Rape Relief is an organization that has as a primary purpose the promotion of the interests of all women in responding to male oppression and violence." (*Nixon* at para. 222). It is submitted that the Tribunal should have taken a contextual approach to the question of whether a male to female transsexual is included within the term woman. Sexual classifications are used in many different contexts, such as those involving courtesy in social interaction, washrooms, sports, education, medical and other academic research, historical analysis, and, as here, the political and therapeutic response to male violence.

269. In the paragraphs dealing with section 41, it appears to have been assumed by the Tribunal that the Complainant is a woman, without qualification, and thus falls into the group described by the Petitioner in its Objects. This is demonstrated in the need to qualify the term "woman" in referring to women who have been treated as women from birth, such as in references to "women who have never experienced male privilege" (*Nixon* at para. 221), to "non-transsexual women" (at para. 222). However, it is not clear what, if any, understanding of woman is being applied. It may be that the legal assumption is that birth certificates are conclusive with respect to gender, or that self-identification is the legal test. Either way, the assumption is that the personal characteristic of transsexuality is one that should be ignored in interpreting the meaning of woman, even in a context of a women's group seeking equality through resistance to male violence.

270. The question of how to approach the issue of whether the term woman, in any particular context, includes male-to -female transsexuals is a legal one. The Petitioner took the position that a decision on the legal meaning of woman in all contexts was not necessary to its case, but did not concede that birth certificates are legally conclusive. In *Gill* v. *Murray*, [2001] B.C.H.R.T.D. No. 34 (TAB 12), a case relating to the registration of same sex partners as parents on birth certificates, it was stated, at para. 76, with respect to the effect of a birth certificate: "While the birth certificate is not a declaration of legal parentage, the Act provides that registration is *prima facie* proof of the relationship (section 41)."

271. The evidence was consistent that in the context of Rape Relief, "women" meant persons with the experience of the oppression of women from birth, and did not include men or male-to-female transsexuals.

272. The reason the law should require contextual analysis of the term "women" lies in freedom of political belief. The evidence reflected the Petitioner's view that some people are assigned to a devalued status from birth, on the basis of class, race and sex. Lives are then significantly affected by such accidents of birth. A poor Aboriginal woman may become Prime Minister of Canada, but it is clear from the time of her birth that her pathway to that position will be very different from that of a male child born into an affluent family. If such a woman felt that she would benefit from the support of a group made up of people with the life experience flowing from such a position at birth, section 41 should be applied so as to protect such a right.

273. A contextual approach to the definition of groups protected by section 41 promotes the purpose of section 41, by reflecting respect for the therapeutic and equality-promoting importance of a sense of common experience. Not every women's group is alike, and section 41 should be interpreted not only as promoting diversity but also as promoting equality through the protection of equality-seeking groups. In such groups differences will occur in defining who can join each group and in different understandings of a term such as woman, or lesbian, or Aboriginal. The concepts identifying in broad terms the groups entitled to the protection of section 41, such as race, disability, and sex in this case, are not susceptible to rigid definition. They may be the subject of legitimate debate and evolving understandings. Diversity among groups defined in a contextual manner is not only permissible but should be welcomed in a pluralistic society, committed to the eradication of group disadvantage.

274. The value of diversity in groups was recognized in *Gould*. Ms Gould was unsuccessful in her complaint that she had been discriminated against by being denied membership in the male-only Yukon Order of Pioneers:

> I have found that the only service offered to the public is the offering or providing of the information gathered by the Order. The appellant

> contends that through the exclusion of women from the Order, the history of the Yukon will consequently be distorted by creating a male bias. To this I reply that forcing a private organization to compile history in a particular way would have serious implications for the freedom of association and of expression of those who join a particular group for that purpose. The very essence of our Canadian society is determined by the diversity which is permitted to flourish. Those who wish to present a different view of history are free to do so. The Order does not purport to provide the definitive history of the Yukon. (*Gould*, at para. 76, *per* La Forest J.) (TAB 12)

275. The value of group diversity, in this case religious diversity, was also mentioned in *Trinity Western University* v. *British Columbia College of Teachers*, [2001] 1 S.C.R. 772, at para. 33. "The diversity of Canadian society is partly reflected in the multiple religious organizations that mark the societal landscape and this diversity of views should be respected." (TAB 37)

276. The assumption made by the Tribunal was that the Complainant is a member of a group "women" (utilizing some assumed but unexpressed definition), rather than the group transsexual persons (the group she was in when determining discrimination). Therefore, when the Petitioner used the term women this automatically included male to female transsexuals, and possibly all persons self-identifying as women, provided an erroneous legal foundation for the factual finding of the Tribunal. This error in itself makes the conclusion about primary purpose unreasonable.

(b) <u>The explicit exclusion issue</u>

277. The Tribunal found that "[n]owhere in its objects does the Petitioner set out a primary purpose of being a charitable organization for the promotion of the interests of an identifiable group". (*Nixon* at para. 218) The Tribunal erred in assuming that identifiable groups are required to spell out, in their self-description, their shared understandings of who they are. Thus, in *Gould*, the male-only group's understanding of itself was respected through deference to its understanding of the term "pioneer". This concept was understood in its context, in the way sought by the Petitioner in this case. (TAB 13)

278. The intervener stated that within the spectrum of benefits associated with membership is the public recognition as a "Pioneer" and the inclusion of one's name as a pioneer on

important historical records. But what the agreed facts reveal is that one's name as a "Pioneer" is recorded on the Order's roll and that the status as a "Pioneer" that follows the members of the Order is not the status as a pioneer in the generic sense of the word, but is the status associated with the Order itself, as a member of the Yukon Order of Pioneers. (*Gould*, at para. 85, *per* La Forest J.) (TAB 13)

279. Similarly, in *Caldwell*, the identifiable group in question was characterized by the common religion, Catholicism. St. Thomas Aquinas High School was a "Catholic School" but the evidence showed that the "identifiable group" was "those members of the Catholic faith residing in the five North Shore parishes which the school serves". Alternatively, the majority concluded that the proper community may be those "members of the Catholic faith who support the Respondent Society." (at p. 20) Further, with respect to granting a preference to members of the group by hiring them as teachers, the group was even narrower than Catholics in the abstract, that is those who "accepted and practised the doctrines of the Church." (at p. 21) (TAB 30)

280. Thus men can form groups of Pioneers, without spelling out that Pioneers does not include women, or indeed pioneers in general. Catholic schools can exist without spelling out that by Catholic they mean only Catholics who practice the doctrines of the Church. The conclusion of the Tribunal incorporates a standard of explicit specificity for women's groups which is inconsistent both with Supreme Court of Canada jurisprudence and with a non-restrictive approach to section 41.

281. From the perspective of the Petitioner, there are stronger reasons for giving the protection of section 41 to it than to religious groups and men's groups. First, the concepts "pioneer" and "Catholic" are relatively uncontroversial concepts in themselves. It is unreasonable to demand that women's groups reflect, in their self-descriptions and policies, an understanding of the legal concept of woman which the law itself as not yet developed. The Petitioner's understanding of women was not unusual or radical. Second, applying a restrictive approach to an equality-seeking group in particular is inconsistent with the fundamental purposes of the *Code*.

282. The correct approach, as in *Gould* and *Caldwell*, would have been to focus on the evidence, set out above, of what the Petitioner meant in defining itself as a women's group. Instead the Tribunal erred by assuming some unexpressed and non-contextual meaning of woman, as addressed above, and then by assuming that the only way for the Petitioner to adopt a different meaning was by explicit exclusion.

283. The effect of the decision is that the Petitioner is required to spell out that when it says women it does not mean men or male-to-female transsexuals. This is inconsistent with a political view which sees women as having the life-time experience of being assigned to the category. Such women are to be described as "non-transsexual women", or biological women, or on a demeaning level, "bio" or "real" women. Biological women are no less entitled to use the word women to describe themselves than are male to female transsexuals.

284. Similarly, section 41 should be construed so as to protect the right of Aboriginal women to form a group called the Aboriginal Women's group, irrespective of any transient or contested legal meaning of Aboriginal. Thus a group with such a name might take the view that it is not open to non-Aboriginal women legally defined as Indian because of marriage, on the basis that such women lacked the life-time experience of social devaluation on the basis of Aboriginality.

285. The Tribunal's assumption that, in order to show a primary purpose, the Petitioner's Objects and policies should spell out that they promote the interests of "non-transsexual women" as a sub-group of the category women, provided an erroneous legal foundation for the factual finding of the Tribunal. Thus even if the Tribunal were correct in assuming a broad and non-contextual meaning for the concept "woman", the interpretation of the Petitioner's primary purpose should be based on the evidence as a whole and not on the absence of explicit exclusions in the Objects or policies of the Petitioner.

(c) <u>The common experience issue</u>.

286. The Tribunal stated "There was no evidence before me that there is, in fact, a shared life experience that is common to all non-transsexual women, and Rape Relief called no evidence to show that it requires its volunteers, or its clients, to have such a common experience." (*Nixon* at para. 222) Section 41 does not require that groups protected by it have any shared experience other than shared protection under a ground of discrimination.

287. The Tribunal erred in making the legal assumption that, in order to prove their primary purpose, groups entitled to the protection of section 41 have to go on to prove a specific common experience other than the factor which allows them to form a group protected by section 41 in the first place.

288. With respect to the ground of discrimination, the Tribunal proceeded on the basis that sex as a ground of discrimination includes transsexuality, and thus the Complainant was treated differently on the basis of sex. The same reasoning protects "non-transsexual women" from discrimination. When sex, as interpreted to include transsexuality, appears in section 41, it protects the right of both transsexual persons and non-transsexual persons to form groups. Similarly, given that discrimination on the basis of pregnancy is understood to mean discrimination on the basis of sex, section 41 protects the right of groups to organize around the experience of pregnancy. The experience in common of falling into a group protected from discrimination is legally recognized in section 41.

289. Denial of the protection of section 41 to "non-transsexual women", even though they are protected from discrimination in the *Code*, would be inconsistent with section 15 of the *Charter*. Transsexual persons have a right to be protected from discrimination, as properly understood through a purposive, contextual analysis, consistent with the section 15 jurisprudence. Such protection does not require that women be denied the right, enjoyed by other British Columbians, to associate in equality-seeking groups, and to call those groups women's groups. Denial of such a right would also be inconsistent with section 2 of the *Charter*. The protection offered by section 41 for freedom of association and of political belief is part of what it means to live in a pluralist society.

290. The assumption that the experience of women should be the subject of evidence at all is a rejection of the idea that people are free to have their own political opinions and organize around them. The Petitioner believes in an experience of womanhood which involves assignment to that category from birth, however varied such an experience is. Similarly, it would not be possible to prove that there is such a thing as race, or one defining experience of racism. However, the constitutional values of equality and freedom of political belief require recognition of the importance of group self-definition to anti-racist organizing. Thus, section 41 should be interpreted so as to protect the right of people of colour to group self-definition, including group definition based on a life-time experience of being visibly identifiable as a minority person.

291. In summary, the Tribunal erred in its failure to approach the significance of transsexuality in context, in holding that women with the life experience of being treated as women are required to explicitly describe themselves as a sub-set of an undefined category of women, in its requirement of a common experience, other than the legal status of being protected by section 41. It is submitted that any one of these errors of law, grounded in a restrictive interpretation of section 41, renders what appeared to be a factual conclusion about the Petitioner's primary purpose unreasonable.

292. What flows from this? In the Petitioner's submission, it was denied the protection of section 41 because of the Tribunal's unreasonable evidentiary rulings with respect to whether the Petitioner had a "primary purpose [of] the promotion of the interests and welfare of an identifiable group or class of persons characterized by … a common sex". The only reasonable conclusion is that the Petitioner had such a primary purpose. Once that primary purpose is recognized for a group falling within the list (of sex, race, etc.) in section 41, the group is then entitled to the protection of that section.

D. The Tribunal Erred in Awarding $7,500 Damages for Injury to Dignity, Feelings and Self-respect.

293. The Tribunal erred in failing to hold that the existence of groups exclusively composed of women with the life-long experience of the social subordination of women is consistent with the dignity of persons who lack that experience.

294. The Petitioner submits that, at most, an award of nominal damages would have been appropriate.

295. The appropriate amount of damages should be assessed in the overall context of the case.

296. In summary, a significant aspect of the context is that the subject-matter of the complaint does not lie at the core of protection of human rights but rather at its most extreme, and contested, edges. Specifically:

(a) Nixon applied for training as a volunteer. The Tribunal interpreted employment to include the opportunity to volunteer.

(b) Nixon applied for training to volunteer in a service organization. The Tribunal found that a training program for volunteers was a service to prospective volunteers, rather than solely an opportunity for prospective volunteers to provide service to others.

(c) Nixon alleged a *prima facie* case of discrimination. The Tribunal found that a contextual analysis of injury to dignity, as required by the constitutional jurisprudence on the meaning of discrimination, was not an element of a *prima facie* case of discrimination. Further, with respect to the final decision, injury to dignity is not even an essential element of a finding of liability under the *Code*. (TAB 42) A Tribunal only "may" consider the impact on the Complainant's dignity and the contextual factors that were set out in *Law*." (*Nixon* at para. 124) Thus there was no point in the argument where the factors relevant to a *Charter* analysis of discrimination, including the subjective/objective test of injury to dignity, had to be applied.

297. In the analysis of the impact on Nixon with respect to damages, a purely subjective approach was utilized. Paragraphs 241-243 of the Decision exclusively focused on a description of the Complainant's feelings and experiences, in a case where conflicting constitutional values were at issue, and where the needs of victims of male violence were also significant. Thus the more any individual complainant is attentive to her own needs and inattentive to the needs of others, the higher the award of damages would be.

298. It is submitted that while the evidence is clear that from a subjective perspective the Complainant experienced what happened as an injury to her dignity, any reasonable person in the same situation would not have taken that view. The same factors which are relevant to the objective aspect of the dignity analysis are relevant to the assessment of damages. (See the analysis of "dignity" in paragraph 116 to 149.)

299. The Tribunal erred in not addressing the fact that the *Code*, in section 41, protects the right to associate in groups without being discriminatory, with the inevitable exclusion of persons not included in the definition of the group. All British Columbians, including many who may experience severe discrimination in society generally, can thus be excluded from many groups without an adverse impact on dignity.

300. For instance, the Tribunal quoted the Complainant as being hurt by "the fact that they viewed me as a man" (*Nixon* at para. 242). This was its subjective interpretation of the consistent evidence of the Petitioner's witnesses that Nixon was viewed, correctly, as a person with experience of being treated as a man in the world, and who therefore did not have the lifetime experience of being treated as a woman. In essence, Nixon, unreasonably, took the position that drawing a distinction between a male to female transsexual and a person with the lifetime experience of being treated as a woman was an affront to her dignity. In effect, Nixon was awarded a high level of damages for the experience of encountering women with different opinions.

301. Furthermore, in the context of other human rights decisions, the amount awarded to Nixon was excessive.

302. The purpose of awards for injury to dignity, feelings and self-respect, as provided in section 37(2)(d)(iii) of the *Code* is set out in *Rafuse* v. *British Columbia (Ministry of Tourism)* (2000), 2000 BCHRT 42 ("*Rafuse*"). (TAB 29) At para. 217, the Tribunal states is to compensate the victim of discrimination, not to punish the perpetrator.

303. At para. 244, the Tribunal used *Rafuse* as a guide to awarding damages. However, the Tribunal gave no consideration to the basis for the larger award in *Rafuse*. In *Rafuse*, the government was ordered to compensate Rafuse for injury to dignity, feelings and self-respect based on three separate incidents of discrimination, arising out of a long-standing, albeit troubled, employment relationship. Rafuse was awarded $5,000 for the government's suspension of his benefits while he was on disability leave and while the government was aware he might not be able to comply with requirements because of his mental disability (at para. 226). Rafuse was awarded two additional amounts of $750 for other, much lesser incidents of discrimination. The total award was $6,500, but it was not based on one incident of discrimination only. (TAB 29)

304. The Petitioner submits that the circumstances in *Rafuse* are very different from the circumstances in the present case.

305. In other decisions in which the Tribunal awarded damages of more than $5,000 the complainants were significantly impacted by the conduct. For instance, in *Bitonti et al*. v. *The College of Physicians and Surgeons of British Columbia* 2002 BCHRT 29 (TAB 2), four of the complainants were awarded damages of $7,500. The four complainants were foreign doctors who were denied the right to work in British Columbia. All four complainants suffered significantly from being prevented, because of the discriminatory rule, from pursuing their careers over a protracted period. Two doctors were forced to leave the country to work, one of whom had to leave her disabled daughter behind.

306. The Petitioner submits that the circumstance of being unable to volunteer for one of several women's groups, while being permitted to volunteer with other women's groups pales in comparison to being deprived of one's career, livelihood, family and right to live in one's adopted country while being forced to wage a protracted political battle against an intransigent governing body.

307. In the majority of decisions in British Columbia in which the complainant was awarded $5,000 or more under section 37(2)(d)(iii), the award was made to compensate the victim for sexual harassment. The awards were made following an analysis of the factors listed in *Torres* v. *Royalty Kitchenware Ltd*. (1982), 3 C.H.R.R. D/858 (Ont. Bd. Inq.) ("Torres")(TAB 36). These factors are not exhaustive but include:

(i) The nature of the harassment (verbal, physical or both);
(ii) The degree of aggressiveness and physical contact in the harassment;
(iii) The ongoing nature and time period of the harassment;
(iv) The frequency of the harassment;
(v) The age of the victim;
(vi) The vulnerability of the victim; and
(vii) The psychological impact of the harassment. (para. 7758, L873).

308. In the cases where the *Torres* factors were applied to justify an award of $5,000 or more, the relationships between complainant and respondent were employment relationships, not single incidents, often including a real risk to the physical safety and well-being of the Complainant. See *Willis* v. *Blencoe*, 2001 BCHRT 12 (TAB 41), *Simon* v. *Paul Simpson and Med Grill Ltd*., 2001 BCHRT 24 (TAB 34), *Tannis et al*. v. *Calvary Publishing Corp*. *and Robbins*, 2000 BCHRT 47 (TAB 35), *Hayward* v. *Gary Stinka & Moxies Restaurant*, 2001 BCHRT 9 (TAB 16), for example.

309. The Petitioner submits that the Tribunal's award to Nixon was excessively high in the circumstances. The award was not reflective of the purpose of the section which was to make a compensatory, not punitive award. Moreover, in making the award, the Tribunal ignored the context of the larger awards which given in compensation for much more egregious conduct than that of the Petitioner, and that conduct resulted in much more serious harm to the complainants than that suffered by Nixon.

V. REMEDIES

310. The Petitioner submits that the decision of the Tribunal should be quashed.

All of which is respectfully submitted this 12th day of August, 2003

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Counsel for the Petitioner