# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Vancouver Rape Relief Society v. Nixon,***
2005 BCCA 601

Date: 20051207
Docket: CA031546

Between:

**Vancouver Rape Relief Society**

Respondent
(Petitioner)

And

**Kimberly Nixon**

Appellant
(Respondent)

And

**British Columbia Human Rights Tribunal**

Respondent
(Respondent)

And

**EGALE Canada Inc.**

Intervenor

Before: The Honourable Chief Justice Finch
The Honourable Madam Justice Southin
The Honourable Madam Justice Saunders

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| Place and Date of Hearing: | Vancouver, British Columbia<br>April 4, 5, and 6, 2005 |
| Place and Date of Judgment: | Vancouver, British Columbia<br>December 7, 2005 |

**Written Reasons by**:
The Honourable Madam Justice Saunders

**Concurring Reasons by:**
The Honourable Chief Justice Finch (Page 30, Paragraph 72)

**Concurring Reasons by:**
The Honourable Madam Justice Southin (Page 32, Paragraph 79)

**Reasons for Judgment of the Honourable Madam Justice Saunders:**

[1] This appeal engages the application of the provisions of the ***Human Rights Code***, R.S.B.C. 1996, c. 210 prohibiting discrimination on the basis of sex in providing a service (s. 8) and employment (s. 13), and the application of the group rights exemption (s. 41), to a circumstance in which Ms. Nixon was denied the opportunity to train (and serve) as a volunteer peer counsellor for the respondent Vancouver Rape Relief Society.

[2] Ms. Nixon is a post-operative male-to-female transsexual woman. Although she was born with the physical characteristics of a male and was raised as a male, she realized at an early age that, as the Human Rights Tribunal stated it, "her physical maleness did not accord with her own sense of herself as a female". In 1990 she underwent sex reassignment surgery and her birth certificate has since been amended to show her as a female.

[3] Vancouver Rape Relief Society was described by the Tribunal as a "Vancouver, non-profit, feminist organization whose mandate is to provide services to women victims of male violence and to fight violence against women". The Tribunal found it provides "a number of different services to women who are survivors of male violence, including: a 24-hour rape crisis telephone line, a transition house for women and their children, emotional and informational support, referrals, and peer counselling in group sessions" and that it operates "as a non-hierarchical collective of unpaid volunteers and paid staff members."

[4] Ms. Nixon, from her experiences, realized the value of the type of service provided by the Society and wanted to "give something back". She responded to an advertisement placed by the Society for volunteers who wished to train as peer counsellors for female victims of male violence, and was successfully pre-screened to ensure she agreed with the Society's collective political beliefs. When she attended for training, she was identified as a person who had not always lived as a female, and was asked to leave. The Society has continued to deny Ms. Nixon the opportunity to train as a volunteer peer counsellor because she had not always been a female. Its view is that "a woman had to be oppressed since birth to be a volunteer at Rape Relief and that because she had lived as a man she could not participate".

[5] Thus the two parties are, on the one hand, a non-profit society formed to assist persons seen by its members as marginalized and disadvantaged by men, and on the other, a person found by the Tribunal to be "a member of a group that has been marginalized", and their dispute arises in the context of volunteer activity.

[6] Language makes a binary distinction between male and female, although there was reference in the hearing to sexual identity existing as a continuum. Ms. Nixon's complaint is that the Society chose to distinguish her from the vast majority of women on the basis that her starting place on the continuum of sexual identity was a position other than one initially identified as female.

[7] As a justification for denying Ms. Nixon the opportunities she seeks, the Society has advanced its collective belief that all those offering peer counselling on

behalf of the Society, and thus necessarily that all those it trains in peer counselling, share the same experience of being born and raised a female, which Ms. Nixon was not. It says that this belief is complementary to the tenets to which all volunteers and members must subscribe.

[8] The Human Rights Tribunal upheld Ms. Nixon's complaint that the Society had discriminated against her under both ss. 8 and 13 of the ***Code*** and awarded Ms. Nixon $7,500 in damages. The decision of the Tribunal is indexed as 2001 BCHRT 1. The Society brought an application for judicial review of the Tribunal's decision, pursuant to the ***Judicial Review Procedure Act***, R.S.B.C. 1996, c. 241. The petition for judicial review was heard by Mr. Justice Edwards. He set aside the Tribunal's decision, giving reasons for judgment that are indexed as 2003 BCSC 1936. Ms. Nixon appeals from that order.

[9] For the reasons that follow, I conclude that the learned reviewing judge was correct in his conclusion that the ***Human Rights Code*** does not extend to the impugned activity, substantially for the reasons he has articulated in his discussion of s. 41 of the ***Code***. However, I disagree with his conclusion that the analytical framework set out in ***Law v. Canada (Minister of Employment and Immigration),*** [1999] 1 S.C.R. 497, 170 D.L.R. (4th) 1, applies in determining whether the alleged discrimination is established, and with his subsequent conclusion that discrimination was not established. In my view, the behaviour of the Society meets the test of 'discrimination' under the ***Human Rights Code***, but it is exempted by s. 41.

[10] The question is not one of concurrence with, or approval of, the belief here advanced to exclude Ms. Nixon from the volunteer activity to which she aspired. It is, rather, a question of the meaning of the ***Code***: does it allow the Society to exclude her?

[11] Although the Legislature could elect to prohibit this behaviour, it has not done so in my view.

[12] However, before I embark on my discussion, I caution the reader that although the case was advanced as one of discrimination in the provision of a service customarily available to the public (contrary to s. 8 of the ***Code***) and in employment (contrary to s. 13 of the ***Code***) whether a service was here provided by the Society to a volunteer for peer counselling or whether the denied activity is in the nature of employment were not questions explored on this appeal.

[13] In the hearing before the Human Rights Tribunal, the Society contended that the activity to which Ms. Nixon aspired, that is, training and serving as a volunteer peer counsellor, was neither a service customarily provided to the public within the meaning of s. 8 of the ***Code***, nor employment within the meaning of s. 13 of the ***Code***. The Tribunal did not agree and found that the activity was both a service and employment within the scope of those sections, leading it to consider other issues in the case.

[14] Those conclusions were not challenged before the reviewing judge, and are not challenged by the Society on this appeal.

[15] In the course of the hearing of the appeal, the basis for the application of s. 8 and s. 13 came into question. Counsel for Ms. Nixon offered to provide a written submission on the application of those sections, and has done so.

[16] The Tribunal, in finding that the training was "a service", relied upon evidence that the Society "advertises publicly for its volunteers and offers to provide the necessary training to all female members of the public" and the "training received at Rape Relief would be very useful elsewhere in the feminist movement and that Rape Relief considers the number of volunteers it trains as one of their contributions to the local women's movement". It held that "Rape Relief offers a number of different services to the public including a 24-hour crisis line, a transition house and a training program for volunteer counsellors" and the "training program is an adjunct to its other services". With that evidence and legal authority such as ***University of British Columbia v. Berg***, [1993] 2 S.C.R 353, 102 D.L.R. (4th) 665, 79 B.C.L.R. (2d) 273, and ***Gould v. Yukon Order of Pioneers***, [1996] 1 S.C.R. 571, 133 D.L.R. (4th) 449, 18 B.C.L.R. (3d) 1, it was open, in my view, to the Tribunal to conclude that there was the requisite public relationship between the Society and the trainee and the requisite holding out to the public, to qualify the training as a service customarily available to the public.

[17] My view is different on s. 13. While I proceed on the premise that s. 13 must be considered, given the basis on which judicial review was sought, I must express my reservation on the application of that section as I am not confident that this is the correct approach.

[18] It is clear that the term "employment" in s. 13 of the ***Code*** has a broader meaning than is ascribed to it in employment law. For example, in ***Reid v. Vancouver Police Board*** (2005), 44 B.C.L.R. (4th) 49, 2005 BCCA 418, Lowry J.A. for the majority, referring to ***Barrie (City) v. Canadian Union of Public Employees, Local 2380*** **(CUPE)**, [1991] O.P.E. D. No. 41 (Ont. P.E. Trib.) (Q.L.), said at para. 41 that the proper approach required "consideration of factors that are well beyond what traditional common law perceptions of the employer-employee relationship might dictate". In the same spirit, the Federal Court of Appeal has applied a broad meaning to the term "employ" and in ***Canadian Pacific Ltd. v. Canada (Human Rights Commission)***, [1991] 1 F.C. 571 (C.A.), 120 N.R. 152, found it to encompass the relationship between Canadian Pacific Ltd. and an employee of a firm with whom Canada Pacific Ltd. contracted for services. As well, in ***Pannu, Kang and Gill v. Prestige Cab Ltd.*** (1986), 73 A.R. 166 (C.A.), 31 D.L.R. (4th) 338, the Alberta Court of Appeal interpreted the words "employer", "employee" and "employment" to encompass a relationship between a taxi company and taxi drivers in a fact situation in which the taxi drivers were more in the nature of independent contractors. We were also referred to tort cases in which a duty of care identical to that owed to an employee was found to be owed to a volunteer: ***Huba v. Schulze and Shaw*** (1962), 32 D.L.R. (2d) 171 (Man. C.A.), 37 W.W.R. 241; ***Poppe v. Tuttle (c.o.b. 800 Ranch)*** (1980), 14 C.C.L.T. 115.

[19] The effect of those cases and the relevance of discussions on the law of negligence to this issue should wait, in my view, for another day and we must decide the case on the basis of the record before us. Given the breadth of

volunteer activity in the community, the myriad benefits it can provide and the diversity of motivation, ranging from pure altruism and a desire to "give back" to enlightened self-interest in developing social relationships, experience and training, volunteerism as employment is an important question that remains for another day.

[20] I turn now to the substance of the appeal. Ms. Nixon's initial complaint against the Society alleged it had violated s. 8 of the then ***Human Rights Act***, R.S.B.C. 1984, c. 22, now s. 13 of the ***Human Rights Code***. She later amended the complaint to add an allegation of breach of s. 3 of the ***Act***, now s. 8 of the ***Code***. Although the complaint was made under the ***Act***, it was decided under the ***Code***. In this decision I refer generally to the present ***Code*** provisions, as they bear the section numbers and the language considered by the Tribunal and reviewing judge. However, I append as an addendum the language in effect on the date of the complaint, a predecessor provision to s. 41 and the present language of s. 3 that came into force in 1997 as s. 1.1, expressing the purposes of the ***Code***.

[21] The two sections found by the Human Rights Tribunal to have been breached by the Society are s. 8(1)(a) and s. 13(1)(a). Sections 8(1) and 13(1) provide:

> **8**(1) A person must not, without a bona fide and reasonable justification,
>
> (a) deny to a person or class of persons any accommodation, service or facility customarily available to the public, or
>
> (b) discriminate against a person or class of persons regarding any accommodation, service or facility customarily available to the public

> because of the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex or sexual orientation of that person or class of persons.
> …
>
> **13**(1) A person must not
>
> (a) refuse to employ or refuse to continue to employ a person, or
>
> (b) discriminate against a person regarding employment or any term or condition of employment
>
> because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.

[22] Discrimination is defined in the ***Code***:

> **"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;

[23] Section 41, on which the outcome of this appeal depends, exempts non-profit organizations from the application of the ***Code*** in these terms:

> **41** 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.

[24] Courts approach human rights legislation using a broad, liberal and purposive approach to "advance the broad policy considerations underlying it", to

interpret the provisions "in a manner befitting the special nature of the legislation", giving it "such fair, large and liberal interpretation as will best ensure the attainment of their objects": ***Robichaud v. Canada (Treasury Board)***, [1987] 2 S.C.R. 84 at p. 89, 40 D.L.R. (4th) 577; ***Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.***, [1985] 2 S.C.R. 536, 23 D.L.R. (4th) 321; and ***North Vancouver School District No. 44 v. Jubran*** (2005), 253 D.L.R. (4th) 294, 39 B.C.L.R. (4th) 153, 2005 BCCA 201. At the same time, as observed by Lamer C.J. in ***University of British Columbia v. Berg***, *supra,* in a passage referred to by La Forest J. in his concurring reasons in ***Gould v. Yukon Order of Pioneers***, *supra*, at para. 50: "[t]his interpretative approach does not give a board or court license to ignore the words of the Act in order to prevent discrimination wherever it is found."

[25] It is useful also to bear in mind the general approach to interpretation set out in ***Re Rizzo v. Rizzo Shoes Ltd.***, [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193, wherein Iacobucci J. famously approved the statement by Elmer Driedger at p. 87 of *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983):

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[26] Our task is to review the order of the reviewing judge. His task was to review the Tribunal's decision. The Tribunal, of course, is owed deference by the courts in findings of fact and the application of those facts to the law. In those matters, the question for the reviewing judge was whether the Tribunal's conclusions were reasonable: ***Reid v. Vancouver Police Board***, *supra*, and ***Law***

***Society of New Brunswick v. Ryan***, [2003] 1 S.C.R. 247, 2003 SCC 20. However, as to the proper analysis regarding the existence of discrimination and the interpretation of the ***Code***, these questions are questions of law and the decision of the Tribunal was required to be reviewed for correctness: ***Canada (Attorney General) v. Mossop***, [1993] 1 S.C.R. 554, 100 D.L.R. (4th) 658; ***University of British Columbia v. Berg***, *supra;* and ***Dr. Q. v. College of Physicians and Surgeons of British Columbia***, [2003] 1 S.C.R. 226, 11 B.C.L.R. (4th) 1, 2003 SCC 19. And the reviewing judge's order as to the standard of review and other questions of law falls to be considered by this Court for correctness: ***Dr. Q.***, *supra*, para. 43.



[27] The case naturally divides into two parts, the question of discrimination and the application of the group rights exemption (s. 41).

## I. Discrimination

[28] The Tribunal found the Society had discriminated against Ms. Nixon. The reviewing judge concluded it had not. Both approached the question as one of the application, or not, of the analysis set out in ***Law*** and a statement of this Court in ***British Columbia Government and Service Employees' Union v. H.M.T.Q.*** (2002), 216 D.L.R. (4th) 322, 4 B.C.L.R. (4th) 301, 2002 BCCA 476 ("***Reaney***"). In ***Reaney***, Lambert J.A. said, referring to the analytical framework for s. 15 of the ***Canadian Charter of Rights and Freedoms*** set out in ***Law***:

> … In my opinion, the same analytical framework must govern the determination of whether there has been a violation of s. 13 of the Human Rights Code of British Columbia. But it must be understood

> that the *Law* framework does not consist of a series of strict tests but rather a cluster of points of reference. …

[29] That approach contrasted with what has been the traditional test as expressed in ***Oak Bay Marina Ltd. (c.o.b. Painter's Lodge) v. British Columbia (Human Rights Commission)*** (2002), 217 D.L.R. (4th) 747, 2002 BCCA 495; ***British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.***, [1999] 3 S.C.R. 3, 176 D.L.R. (4th) 1, 66 B.C.L.R. (3d) 253 ("***Meiorin***"); and ***British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)***, [1999] 3 S.C.R. 868, 181 D.L.R. (4th) 385, 70 B.C.L.R. (3d) 215 ("***Grismer***"). The latter two cases, both human rights cases, were decided after ***Law***, but made no reference to its analytical framework.

[30] One of the consequences of the application of the ***Law*** framework is to engage the Tribunal, or a court, in consideration of the degree to which the impugned behaviour has injured the human dignity of the complainant.

[31] I observe firstly, that the words "discriminate" and "discrimination" are not found in the sections of the ***Code*** invoked by the complaint: s. 8(1)(a) which prohibits denying a service, and s. 13(1)(a) which prohibits refusing employment, both for the reasons listed.

[32] The only use of the word "discriminate" in conjunction with those sections is in the enforcement and remedy sections of the ***Code*** which provide for a remedy where discrimination is established. And as to the use of that word, its meaning is set out in s. 1, *supra.* That provision, replicated earlier, is the Legislature's

expression of its intention that conduct falling within any of the eleven listed statutory provisions is, by definition, discrimination. The two sections with which we are here concerned, s. 8(1)(a) and s. 13(1)(a), are included in the eleven listed provisions in s. 1.

[33] The Tribunal's findings, which were not challenged, that the Society, for a prohibited reason, denied Ms. Nixon a service customarily available to the public and refused her employment are, by definition, findings of discrimination because the Legislature has said that those behaviours are discrimination. Accordingly, they entitle Ms. Nixon to an order in her favour (s. 37) unless the Society can establish a defence. In this case, the defence that the Society asserts is the group rights exemption in s. 41.

[34] This discussion of the meaning of ss. 1, 8 and 13 is enough to dispose of this issue, but a great deal has been made of the application of the ***Law*** framework, and there are a handful of provisions prohibiting discrimination not enumerated in the definition in s. 1 of "discrimination". Those sections not included in the s. 1 definition of discrimination themselves include the word "discriminate" in the text of the prohibition; for example, s. 8(1)(b): “A person must not … discriminate against a person … regarding any … service … customarily available to the public". The prohibitions against discrimination that are not enumerated in the definition in s. 1 invite the question as to the meaning of the word “discriminate” and the application of the ***Law*** framework for complaints under them.

[35] The Tribunal, rendering its decision before ***Reaney*** was published, discussed the implications of applying the ***Law*** framework to a human rights complaint, including the implications of a requirement that the complainant establish injury to human dignity. The Tribunal concluded that the ***Law*** framework, designed to address challenges to law or government action under s. 15 of the ***Charter***, may overpower the relatively discreet event, the nature of the relationship (often between private parties) and the personal affront that is the subject of the human rights complaint, and in this way may have a narrowing consequence unsuited to a human rights context, although suited to the broad language and broad reach of s. 15 for which it was designed.

[36] ***Reaney*** involved a s. 13(1)(b) complaint. The issue was a term of a collective agreement that "topped up" maternity benefits provided by Employment Insurance with the result that adopting mothers were treated under the collective agreement less generously than biological mothers, just as they were under the Employment Insurance program. The Employment Insurance program itself had been found in ***Schafer v. Canada (Attorney General)*** (1997), 149 D.L.R. (4th) 705, 35 O.R. (3d) 1 (Ont. C.A.) not to amount to discrimination under s. 15 of the ***Charter***.

[37] ***Reaney*** held that the ***Law*** framework applied to the complaint, although not addressing the implications of either ***Meiorin*** or ***Grismer,*** or the other questions explored in the decision of the Tribunal in this case.

[38] The application of ***Law*** was also raised in ***British Columbia Public School Employers' Assn. v. British Columbia Teachers' Federation*** (2003) 15 B.C.L.R. (4th) 58, 2003 BCCA 323 (the "***Teachers case***"), concerning internal co-ordinations of employment benefits for married co-teachers which permitted primary enrolment to only one teacher of a couple. Only one member of the Court, in his separate concurring reasons for judgment, referred to ***Law***, holding that the employment benefit did not cause injury to human dignity, and that discrimination under s. 13 was not established.

[39] Both ***Reaney*** and the ***Teachers case***, concerning s. 13(1)(b), fell outside the definition in s. 1 of "discrimination". Further, ***Reaney*** concerned a condition of employment premised on a government program that had been found not to contravene the equality section of the ***Charter***. The broad application of the ***Law*** framework in a case without that governmental overtone is not obvious to me, particularly in light of ***Meiorin***, ***Grismer*** and ***Oak Bay***, and considering the issues otherwise referred to in the Tribunal's decision. However, that is an issue that must wait for its own case.

[40] The Society urges the Court, in recognizing the broad scope of the ***Code*** and the high purposes set out in s. 3, to also recognize that the result of not applying the ***Law*** framework may be to brand equality-seeking organizations as discriminatory, creating an unfair burden on them to defend their discriminatory conduct, perhaps in circumstances in which the statutory defences are not available.

[41] I do not accept the premise of unfairness. If, as I conclude here, the Legislature has said that certain behaviour is prohibited and has established the available defences, it seems to me the Legislature, as law-maker, has set the balance of competing rights in a way that we may not ignore and which is presumptively fair.

[42] It follows that I conclude that the reviewing judge erred in finding that discrimination was not established. The issue, then, is the application of s. 41 raised in defence.

**2. Application of s. 41 of the Code**

[43] Section 41 is commonly referred to as the group rights exemption, and it protects certain non-profit organizations such as an equality-seeking organization, as the Society describes itself, from liability. Section 41 is at least a partial answer to the Society's concern that defences in the ***Code*** do not protect organizations established to redress inequality.

[44] Section 41, again, provides:

> **41** 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.

[45] The Tribunal concluded that s. 41 did not apply to protect the Society from liability for discrimination:

> [211] Section 41 operates as a limited exemption from the application of the *Code*. It is an exemption available to organizations which have a particular, primary purpose. I am required to interpret the exemption section in light of the stated purposes of the *Code* in s. 3. While limitations on rights in statutes of general application like the *Code* are normally restrictively interpreted, because s. 41 is also a rights-granting provision, it is not subject to a restrictive interpretation. (*Re Caldwell and Stuart* (1984), 15 D.L.R. (4th) 1 (S.C.C.) at pp. 19-20)
>
> …
>
> [219] I do not doubt … that the political beliefs of the current members of the collective, ...inform the manner in which Rape Relief performs its stated primary purposes of providing services to the victims of rape and of being an "educational force for progressive changes in attitudes, laws, institutional procedures, and to work for the prevention of rape." … The political views that inform Rape Relief's purpose and the manner in which it delivers its services do not change the primary purpose of the organization which, I find, is the provision of services to all women who are the victims of sexual assault regardless of their political belief or their life experience.
>
> **[**220] Moreover, with respect to its asserted political belief, Rape Relief has not established a link, either direct or indirect, between its belief and its discrimination on the basis of sex. Ms. Nixon says that she shares Rape Relief's beliefs. If what Rape Relief is proposing is that Ms. Nixon must share a common experience rather than a system of thought, belief, principle or like-mindedness, they are not, in my view, asserting a "political belief" captured by s. 41.
>
> [221] Rape Relief is not, and has never been, an organization that has as its primary purpose the promotion of women with a shared life experience, or the promotion of the interests of women who have never experienced male privilege. At the time Ms. Nixon was asked to leave the volunteer training program, Rape Relief had no policy in place which would indicate that their primary purpose was the promotion of the interests of only those women who fit their political definition of what it means to be a woman. In fact, the evidence of the Rape Relief collective members was that they had provided, on at least two occasions, services to transsexual or transgendered women.

> [222] 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. 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. In fact, the evidence that they did call leads me to the opposite conclusion. …
>
> **[**223] Further, Rape Relief makes no inquiry as to a volunteer's life experience, including whether a prospective volunteer has lived some part of her life as a man, in the screening interview conducted before accepting a volunteer into their training program. Instead, they accept that all women have had a similar life experience and that, unless they present with an appearance that would trigger an inquiry, they are a woman. Some transgendered women "pass" without triggering an inquiry. In fact, in undisputed evidence, Dr. Watson testified that some are able to pass without inquiry from their intimate partners or from their medical doctors. Hence, it is only those transgendered women with what society has labelled as masculine features who would be subject to the confrontation Ms. Nixon experienced. Rape Relief discriminated on what it perceived, or believed, the life experience of Ms. Nixon had been, not on any actual knowledge of that experience.
>
> [224] I conclude that the exclusion practised by Rape Relief is not justified in an objective sense by the nature of the organization. Rape Relief's conduct is not exempted under s. 41 of the *Code*.

[46] The reviewing judge held that s. 41 provided a defence to the Society for its behaviour. In so holding he stated:

> [114] In its analysis of s. 41 the Tribunal recognized at para. 211 of the decision that in the leading case on s. 41, *Re Caldwell and Stuart*, [1984] 2 S.C.R. 603 ("*Caldwell*"), the Supreme Court of Canada found it was a rights-granting provision and therefore not subject to the restrictive interpretation generally applicable to legislative provisions which place limitations on rights.
>
> [115] Nevertheless, the Tribunal, by interpreting s. 41 as requiring Rape Relief to prove its primary purpose was the promotion of the interests of women "who met their political definition of what it means to be a woman", gave s. 41 a restrictive interpretation inconsistent with that of the Supreme Court of Canada in *Caldwell*.

[116] In *Caldwell*, *supra* at p. 612 McIntyre J., for the Court, noted that the Court of Appeal, *per* Hutcheon J.A., held that s. 22 (the predecessor to s. 41) "permitted the preference of one member of the identifiable group over another". This conclusion was upheld by the Supreme Court of Canada. At p. 628 McIntyre J. indicated this meant the employer, a Catholic school, was entitled to distinguish in its hiring policy "for the benefit of the members of the community served by the school and forming the identifiable group", between members of its "identifiable group" of Catholics on the basis of which of them adhered to Catholic dogma on marriage.

[117] Under s. 41, the school as employer in *Caldwell* was entitled to employ as teachers only those Catholics who were "Catholic enough" (through their adherence to Catholic dogma on marriage) to serve as an example to its students and whose adherence to Catholic dogma would, according to the *bona fide* religious beliefs of the employer, benefit the "identifiable group", Catholics, it served, without proving that its primary purpose was to promote the interests only of an "identifiable group" whose adherence to Catholic dogma met the same standard that it demanded of its Catholic employees.

[118] By parity of reasoning, Rape Relief was not required to prove its primary purpose was the promotion of the interests of persons who were "woman enough" to meet its "political definition" of women as persons who had lived their entire lives as females in order to employ only persons who met that definition as peer counsellor trainees. This is because it had the *bona fide* belief that employment of only such persons benefited its clients from the "identifiable group", women, (however defined) by protecting them from the possible trauma of dealing with persons its female clients, already traumatized by male violence, might perceive as male and therefore threatening or at least "not woman enough" and therefore unwelcome confidantes.

[119] Just as the school in *Caldwell* did not have to prove its insistence that Catholic teachers adhere to Catholic dogma would actually benefit students from its identifiable group of Catholics with a better Catholic education, a matter impossible to prove not least because the school also employed Protestant and Muslim teachers who adhered to the dogma of their denominations, so Rape Relief did not have to prove that exclusion of male to female transsexuals from its peer counsellor training program would actually benefit its clients with a better or less traumatic counselling experience, any more than it had to prove its clients would benefit from the exclusion of men.

[120] I find the Tribunal failed to correctly interpret and apply the Supreme Court of Canada decision in *Caldwell* on the application of s. 41 in this case and that its conclusion that s. 41 did not permit Rape

> Relief to exclude Ms. Nixon from its peer counselling training program was unreasonable.

[47] Ms. Nixon contends that the reviewing judge erred in his analysis of s. 41 and in his application of it to the facts found by the Tribunal. She contends, relying upon ***Brossard (Town) v. Quebec (Commission des droits de la personne)***, [1988] 2 S.C.R. 279, 53 D.L.R. (4th) 609, that an entity relying on s. 41: (1) must, as its primary purpose, have the promotion of the interests and welfare of an identifiable group of persons characterized by a common ground of prohibition under the ***Code***; (2) establish a connection between the ground of discrimination and a primary purpose of the organization; and (3) justify the exclusion in an objective sense by the particular nature of the organization. She relies as well upon a passage from the reasons of La Forest J. in ***Gould*** in reference to a provision in the ***Yukon Human Rights Act*** similar to our s. 41:

> The exempted discrimination, I would have thought must be of a kind necessary to the furtherance of the fundamental objects of the organization.

[48] On the Tribunal's conclusion that the primary purpose of the Society was "providing services to the victims of rape" and being an "educational force for progressive changes in attitudes, laws, institutional procedures, and to work for the prevention of rape", Ms. Nixon says that the requisite connection between the Society's primary purpose and its discrimination of her which is essential to a s. 41 defence, is missing. She says further that justification, in an objective sense, was not established. She is supported in these submissions by the intervenor EGALE.

[49] Ms. Nixon contends, further, that the reviewing judge should not have relied upon ***R. v. Powley***, [2003] 2 S.C.R. 207, 230 D.L.R. (4th) 1, a case decided after the judicial review proceeding hearing and on which counsel were not asked for submissions. Lastly, she contends that in the event s. 41 is ambiguous, s. 15 of the ***Charter*** is relevant as an aid to assist in that interpretation.

[50] Notwithstanding the able submissions on behalf of Ms. Nixon and EGALE, I have concluded that s. 41 applies, largely for the reasons of the reviewing judge.

[51] The leading case on s. 41 is ***Caldwell et al. v. Stuart et al.***, [1984] 2 S.C.R. 603, 15 D.L.R. (4th) 1, 66 B.C.L.R. 398. ***Caldwell*** concerned a Roman Catholic teacher who was not re-hired for the following school year as she had married a divorced man in a civil ceremony contrary to church dogma. In his reasons for judgment, McIntyre J. confirmed that then s. 22 (now s. 41) permitted the preference of one member of the identifiable group over another, saying at p. 626:

> This section, while indeed imposing a limitation on rights in cases where it applies, also confers and protects rights. I agree with Seaton J.A. in the Court of Appeal where he expressed this thought in these words:
>
> > This is the only section in the *Act* 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 the religion.

And at p. 628:

> … In failing to renew the contract of Mrs. Caldwell, the school authorities were exercising a preference for the benefit of the members of the community served by the school and forming the identifiable group by preserving a teaching staff whose Catholic members all accepted and practised the doctrines of the Church. …

In the result, the school was found to be entitled to make a preference among the members of the Catholic community.

[52] ***Brossard***, the case relied upon by Ms. Nixon, was decided subsequent to ***Caldwell***. ***Brossard*** concerned a complaint that an anti-nepotism policy precluded the complainant from employment. At the time the complaint in ***Brossard*** was initiated, the Quebec ***Charter of Human Rights and Freedoms***, R.S.Q. 1977, c. 12, rolled the defence of *bona fide* occupational requirement and a group rights exemption into the same provision, s. 20, in a way that engaged the issue of justification for the group rights exemption:

> A distinction, exclusion or preference based on the aptitudes or qualifications required in good faith for an employment, or justified by the charitable, philanthropic, religious, political or educational nature of a non-profit institution or of an institution devoted exclusively to the well-being of an ethnic group, is deemed non-discriminatory.

[53] An examination of our s. 41 reveals no analogous requirement to the justification required by that section considered and discussed in ***Brossard***. For that reason, I do not read the test set out in ***Brossard*** as determinative of this case. We are, however, bound by ***Caldwell***.

[54] Nor, in my view, does ***Gould*** modify the law expressed in ***Caldwell;*** the majority in ***Gould*** declined to deal with the Yukon statute's group rights provision.

[55] At the hearing of the complaint the Society advanced the argument that its purposes and activities are a *bona fide* and reasonable justification, a defence under s. 8, and a *bona fide* occupational requirement, a defence under s. 13. The Tribunal dismissed both defences and in doing so, concluded that the Society's exclusion of Ms. Nixon was rationally connected to the Society's work and was adopted in good faith, but was not reasonably necessary to accomplish the Society's purpose.

[56] On the basis of ***Caldwell*** (and given the difference between s. 41 and the provision considered in ***Brossard***), the dual conclusion of the Tribunal that the exclusion was rationally connected to the Society's work and was in good faith, was sufficient, in my view, for the purposes of s. 41 of the ***Code***.

[57] Further, I would not find that the reviewing judge erred in referring to ***Powley*** in the passages I have not replicated. Although ***Powley*** is not a human rights case, it speaks to the question of community and is useful by analogy.

[58] All of this is to say that, in my view, the reviewing judge was correct in following the guidance of ***Caldwell*** and concluding that a group can prefer a sub-group of those whose interests it was created to serve, given good faith and provided there is a rational connection between the preference and the entity's work, or purpose. Just as the school was not required to establish that it only served practicing Catholics in order to lawfully prefer practicing Catholics in its hiring practices for purposes of the group rights exemption, so here the Society is not required to establish that it only serves women raised and who have lived as

females. And just as the School was not required to show that it never employed non-Catholics, here the Society is not required to show it never provided services to transsexuals.

[59] I conclude that on the reasoning of ***Caldwell***, the Society was not required to establish that its primary purpose was to promote the interests of women who have lived their entire lives as females in order to benefit from s. 41. The Society was entitled to exercise an internal preference in the group served, to prefer to train women who had never been treated as anything but female.

**Other Issues**

[60] In its factum, the Tribunal contends that the reviewing judged erred when he "conducted his own review of the evidence and arrived at his own determination regarding the correct outcome." In support of that submission, it referred to those matters considered by the Tribunal, including evidence before it.

[61] The Society contends the Tribunal lacks standing to make that submission, saying that it has impermissibly strayed beyond the limited role allowed as expressed in ***Northwestern Utilities v. Edmonton (City)***, [1979] 1 S.C.R. 684, 89 D.L.R. (3d) 161 and ***CAIMAW Loc 14 v. Paccar of Canada Ltd.***, [1989] 2 S.C.R. 983, 40 B.C.L.R. (2d) 1.

[62] In response, the Tribunal says that those cases allow it to make submissions it has advanced and that it did not stray into submissions on the merits of the appeal.

[63] The submissions in contention addressed the Tribunal's proposition that the reviewing judge correctly set forth the applicable standard, but erred in holding that the Tribunal was unreasonable in its conclusion on s. 41.

[64] The authorities on this question are conveniently gathered in ***British Columbia Securities Commission v. Pacific International Securities Inc.*** (2002), 2 B.C.L.R. (4th) 114, 2002 BCCA 421. They contemplate a Tribunal speaking to its jurisdiction but not speaking to the merits of the appeal of its decision.

[65] Given the three standards of review and the submersion of the issue of jurisdiction in administrative law, the Tribunal may be allowed to speak to the reasonableness of the decision as was done in ***Paccar***, although in a fashion that points to features of the case rather than the train of reasoning.

[66] I do not consider that the Tribunal overstepped its mark in this case.

[67] Earlier in the decision, I discussed the task of this Court without reference to the new British Columbia ***Administrative Tribunals Act***, S.B.C. 2004, c. 45. The Attorney General contended that the standard of review set out in that ***Act*** applies to this appeal, although it was not in force at the time the order appealed was made.

[68] Section 59 of the ***Administrative Tribunals Act*** requires the court to apply the correctness standard to all questions except findings of fact and the application of common law rules of natural justice and fairness. As to a finding of fact, it states

that a finding of fact may not be set aside "unless there is no evidence to support it or in light of all the evidence, the finding is otherwise unreasonable".

[69] The question we were asked to answer is whether that section applies to this appeal.

[70] I have concluded that the interpretation of s. 41 given by the reviewing judge was correct. On that conclusion, application of the ***Act*** makes no difference, and I have not addressed, therefore, the interesting question of its application to this proceeding.

**Conclusion**

[71] It follows that I would dismiss the appeal.

"The Honourable Madam Justice Saunders"

## ADDENDUM

***Sections of the Human Rights Act as they were in force August 1995 (the date of the events in issue)***

**Section 1(b)**

"discrimination" includes the conduct described in section 3(1)(a), 4(a) or (b), 5(1)(a), 6, 8(1)(a) or (2) or 9(a) or (b)

**Section 3(1)(a) (later s. 8(1)(a))**

**3.**(1) No person, without a bona fide and reasonable justification, shall

(a) deny to a person or class of persons any accommodation, service or facility customarily available to the public, or

(b) discriminate against a person or class of persons with respect to any accommodation, service or facility customarily available to the public,

because of the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex or sexual orientation of that person or class of persons.

**Section 8 (1)(a) (later s. 13(1)(a))**

**8.**(1) No person shall

(a) refuse to employ or refuse to continue to employ a person, or

(b) discriminate against a person with respect to employment or any term or condition of employment,

because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.

**Section 19 (later s. 41)**

> **19.**(1) Where 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 group shall not be considered as contravening this Act because it is granting a preference to members of the identifiable group or class of persons.

**Section 22 at the time of *Caldwell* (later s. 19 and now s. 41)**

> **22.** Where 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 interest and welfare of an identifiable group or class of persons characterized by a common race, religion, age, sex, marital status, political belief, colour, ancestry or place of origin, that organization or group shall not be considered as contravening this Act because it is granting a preference to members of the identifiable group or class of persons.

**Section 3 of the *Code* Subsequently Enacted**

> **3** The purposes of this Code are as follows:
>
> (a) to foster a society in British Columbia in which there are no impediments to full and free participation in the economic, social, political and cultural life of British Columbia;
>
> (b) to promote a climate of understanding and mutual respect where all are equal in dignity and rights;
>
> (c) to prevent discrimination prohibited by this Code;
>
> (d) to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by this Code;
>
> (e) to provide a means of redress for those persons who are discriminated against contrary to this Code.

**Reasons for Judgment of the Honourable Chief Justice Finch:**

[72] I have had the advantage of reading in draft form the reasons of Madam Justice Saunders. I agree with her that the appeal should be dismissed, but wish to state in a more abbreviated form the reasons that, in my opinion, lead to that conclusion.

[73] Discrimination is defined in s. 1(b) of the ***Human Rights Act*** to include conduct that offends ss. 8(1)(a) and 13(1)(a). The Human Rights Tribunal found that there was a denial of "service" within the meaning of s. 8(1)(a). In my opinion that was a correct conclusion of law. The learned chambers judge erred in holding that breach of s. 8(1)(a) was not discrimination.

[74] It is therefore not necessary to address the more difficult issue of whether there was a breach of s. 13(1)(a). Whether volunteer work qualifies as employment and hence whether denial of a volunteer position equates with denial of employment, is a question better left for another case.

[75] It is similarly unnecessary to decide whether the analysis in ***Law v. Canada (Minister of Employment and Immigration)***, [1999] 1 S.C.R. 497 applies in deciding if discrimination has been established; and it also unnecessary to decide whether the Court's decision in ***Reaney*** applies in these circumstances, or whether it was decided *per incuriam*.

[76] I agree with my colleagues that the conduct of the respondent Society is exempted from a finding of discrimination by s. 41 of the ***Code***, essentially for the

reasons of the learned chambers judge (see especially at paras. 113 to 120 of his reasons).

[77] The respondent Society was entitled to give preference to women who are not post-operative transsexuals, because there is a rational connection between the preference and the respondent's work or purpose.

[78] For these reasons I too would dismiss the appeal.

"The Honourable Chief Justice Finch"

**Reasons for Judgment of the Honourable Madam Justice Southin:**

[79] I have had the privilege of reading in draft the reasons for judgment of my colleague, Saunders J.A., with whose disposition of this appeal I agree.

[80] I add words of my own only because of the importance of the case to the appellant in particular and, perhaps, to transsexuals in general.

[81] Sex reassignment has only been medically possible for the last 35 years or so. The earliest work – it was first published in 1974 – I know of on the emotional implications is *Conundrum* by Jan Morris, an author of great distinction. Indeed, as James Morris, it was he who first sent forth to the world of 1953 the news that Hillary and Tensing had conquered Mt. Everest.

[82] But it takes many years for society in general to adjust itself to radical developments in the human condition.

[83] To force people, especially those in an organization such as the respondent, which has its own radical agenda, to associate with those who for some reason deeply offend their own avowed principles, can lead not to acceptance or at least toleration, but, if not to hatred, at least to animosity.

[84] Section 41 of the ***Human Rights Code*** is intended, in my opinion, to give, in cases within it, the right not to associate. Implicit, in my opinion, is that freedom of association includes freedom from association.

"The Honourable Madam Justice Southin"