**Vancouver Rape Relief and Women's Shelter Legal Argument Part I**

presented by Christine Boyle, January 24-26, 2001

This case is about fundamental values - privacy, dignity, and freedom of association. First it is about whether the respondent has harmed the complainant's dignity in a discriminatory way. Is the complainant's interest in volunteering with a particular group an interest that is protected by the Code at all? I will be addressing the issue of whether there has been a prima facie infringement of the Code, that is the issues of discrimination, service and employment. Secondly, it is about the legitimate privacy interests of the women who use the services of the RR, with respect to BFOR. Lastly it is about the freedom to associate in groups, with respect to s.41. Ms Gray will be addressing these defences.

Discrimination.

It is common ground that the complainant must show a prima facie case of discrimination, but there is an issue of what discrimination means in the human rights context. RR takes the position at para 55 that the human rights and Charter meanings of discrimination should be consistent. When one applies the meaning of discrimination from cases such as Law and Lovelace, which include the third, correspondence, factor, there is no discrimination here. The DCC says this is wrong. The Complainant says that the Law case has not rewritten the test for discrimination in human rights law.

It is important to RR, as an equality-seeking group, to make the argument that it has not discriminated against the complainant, rather than be forced prematurely into a justification argument, so I would like to address this issue of the meaning of discrimination first.

My overall argument will be that while Law elaborates the concept of discrimination in a way that has not yet been analysed in the human rights context, Law does not rewrite that concept. Let me start with the point from para. 55, that it is a familiar point that human rights law and Charter equality law are mutually influential. Thus both the C and the DCC adopt the Andrews meaning of discrimination in their arguments.

In the argument of the C, prima facie case, p. 4, she says that not all decisions which chose between people are discriminatory and notes that human rights tribunals have adopted the test from Andrews, which is quoted. The DCC adopts this argument. And we agree.

Law heavily relies on Andrews, so what I would like to do is refer you to what it has to say about Andrews.

Tab 7 of the R's book of authorities.

Para 3 - Andrews says that it is inappropriate to confine analysis to a fixed and limited formula - rather there should be a purposive and contextual approach.

Para 23 - Andrews adopted an approach which focuses upon 3 stages, including the 3rd, discriminatory purpose or effect.

Para. 26 - quote from Andrews. This is similar to the quote used by the C and the DCC with one important difference. This quote goes on to include the last sentence - read last sentence.

In essence our position is that this is one of those rare cases in human rights law where a distinction is not discrimination, and that the R should not be precluded from making that argument by presenting it as a departure from Andrews rather than an application of Andrews.

Go on to read para. 27.

Again in essence our position is based on a substantive rather than a formal approach.

Para. 42. The court goes on to quote other cases about the purpose of s.15- ending at para 51 first two sentences and last sentence.

Again we will be arguing that to recognize differences in life experience between persons with a life long experience of the subordination of women and persons without that experience, in the rare context where life experience matters, is not inconsistent with human dignity.

For an example of recognition of how the context can make a gendered distinction non-discriminatory, go back to para. 45.

Para.54.

Para 57.

Para. 84

It is my submission that the Andrews decision, as elaborated but not changed by Law, clearly shows that distinction per se is not always discrimination. Indeed it is trite that the absence of distinction can sometimes be discrimination. As stated in Andrews, SCR, at 164. - identical treatment may frequently produce serious

inequality. That would still be the case even if Law had never been decided. Law, however, continues that principle, which is fundamental to the Canadian jurisprudence on substantive rather than formal equality.

It is my submission that in essence what the C and the DCC are arguing is that rather than following the substantive approach adopted in Andrews and unanimously supported in recent cases, that human rights law should reflect a formal equality approach while section 15 reflects a substantive equality approach to discrimination. There are a number of arguments why I would urge you to adopt a consistent approach.

1. There are of course differences between human rights and Charter law, although I say the trend, exemplified by Meiorin, is toward consistency. See Tab 2, para. 48 and para 50. Hence a unified approach to direct and adverse effect discrimination was adopted to diminish the difference between Charter and human rights law. The obvious differences are that the Code covers a limited range of situations, such as services and employment, while the Charter applies to the whole potential range of legislation and government action. In a section 1 argument under the Charter, the legislature is entitled to deference, while RR is not. Authority for this is Dickason v. University of Alberta [ 1992] 2 S.C.R. 1103, at 1123. Nevertheless, Dickason goes on to say, at 1124, that Charter cases may assist with the Alberta equivalent of a BFOR (s.11.1 - reasonable and justified). The SCC took the position that such a defence is similar to though not identical to s.1 of the Charter. However, the basic purpose of the non-discrimination norms in both human rights law and s.15 are the same. Since failure to make a distinction can be discrimination, a formal equality approach in human rights law risks creating rather than combatting inequality.

To point to the deference difference between the Charter and human rights law does not justify adopting a different meaning of discrimination. What deference means is that a s.1 defence is easier for the state than the BFOR defence is for RR. This suggests to me that if anything it should be harder to get over the discrimination hurdle in human rights cases than in Charter cases.

2. Nevertheless, when one looks at human rights cases, it appears a formal meaning of discrimination is used. For instance, if a complainant shows race to be factor in denial of employment, then that is a prima facie case, as it should be in most situations. Why is this? It partly flows from the fairly simple and limited situations covered by the Code, and partly because in most cases, taking into consideration any of the factors covered by the grounds of discrimination would be obviously improper. It does not require an elaborate analysis to find that rejecting a person for a lawyer's job on the basis of sex is discrimination. However, to turn what is usual into what is invariably required is to ignore the view of the SCC in Andrews and in recent cases that analysis of discrimination

must be contextual and purposive. In my submission, what we have here is the rare case explicitly discussed in Andrews.

Why is it rare rather than the usual case? Here I wish to turn to para. 76 of RR argument. Here the issue is not the usual case where gender is simply irrelevant. All parties agree that gender is legitimately relevant, as men can be excluded from RR. We say this conclusion flows from discrimination analysis rather than the BFOR defence. Using the BFOR concept, a defence to discrimination rather than a denial of discrimination, would result in an analysis of men and women as separate but unequal. The DCC has not explained why a separate but unequal system is acceptable for men and women but not for other distinctions which can be drawn on the gender continuum. In any event where gender can legitimately be a factor it cannot automatically be discrimination where it is a factor. Hence the need for the, albeit rare, more nuanced analysis of discrimination in this case. As well, it is common ground that sex and gender falls along a continuum and is not binary, thus raising the question of which distinctions on that continuum are non-discriminatory.

At first glance it looks as if this argument was made and rejected in O'Neill, quoted in para. 12 of the DCC's argument. Indeed age discrimination may provide some parallel to sex since age lies on a continuum too. Some age distinctions may well correspond to needs, capacities and circumstances, and thus be non-discriminatory. The Tribunal here did indeed distinguish between human rights and Charter cases, declining to follow the Federal Court of Appeal in Law. Two points can be made about O'Neill. First, it was not one of the rare cases where a more nuanced analysis is required in human rights law. Mrs. O'Neill was not eligible for survivor benefits because her husband was not 55 when he died. However, in my submission there was no realistic argument that this distinction was not discrimination in the particular context. The Pension Benefit Standard Act (para. 19) would require a pre-retirement survivor benefit, and such a benefit had been introduced (para. 3) in anticipation. Mr. O'Neill died two days before its implementation. The result would have been the same whatever the approach to discrimination. More significantly, the case was decided before the SCC decision in Law, which makes clear that its approach is grounded in the Andrews substantive equality approach. Given that, in my submission, O'Neill is not helpful in a case whether the approach to discrimination does matter and we now have the benefit of recent SCC elucidation and elaboration of Andrews.

3. There is another reason why a formal equality approach to discrimination is inappropriate here. It does not work well in this complex case. Ms Nixon was denied the opportunity to volunteer at RR. Ms F asserts that she is a woman. There is no dispute that her birth certificate says she is female. I have already

submitted that Justice Davies made clear in the judicial review that he was relying on an invitation of RR to assume the facts most favourable to the C, so there was no argument or determination of this issue in that case. The issue of Ms. Nixon's womanhood is very complex. We have heard no legal arguments on the legal definition of what a woman is as part of the C's case. We have not even heard evidence or argument about whether being a woman is a matter of sex or gender or both. We know from Dr. Watson that there is brain sex and anatomical sex. Dr. Pacey's uncontradicted medical evidence is on p. 64, line 13,etc. RR has a political understanding which it would like the freedom to state in the market-place of ideas.

In my submission, there is a significant and complex public policy and legal question of what it means to be a woman in a world where gender lies on a multi-dimensional continuum rather than being binary. Any answer would require significant argument, preferably in a political context where there is less concern about burdening small women's shelters with the cost of finding and producing extensive evidence, about the broad implications of the assertion that Ms. Nixon is a woman, period. It is simply not realistic to explore the implications for sports, medical and social science research, employment equity programs, prisons, all the many variations of women's programmes, some of which may be well suited to inclusion of transgendered women and some not. We have not heard what the appropriate legal test for what a woman is, or whether this can vary in different contexts - is it self-identification, medical identification, some sort of legal documentation? A birth certificate in itself is not an obviously correct test, since the legislature might easily intend to save post-operative individuals the embarrassment of inconsistent documentation, without intending to indicate the persons with female on the birth certificates are to be treated as biological women for all purposes. I mention the difficulties while making it clear that RR is not asking the Trib to take a position on this - para. 50. Neither the evidence nor the legal argument that would produce the proper foundation for such a legal conclusion, which seems to go far beyond the scope of a human rights complaint.

Against this background, the complaint can be characterized in different ways. RR failed in its argument at the judicial review that sex discrimination addressed the inequalities of the relationship between men and women. That approach had the advantage of making clear what the comparator group was - a woman could complain, e.g. that she was paid less than a man. Here it is not at all clear what the comparator group is. In some respects, Ms Nixon was treated in the same way as a man - her gender identity was not a factor - in fact she complains of this. She was treated in the same way as the majority of people in BC - men, pro-life women, etc, but complains of this. One can say she complains of her particular gender identity not being a factor in distinguishing her from other British

Columbians, as easily as one can say she complains of her gender identity being a factor in distinguishing her from women who can volunteer at RR. Is she complaining of her history of being treated as a man being a factor in the decision, or is she complaining about not receiving positive validation of her gender in one of the few places where gender matters. A formal equality approach does not dictate the proper characterization. It can work well where the ground of discrimination should properly be irrelevant. But here the C is relying on the gender as a relevant factor in order to make a claim. The C relies on a category (women) being sufficiently stable and identifiable to make sense of a claim for inclusion and to justify the exclusion of men. At the same time, the C' s case is based in part on a strategy of destabilization of the distinction between men and women, on the basis that it can change through self-identification and surgery. In our submission, a formal equality approach is not capable of addressing the complex issue of how to characterize this complaint. The substantive equality approach developed in Andrews and continued in Law and Lovelace is appropriate. Lovelace is especially useful as a recent ca se dealing with different experiences of aboriginality.

4. There is a further reason for not applying the usual approach to this rare case. I would like to refer to the Lovelace discussion of affirmative action I believe copies of Lovelace were made available earlier in the hearing.

Starting at para. 93 there is a discussion of the relationship between s.15 (1) and (2). In my submission the equivalent to s.15(2) is s.42 of the Code. RR is not putting forward a s.42 defence. But if it did, this passage would be applicable. The court in para. 99 discusses the Ontario CA case of Roberts, dealing with the Ont equivalent of s.42., and comes to this conclusion in para.100 - 104. Here I suggest that the court is supporting the expression of concern that affirmative action might be seen as a source of discrimination. The approach advocated by the C and DCC would require it to be easy to show discrimination, thus increasing the burden of justifying affirmative action, and leaving affirmative action with the stigma of discrimination. In my submission this support of formal equality with the resulting risk that affirmative action be attacked as reverse discrimination is inconsistent with the purposes of the Code, in particular s3 (d) - to eliminate persistent patterns of inequality. While not directly in issue here, such an approach would undermine programs for achieving equality for women and other disadvantaged groups. Lovelace makes it clear that the equivalent to s.15(2) in human rights legislation can both co-exist as supporting a substantive equality analysis and as a possible defence in its own right - para. 108.

5. A further reason is a more theoretical one. The idea that a distinction between trans women and non-trans women is discrimination without further analysis manifests itself in an approach that runs throughout both the case for the C and

the DCC. Here I turn to para. 85. There is a significant contrast between the position of the parties on the parallels that can be drawn between different forms of disadvantage.

The DCC takes the position that to recognize difference is to replicate the separate but equal doctrine. The R disagrees, RR says that the respectful recognition of difference is at the heart of substantive equality. Levelling out differences between the experience of homophobia, racialization and transgender does not serve the purposes of mutual respect, etc (check s.3) - it makes diversity invisible.

Contrast complainant - e.g. drew analogy to lesbian fear of disclosing information about themselves (p. 94 and p.102), p. 105 - explicit parallels. There is conflicting evidence about whether Ms Nixon made reference to the coloured women in the group, but she says herself that she referred to the fact that there were women of different races and different sexual orientations (p. 100). I think it is fair to say that this parallelism is a significant feature of the complainant's case. That is that RR cannot include women of colour and exclude her, that there is a parallel to the experience of lesbians, and that her experience is the same as a woman who is mistaken for a man. At the same time, she finds any parallelism to gay men or men in general deeply offensive.

On the other hand, RR's position is that each form of discrimination deserves its own distinctive and respectful analysis. Its view is that there are certain conditions that one is born into that significantly affect the course of one's life. If one is born as a poor woman of colour, the decks are stacked against one from the beginning. Turn to the evidence of Fatima Jaffer on p. 23, starting at line 32. This expresses a point of view that finds collapsing racism and discrimination on the basis of gender identity offensive, whatever the words used to express that idea.

My point here is that there should be room in the analysis of discrimination to focus on context and diversity, in those rare cases where this is important. For example, both lesbians and transgendered persons may fear the reaction of others to information about, respectively, their sexual orientation or history of dissonance between biological sex and gender identity, but transgendered people may face distinctive issues relating to difficulties of employment if one wishes to keep secret part of one's employment history. Ms Nixon testified (p.58) about her difficulties in getting a job as a pilot after her surgery. She used the name Kim, so that she would get in the door, but then it was always difficult because her history of flying was appearing as a male, so that was reflected in her references. So the two worlds would sort of collide. (If policy document in refer to passage re keeping of records.)

Making diversity carries the risk that assumptions will be made that people are the same. Ms Nixon's evidence, although not entirely clear, on p. 682 was, when asked if she had suffered any restriction on her ability to obtain training as a pilot, when living outwardly as a male, that "women have the same opportunities. I was persistent and dedicated."

With respect to this particular complaint, there should be room for argument about the factors which the SCC noted in Weatherall as being relevant to a gendered distinction - para. 85 - the larger historical, biological, and sociological context. Are there differences in the historical, biological and sociological context for someone in the situation of Ms Nixon and someone in the situation of Ms Gilhooly?

In my submission there are clear biological differences between Ms. Nixon, and Ms Gilhooly, who testified that she is a woman and has been treated as a girl from the time she was born. She does not have a sense of herself as transgendered which means, according to Dr.Ross means those people who have an incongruity between sex at birth and gender identity. It seems clear that there are significant biological dissimilarities between the comparator groups. To the extent that resistence to oppression may relate to biological issues, such as childbirth, medical research priorities, medical treatment priorities, that difference matters.

The historical context seems very different too. As she was growing up. Ms Nixon did not belong to a group with a history of discrimination suffered by people assigned to the female sex at birth. In terms of Canadian legal history, I am thinking of the history of the vote, to the extent it was denied on the basis of sex, the meaning of person, custody and property rights, divorce, abortion, rape. People assigned to the sex male at birth, no matter what their feelings about this, have a very different legal history than people in the situation of Ms. Gilhooly. It is not within the power of the medical profession, or even of legislation, to change that history. To the extent that an oppressed group may want to draw on its history for inspiration and political energy, that history matters.

In terms of sociology, there is significant evidence of different contexts. This is most evident when one looks at the material on the experience of transgendered people. Dr. Ross stressed the importance of including the voices of transgendered people in her criticism of Dr. Raymond. Similarly, the DCC has referred to material from the Human Rights Commission which is largely based on discussions with transgendered people. The Commission did not consult with non-transgendered women, and not with women in the situation of Ms. Gilhooly. I think a fair inference is that transgendered people have distinctive experiences of the world around them and that it is worthwhile to listen to those experiences rather than making them invisible by grouping them with non-transgendered men

or women. The very methods of gathering sociological information reflect an assumption of distinctive contexts.

The Andrews/Law/Lovelace allows such a contextual analysis, while the approach of the C and DCC at best merges it with the BFOR defence.

6. Shifting the contextual analysis to the BFOR defence in a case such as this is unfair to the respondent for a number of reasons. First, there is not a natural fit. The correspondence analysis resembles the rational connection test in the BFOR defence, as noted in Lovelace. But it does not easily accommodate RR's argument that it did not harm the C's dignity nor stereotype her, set out in the written argument. As well, there are other elements - bona fides and reasonable necessity, leaving the possibility that a respondent might not be able to establish a defence for what would have been a non-discriminatory, applying Andrews. As well, it puts the respondent in the position of proving non-discrimination, an unfair burden on an equality-seeking group with a legitimate argument that its self-definition is non-discriminatory. Lastly, the BFOR defence itself seems more suited to assessing things like how fast fire-fighters should have to run rather than an issue of how important life experience is for resistance to oppression and for service to the victims of gender-based crimes.

7. Lastly, the DCC takes the position that the Code bars the tribunal from taking a substantive equality approach if a denial of service or a refusal to employ can be shown. However, s.1 says that such discrimination includes such denial or refusal. There are two possible approaches. Either such denial or refusal is contrary to the Code where it is discrimination - the approach we suggest in order to avoid the harms of a formal equality approach in those rare cases where it matters, or that denial or refusal is discrimination per se. This latter view seems inconsistent with the adoption of Andrews by both other parties as containing the definition of discrimination. As well, denial or refusal would not cover the manner of denial or refusal (if the complaint relates to appearance based inquiry or style of communication - addressed in paras. 77-81). I simply note that if denial or refusal is deemed to be discrimination per se, then this points to a narrower reading of service and employment than would be the case if an Andrews 3 stage test were used.

If that is the view that you take, then we will rely on our arguments with respect to service and employment.

I would like to turn now to those arguments, starting at para. 114. In any event the C was not denied employment or refused a service or facility.

Employment.

It is the position of RR that unpaid volunteer work is not employment either at all or in this case. The C relies on Mamela and a liberal interpretation of the Code. The DCC takes a different position in arguing that the relationship would over time evolve into an employment relationship.

It is trite that the concept of employment is a chameleon one - changing with the legal context. We have already seen in argument about damages that the SCC in Wallace refers to payment as part of the unique employment relationship, a relationship that was unique because of the power imbalance inherent in it. (see para. 93) So in the context of wrongful dismissal employment means paid employment.

There seems to be little case law in the human rights context. Thambirajah is the closest case. I think it is a fair characterization that the focus was on the level of control rather than on payment, but the issue was not argued. It was argued in Mamela but the ruling, using the control analysis, was that the opportunity to volunteer was not employment in that case.

So what we have is the SCC stressing the unique nature and power imbalance in Wallace and several human rights cases preferring a control analysis.

In my submission, set out in para. 120, there are good reasons to confine the protection of the Code to paid employment. First, in contrast to Manitoba, the legislature has not included unpaid volunteer work. This wording matters - see Gould, Tab 6, para. 5.

Second, anti-discrimination law is fundamentally about the protection of human dignity, and denial of the opportunity to volunteer at one place rather than another does not implicate the dignity concerns associated with the opportunity to earn a living. Ms Nixon testified on p. 90, line 36, that she was aware that it was BWSS policy that people should wait for a year for the benefit of people receiving services, but she did not want to twiddle her thumbs for a year. People may wish to volunteer for very worthy reasons, or very trivial ones, or a mixture of both, while paid employment is of much more uniform significance. I think it is possible to take judicial notice of the fact, for the very reason of lack of payment, there are many opportunities to volunteer in the world.

Even if the test is the level of control rather than payment, RR can be distinguished from the Girl Guides in the high level of autonomy and mutual respect enjoyed by the peers who volunteer there.

With respect to Ms. Rice's argument, the evidence is clear that denial of the opportunity to train as a volunteer is not denial of ultimate employment. Staff members, such as Ms Lakeman have been hired without being volunteers and

volunteering does not necessarily lead to employment - para. 12. RR is an organisation of peers not the kind of hierarchy identified in Thambirajah and Mamela. In any event, Ms Nixon testified at p. 21 that she did not wish to seek either employment or assessment for employment at RR - lines 23-30.

Service

Turning to para. 125, RR submits that the C was not denied a service or facility. In essence she was denied the opportunity to train to provide a service not to receive one. I should make it clear that the R is not relying on an argument based on the phrase "customarily available to the public". If there was a service or facility to trainees we do not take issue with the proposition that it was a public one. The C argues that the training program was a service or facility because it was of benefit to Ms Nixon and it is her perspective that determines the issue. The DCC sees the C as being denied the opportunity to obtain skills, experience, self-worth, and assessment.

RR says that what was denied was not a service as a matter of law. This is not a matter of personal perspective. Otherwise a selfish person could complain of denial of service where an altruistic one would not.

RR does not base its argument on any denial that association with it is a benefit. Indeed one of the reasons why its freedom of association is important is that that association is of mutual benefit to everyone involved. But surely helping others is always of benefit to the helper. A selfish motive or even simple recognition that my goodness to others benefits me does not turn doing good into a service to myself. In a sense I suppose beggars are doing us a service by taking our money but it would not be a natural use of the term or give us an entitlement to force help on others.

In any event Ms. Nixon's testimony was that she was seeking to help others, not force others to provide a service to her.

See p. 95, line 16.

P. 102, line 20.

Clear that wishing to provide a service, not saying she wanted to get something for herself.

RR submits that in any event this case is very like Gould v. Yukon Order of Pioneers, so I would like to turn to that now, at Tab 6.

Ms Gould was denied membership in the Yukon Order of Pioneers, because she was female. The Order was restricted to males who satisfied the 20 year

residency requirement. Ms. Gould complained about discrimination with respect to services, goods or facilities.

Para. 2 of majority judgment - key issue is whether her exclusion from membership in the Order is discrimination with respect to service, etc.

We say that membership in the Yukon Order of Pioneers is similar to being associated with RR in its training for volunteers. The benefits of membership would be similar to the benefits of volunteering, e.g. the sense of self worth argued by the DCC.

The majority started at para. 8 by noting the purposes of the legislation - read para 9 as being helpful to this case. It went on to note as we do, at our para. 131, that membership is dealt with in a limited way elsewhere in the Code.

The bottom line is that Ms Gould was not able to convince the SCC that association with the Yukon Order of Pioneers was a service to her, even though of course it would have benefited her. She saw the benefit as the chance to participate in the production of Yukon history as a pioneer. The intervenor saw the benefit as social recognition and esteem. However one describes it, denial of that benefit was not contrary to the human rights legislation. (The C mischaracterizes our argument as saying that Gould says RR can discriminate (para 66). ) In reaching that decision it is clear the majority took into account the tension between group and individual rights - this tension is relevant to the interpretation of the discrimination provisions in the Code as it is to defences. In determining the scope of the protection from discrimination, one must respect all relevant values protected by both s.3 and the Charter. In other words the broader the meaning of service the narrower the freedom to associate.

In so doing, it is appropriate as demonstrated by the SCC in Gould, to take the nature of the organisation into account. It should be more difficult to find that a small, non-profit, equality-seeking organisation, is offering a service to the people who wish to be associated with it, than it is to find that a commercial organization is offering a service.

Lastly there is the question of whether Mamela is on all fours with this case. We address that on p. 37. This is quite a different case. The Vancouver Lesbian Connection offered a package of services to it's public- access to library and events and membership as an adjunct. In other words the complainant was discriminated against in relation to a package of services - essentially access and association. Here admission to the training programme was not an adjunct to other services, but was a distinctive form of association with RR, linked to the provision of service to others.