

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Vancouver Rape Relief Society*
v. Nixon et al.,
2003 BCSC 1936

Date: 20031219
Docket: L021846
Registry: Vancouver

Between:

Vancouver Rape Relief Society

Petitioner

And

**Kimberley Nixon and
British Columbia Human Rights Tribunal**

Respondents

Before: The Honourable Mr. Justice E.R.A. Edwards

Reasons for Judgment

Counsel for the Petitioner

Gwendoline C. Allison
Christine Boyle

Counsel for Respondent Kimberley
Nixon

barbara findlay, Q.C.

Counsel for Respondent British
Columbia Human Rights Tribunal

Patrick Dickie

Date and Place of Trial/Hearing:

August 18-22, 2003
Vancouver, B.C.

BACKGROUND

[1] The Vancouver Rape Relief Society ("Rape Relief") petitions pursuant to sections 2 and 3 of the **Judicial Review Procedure Act**, R.S.B.C. 1996, c. 241 for an order to quash decision 2002 BCHRT 1 ("the decision") of the British Columbia Human Rights Tribunal ("the Tribunal") dated January 17, 2002, on the following grounds.

1. The Tribunal erred in its interpretation of "undue hardship" by failing to include a threat to the integrity of Rape Relief as a form of undue hardship.
2. The Tribunal erred in holding that Rape Relief did not have a primary purpose of providing services to women in the political sense understood by Rape Relief.
3. The Tribunal erred in awarding damages in the amount of \$7,500.00.
4. The Tribunal erred and acted outside its authority by ignoring all of the evidence before the Tribunal.
5. Such further argument as counsel may advise and this Court may accept.

[2] In the decision, the Tribunal found that Rape Relief had denied the respondent Kimberley Nixon ("Ms. Nixon") both a service and employment in contravention of sections 8 and 13 of the **Human Rights Code**, R.S.B.C., c. 210 (the "**Code**") by discriminating on the basis of sex. The Tribunal made a

mandatory order under s. 37(2) of the **Code** that Rape Relief cease its contravention of the **Code** and refrain from the same or similar contraventions and a discretionary award of \$7,500 to compensate Ms. Nixon "for the injury to her dignity, feelings and self-respect" occasioned by the contraventions.

[3] The circumstances giving rise to Ms. Nixon's complaint are these.

[4] Ms. Nixon was born physically male on September 7, 1957. At age five she realized her male physical attributes did not correspond to her sense of herself as female. She grew up and dressed publicly as a boy but privately dressed and acted as a girl. Through her university education and while she worked as an airplane pilot Ms. Nixon continued to live publicly as a male and privately as a female.

[5] In 1987, Ms. Nixon began attending the Gender Disorder Clinic at Vancouver General Hospital. In 1989, she began living full time as a female. In November 1990, she had sex reassignment surgery. Her birth certificate was subsequently amended to "change the sex designation on the registration of birth" pursuant to s. 27(1) of the **Vital Statistics Act**, R.S.B.C. 1996, c. 479 from male to female. At the time of the Tribunal hearing in 2001, she lived in a heterosexual relationship with a male, co-parenting a child.

[6] In 1992 and 1993, Ms. Nixon experienced physical and emotional abuse by a male. She attended Battered Women's Support Services ("BWSS") in 1993 where she received one to one counselling for 8 months followed by participation in group peer counselling for an extended period.

[7] As a result of this experience, Ms. Nixon realized the value of this service and wanted to give something back to the women who supported her. BWSS had a policy of not permitting former clients from volunteering for a period after they had been clients.

[8] Ms. Nixon responded to a Rape Relief advertisement for volunteers who wished to train as peer counsellors for female victims of male violence. On August 22, 1995, she was successfully pre-screened to ensure she did not disagree with Rape Relief's collective political beliefs as a feminist, anti-racist, pro-choice and pro-lesbian organization. These beliefs were summarized in evidence before the Tribunal by Danielle Cormier ("Ms. Cormier") as follows:

1. Violence is never a woman's fault,
2. Women have the right to choose to have an abortion,
3. Women have a right to choose who their sexual partners are, and

4. Volunteers agree to work on an on-going basis on their existing prejudices, including racism.

[9] Ms. Nixon accepted these beliefs and was invited to attend the next training session on August 29, 1995. When she attended, Ms. Cormier, one of Rape Relief's facilitators, immediately identified Ms. Nixon as someone who had not always lived as a girl or woman, based solely on her appearance. Ms. Nixon confirmed this was true when Ms. Cormier spoke to Ms. Nixon in private. Ms. Cormier asked Ms. Nixon to leave the training group.

[10] At para. 31 of the decision, the Tribunal found it was not disputed that at the earliest opportunity in the training session Ms. Cormier advised Ms. Nixon 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" and that "men were not allowed in the training group".

[11] Ms. Nixon left the training session on August 29, 1995, never to return, even after the Tribunal ruled in her favour 77 months later.

[12] The next day she filed a complaint against Rape Relief alleging it had violated s. 8 of the *Human Rights Act*, S.B.C. 1984 c. 22, ("the *Act*") the equivalent of s. 13 of the *Code*. On March 6, 1996, the complaint was amended to add an

allegation that Rape Relief had contravened s. 3 of the **Act**, the equivalent of s. 8 of the **Code**.

[13] Following her rejection as a volunteer by Rape Relief, Ms. Nixon returned to the support groups at BWSS for a further six months. In October of 1996, she began six months of training as a volunteer with BWSS which she completed.

Eleanor Friedman of BWSS told the Tribunal Ms. Nixon was "superior" to other trainees on the BWSS crisis line where she was extremely well-prepared and calm.

[14] The Tribunal found Ms. Nixon left BWSS in 1997 during a controversy over the role of transgendered women in BWSS.

[15] Ms. Nixon's complaint moved with such sedate deliberation that Rape Relief applied in April 2000 for judicial review on the ground it was prejudiced by the 61-month delay in the matter reaching the Tribunal. Rape Relief also alleged that by referring the complaint to the Tribunal for hearing after investigation, the Human Rights Commissioner's delegate had exceeded his jurisdiction by:

(a) misinterpreting the meaning of discrimination on the basis of sex under the **1984 Act** and the **present Code** to include discrimination based on "gender identity (including transsexualism)"; and

(b) similarly misinterpreting the statutory group exemption provisions and the approval of the petitioner's 1977 women only hiring policy.

[16] In *Vancouver Rape Relief Society v. British Columbia (Human Rights Commission) et al.* 2000 BCSC 889, Mr. Justice Davies dismissed the petition for prohibition. Rape Relief does not contest the finding at para. 59 "that the prohibition against discrimination on the basis of "sex" in the ... Code includes a prohibition against discrimination on the basis of transsexualism", which term Davies J. used interchangeably with "gender identity".

[17] The issue raised in ground (b) quoted above was not resolved by Davies J. who concluded it was "well within the jurisdiction of the tribunal" adding at para. 44:

... At issue is the ongoing validity of the 1977 approval made by a predecessor human rights board. At issue also is the relationship of that approval and the general group rights exemption to the complaint of a person who is legally a woman. The extent to which such approval may apply to a transgendered woman is an issue which should be determined by the Tribunal on the basis of a full evidentiary record which can explore the rationale for and the continued validity of the approval in light of the group rights exemption provision under the **present Code**. I see no reason to warrant the court's interference in that process. [emphasis added]

[18] The "approval" referred to was one granted to Rape Relief on April 20, 1977, under the then *British Columbia Human Rights Code*, S.B.C. 1973, c. 119, ("the **1973 Code**") sections 22 and 11(5) which provided as follows:

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 interests and welfare of an identifiable group or class of persons characterized by ... sex ... 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.

11(5)The Commission may approve programmes of government, private organizations or persons designed to promote the welfare of any class of individuals and any approved programme shall be deemed not to be in contravention of any of the provisions of this Act.

[19] Section 19 of the **Act** which replaced the **1973 Code** and s. 41 of the **Code** are similar provisions to s. 22 of the 1973 **Code**. Section 41 provides:

41. If a charitable, philanthropic, educational, fraternal, religious or social organization or corporation that is not operated for profit has 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.

[20] But for the change of the initial word "Where" in the two former enactments to "If" in s. 41 of the **Code**, all three of sections 22 of the **1973 Code**, 19(1) of the **Act** and 41 of the **Code** are nearly identical. Section 22 is misquoted in para. 7

of 2002 BCSC 889. Nothing turns on the change of "Where" to "If".

[21] The approval granted in 1977 was a "group rights exemption" which approved Rape Relief's women only hiring policy. Davies J. found this approval had never been withdrawn.

[22] The meaning and effect of s. 41 is at the heart of the present case. The positions of the parties on this issue, reduced to their essentials, are these.

[23] Rape Relief says that because it is entitled to have a "women only" hiring policy for its provision of peer counselling services, it is entitled to determine who is a woman for purposes of that policy consistent with its collective political beliefs.

[24] Ms. Nixon says that because she is medically and legally a woman she cannot be treated by Rape Relief as a man simply because she was not always anatomically a woman.

[25] A point the parties agree on is that "sex" in s. 41 is not a binary concept limited to "male" and "female" but includes a continuum of personal characteristics which may manifest in individuals. Examples include persons with unambiguous male or female anatomy who identify themselves as

members of the sex not consistent with their anatomy, persons with ambiguous sexual anatomy who identify themselves with one or other sex and persons, like Ms. Nixon, who have been surgically "reassigned" by having their anatomy altered to conform to their self-perceptions or sense of their sexual identity.

[26] A second point the parties agree on is that Rape Relief is entitled to exclude men from its collective, from its clientele and from employment since it is an organization which has as a "primary purpose the promotion of the interests and welfare of an identifiable group of persons characterized by a common ... sex", namely female.

[27] What the parties do not agree upon is what the law provides to resolve their conflicting views of which characteristics identify a person as female for purposes of obtaining the services of, or employment with, Rape Relief.

[28] Rape Relief asserts that unless it can decide who is a woman for these purposes, its integrity as an organization devoted to promoting the interests and welfare of women will be so compromised that its right to be such an organization under s. 41 is rendered meaningless.

[29] Underlying that assertion is Rape Relief's political belief that only persons who have been raised and lived their lives exclusively as girls and women are suitable as peer counsellors for female victims of male sexual violence. This is because, as stated in Rape Relief's written argument, "There is a significant danger that a male counsellor, someone who may still have some male characteristics though dressed as a female or a man disguised as a woman will be disturbing to someone already extremely disturbed or afraid."

[30] A second reason expressed in Rape Relief's written argument for not permitting persons with gender identity disorder (which includes Ms. Nixon) to participate in the "political technique" of consciousness raising through peer counselling of female victims of male sexual violence is that for such persons their "primary issue" is gender identity arising from being treated "according to anatomical gender only". Therefore (the argument asserts) it is not appropriate for these persons to be included in peer counselling with persons who grew up being treated as girls and women, because the two groups do not share a common life experience and clients from the latter group "most often" need "non-confusing" care "from a woman without ambiguity, since the male gender may be experienced as threatening".

[31] Counsel for Rape Relief did not object to my characterization of its political beliefs as an "article of faith" which I believe we both understood to mean matters of received or accepted wisdom akin to religious beliefs, intuitively correct and not requiring logical or scientific demonstration for their validity.

[32] Ms. Nixon's position is that although she was once anatomically male, she has been female since birth and since her sex reassignment surgery she is medically female with an amended birth certificate demonstrating she is legally female as well. In effect, she asserts she is female and always was, notwithstanding her birth with male anatomical characteristics, and must be treated as a female by everyone, including Rape Relief, for all purposes.

EFFECT OF PREVIOUS JUDICIAL REVIEW JUDGMENT

[33] In support of that contention, Ms. Nixon's counsel argued the court is bound by the finding of Davies J. at para. 1 of 2000 BCSC 889 that "Kimberly Nixon is a post-operative male to female transsexual. She is medically and legally a woman". That finding, she argued, is dispositive of this case.

[34] I do not understand Rape Relief to dispute that Ms. Nixon is now and always was "medically" female despite her male anatomy prior to sex reassignment surgery.

[35] Rape Relief's assertion is that Ms. Nixon did not live exclusively as a female her whole life and in that sense has experienced life as a male into adulthood, an experience which according to its political beliefs makes her unsuitable to participate in its peer counselling activities or join its collective.

[36] Rape Relief's position, as I understand it, is that only those who have been unambiguously female from birth anatomically, psychologically and experientially are suitable for participation in Rape Relief's activities, other than fund raising which is open to men.

[37] On the basis of that position, Rape Relief asserts it is not prohibited discrimination, on a proper interpretation of the **Code**, to exclude Ms. Nixon from participation in its peer counsellor training program notwithstanding she is "medically a woman".

[38] The fact that Ms. Nixon is "medically" female does not mean the fact she once had male characteristics is necessarily irrelevant to her participation in activities divided along

male/female lines. Her previous male characteristics could be relevant in some cases. Two examples come to mind. One is participation as a female subject of medical research which sought to distinguish between males and females as defined by chromosomal makeup, such as a study of baldness. A second is competition as a female in certain sports.

[39] Mr. Justice Davies' finding that Ms. Nixon is legally a woman is based on his conclusion at para. 41 of 2000 BCSC 889 that s. 27 of the **Vital Statistics Act** reflects a legislative intention that "post operative transsexuals such as Ms. Nixon would be entitled to the same legal status as other members of their post operative sex."

[40] If that was the legislative intent, and if, as is implicit in the enactment of this provision, legislative action was required to give effect to that intent, then the legislature did not go far enough to give full effect to its intent.

[41] That is because s. 27 merely permits persons who have undergone "trans-sexual surgery" to authenticate their assigned sex by obtaining an amended British Columbia birth certificate. Had Ms. Nixon not been born in British Columbia (or a jurisdiction with legislation equivalent to s. 27) she

would have been unable to present an amended birth certificate.

[42] Ms. Nixon's position, as I understand it, is that she has always been female and was before her surgery and before her birth certificate was amended.

[43] Yet Ms. Nixon's counsel argued Rape Relief could preserve its character as an organization offering services, employment or membership only to women by simply requiring persons it suspected of being male to present birth certificates.

[44] Ms. Nixon's counsel did not assert or acknowledge that Ms. Nixon could not have pursued her claim if she did not have a birth certificate indicating she was female. The presence or absence of a birth certificate indicating Ms. Nixon is female cannot determine the outcome of this case.

[45] Section 27 does not expressly prohibit those persons with other sources of knowledge about transgender individuals, apart from birth registration, from continuing to treat such persons as members of the sex from which they were surgically reassigned.

[46] For example, in this case, the Tribunal found that Ms. Cormier "immediately identified Ms. Nixon as someone who had not always been a woman, based solely on her appearance".

This conclusion Ms. Nixon indignantly characterized as "ignorant" but did not refute, acknowledging to Ms. Cormier that she had lived as a male. Nothing in s. 27 expressly prohibits Rape Relief from taking this information, together with her apparently identifiable male appearance, into account in its dealings with Ms. Nixon.

[47] Had the legislature intended to ensure that persons who had undergone "trans-sexual surgery" were to be treated for all purposes under the law as members of the sex to which they were reassigned, it would have to have reflected that intention by enacting legislation which said so explicitly for all such persons, whether their births were initially registered in British Columbia or some jurisdiction with no equivalent of s. 27 of the *Vital Statistics Act*.

[48] The fact the legislature did not do so may be an oversight or may reflect a legislative concern about the consequences of such an enactment, since it would prohibit legal distinctions based on pre "trans-sexual surgery" characteristics which the legislature may regard as legitimate bases for distinction post surgery in some cases, such as medical research or sports competition as hypothesized above.

[49] In contrast, equivalent New South Wales legislation, the *Transgender (Anti-Discrimination and Other Acts Amendment) Act*

1996, s.32I provides that "a recognized transgender person" upon alteration of birth registration from male to female, is considered to be female for the purposes of the law of New South Wales. Yet this enactment made specific exceptions to the unlawfulness of discrimination against "a transgender person" in regard to participation in sports activities in s. 38P and the administration of superannuation in s. 38Q. The latter presumably reflects actuarial longevity distinctions based on sex.

[50] This highlights the fact that when the British Columbia legislature enacted s. 27 of the *Vital Statistics Act* it did not address all the potential legal consequences of sex reassignment surgery. It merely provided a person who has undergone "trans-sexual surgery" with a means of proving his or her sex post surgery. It did not provide that such proof must be accepted by all persons as determinative of the sex of a person whose birth certificate has been changed.

[51] Specifically, it did not address the issue addressed in the New South Wales legislation, of whether there are situations where distinctions based on the pre "trans-sexual surgery" characteristics of a person ought not to be treated as unlawfully discriminatory.

[52] The two exemptions in sections 38P and 38Q of the New South Wales legislation permit what would otherwise be unlawful discrimination in the areas of sports competition and superannuation. Treatment of a "transgender person" whose birth certificate has been amended as a person of the "opposite sex" from that "with which the transgender person identifies", is specifically exempted from the general prohibition of discriminatory treatment under New South Wales law.

[53] British Columbia legislation by contrast does not specifically address the consequences of "trans-sexual surgery" other than to provide for a change of birth registration. There is no equivalent in British Columbia to s. 32I of the New South Wales legislation.

[54] To reiterate, Rape Relief asserts that its political belief, which I characterize as an "article of faith" that persons who have not lived their lives entirely as girls and women are unsuitable as peer counsellors, is a basis for its exclusion of Ms. Nixon from its training program based on her experience as a male is not discriminatory under the **Code**.

[55] The finding of Davies J. that Ms. Nixon was at the relevant time medically and legally a woman is not determinative of the issues in this case.

[56] Davies J. recognized the extent to which the s. 41 "group rights exemption" Rape Relief enjoys, which Ms. Nixon concedes is available to Rape Relief to permit it to exclude men, may apply to Ms. Nixon was an issue which should be determined by the Tribunal on the basis of a full evidentiary record.

[57] If Davies J. had concluded that Ms. Nixon's current status as "medically and legally a woman", rather than her past as a person who had lived as a man, was the only relevant consideration and therefore determinative of the outcome of her complaint, he need not have ordered the Tribunal hearing to proceed. Davies J. could have determined if discrimination had occurred himself and whether s. 41 applied, just as he determined the meaning of discrimination on the basis of sex in the *Code*.

[58] The Tribunal conducted a 21-day hearing, heard from numerous witnesses including experts, deliberated for 11 months and provided 70 pages of detailed findings of fact and reasons.

[59] Rape Relief's written submission to the court on the present petition asserted the following errors in the Tribunal's decision.

1. The Tribunal Erred in Finding a Prima Facie Case of Discrimination.
2. The Tribunal Erred in its Interpretation of Undue Hardship.
3. The Tribunal Erred Regarding the Petitioner's Primary Purpose.
4. The Tribunal Erred in Awarding \$7,500 in Damages for Injury to Dignity, Feelings and Self-Respect.

STANDARD OF REVIEW

[60] A good deal of argument was addressed to the question of the appropriate standard of review by the court of the Tribunal's findings. Counsel for the Tribunal properly limited his submissions to this issue.

[61] All counsel agreed there are now three standards of judicial review of administrative decisions: "correctness", "reasonableness *simpliciter*" and "patent unreasonableness" in light of the decision in ***Law Society of New Brunswick v. Ryan*** 2003 SCC 20 ("**Ryan**").

[62] All counsel also agreed that the correctness standard applies to questions of law, the reasonableness *simpliciter* standard to questions of mixed law and fact and the patent unreasonableness standard to questions of fact.

[63] The Tribunal held "it is self-evident that [the exclusion of Ms. Nixon from Rape Relief's training program] is *prima-facie* discriminatory" under sections 8 and 13(1) of the **Code**.

[64] It did so after concluding that the constitutional analysis of discrimination under s. 15 of the **Charter** as articulated in **Law v. Canada (Minister of Employment and Immigration)**, [1999] 1 S.C.R. 497 ("**Law**") was not applicable to the analysis of discrimination under the **Code**.

[65] The Tribunal reached that conclusion before the decision of the Court of Appeal in **British Columbia Government and Service Employees' Union v. British Columbia (Public Service Employee Relations Commission)** 2002 BCCA 476 ("**Reaney**").

[66] In **Reaney** at para. 12, the Court of Appeal unanimously held that the analytical framework for determining discrimination under s. 15 of the **Charter**, set out in **Law** ("the **Law** analytical framework") "must govern the determination of whether there has been a violation of s. 13 of the **Human Rights Code**." [emphasis added]

[67] Counsel for Ms. Nixon argued that **Reaney** was not determinative of this issue for two reasons. The first was that the Court of Appeal approached the issue of discrimination under s. 13 of the **Code** in **Oak Bay Marina Ltd.**

v. British Columbia (Human Rights Commission) 2002 BCCA 495 (“*Oak Bay Marina*”) without considering the *Law* analytical frame work or mentioning *Reaney*, which had been decided by another panel of the Court just days before *Oak Bay Marina*.

[68] The second was that the Court of Appeal in *Reaney* was considering a collective agreement provision complementary to a federal statutory parental benefit scheme already upheld by the Ontario Court of Appeal as not contravening s. 15 of the *Charter*. Ms. Nixon’s counsel argued it would have been an “absurd result” if the decision in *Reaney* had not conformed to that Ontario *Charter* ruling, and on that basis *Reaney* is “distinguishable” from the present case. I did not understand this submission. The Court of Appeal in *Reaney* at para. 19 did not find itself bound by the Ontario decision, *Schafer v. Canada (Attorney General)* (1997), 149 D.L.R. (4th) 705 (Ont. C.A.), but followed it as a matter of “judicial comity” in the absence of any intervening change in the law.

[69] Counsel for Ms. Nixon also argued there were several reasons based on distinctions between the *Code* and the *Charter* why the *Law* analytical frame work should not be applied to the determination of discrimination under the *Code*.

[70] Neither the asserted inconsistency between *Reaney* and *Oak Bay Marina*, nor the submission that the *Reaney* was

distinguishable and ought not to be followed has persuaded me that I may disregard the clear statement in **Reaney** at para. 12 that the **Law** analytical framework "must govern" a determination of discrimination under s. 13 of the **Code**.

[71] The Tribunal, without the benefit of the Court of Appeal's decision in **Reaney**, specifically declined to apply the **Law** analytical framework and gave reasons for doing so, concluding that the Supreme Court of Canada in **Law** "did not intend ... to alter or shift away from its twenty years of jurisprudence under human rights legislation". The Tribunal also noted that subsequent Supreme Court of Canada decisions considering human rights legislation do not refer to **Law** or require a violation of human dignity as an independent and necessary element of a *prima facie* case of discrimination under human rights legislation.

[72] Counsel for the Tribunal acknowledged that questions about correct legal tests are questions of law. **Law** sets out an analytical framework or legal test for discrimination. A "correctness" standard of judicial review applies. Reasonable and persuasive as the Tribunal's reasons may be, they cannot be correct in light of **Reaney**. I find the Tribunal was incorrect in failing to apply the **Law** analytical framework.

DISCRIMINATION UNDER THE "LAW" ANALYTICAL FRAMEWORK

[73] The key issue on the issue of discrimination thus narrows to this. Does the application of the **Law** analytical framework as required by the Court of Appeal decision in **Reaney** necessarily lead to the conclusion that the Tribunal erred in finding there was *prima facie* discrimination in Rape Relief's exclusion of Ms. Nixon from its peer counsellor training program?

[74] Having rejected the **Law** analytical framework, the Tribunal proceeded with a "full review" of the evidence which related to Rape Relief's argument that Ms. Nixon's exclusion from its training program was not inconsistent with human dignity, stating at para. 133 of the decision: "I have considered this evidence ... in the event that my conclusions about the elements of a *prima facie* case are wrong. However, I wish to emphasize that it was not necessary to my conclusion that Ms. Nixon has established a *prima facie* case of discrimination. I do not accept Rape Relief's argument that such an exclusion, viewed from the appropriate subjective-objective perspective, does not have a discriminatory impact on Ms. Nixon."

[75] Rape Relief acknowledged that the application of the **Law** analytical framework to contextual facts to determine if there

has been prohibited discrimination raises a question of mixed law and fact. That being so, the standard of review is reasonableness *simpliciter*.

[76] Counsel for the Tribunal submitted the test was reasonableness *simpliciter* on this question of mixed law and fact, but that in regard to the specific factual findings upon which the Tribunal's conclusion was based the standard of review is patent unreasonableness, referring to **Ross v. New Brunswick School District No. 15**, [1996] 1 S.C.R. 825 ("Ross"), para. 29, **Pushpanathan v. Canada (Minister of Citizenship and Immigration)**, [1998] 1 S.C.R. 982 paras. 45-47 and **Oak Bay Marina**, *supra*, para. 20.

[77] None of the three cases referred expressly to the patent unreasonableness standard. All three of these cases were decided before **Ryan** made it clear there are only three standards of judicial review.

[78] In **Ross** the Supreme Court of Canada stated "it is appropriate to exercise a relative degree of deference to the finding of discrimination, in light of the Board's superior expertise in fact finding". [emphasis added]

[79] In **Oak Bay Marina** Newbury J.A. stated "However, the law at present seems clear: a human rights ... Tribunal must be

accorded some deference in its fact-finding role as it relates to determinations of discrimination ... On questions necessitating general legal reasoning and statutory interpretation ... on which such tribunals have no particular expertise, the standard is correctness or something approaching it." [emphasis added]

[80] I am not persuaded that "a relative degree of deference" or "some deference" towards the Tribunal's findings of fact dictates the application of the patent unreasonableness standard of review to findings of fact in the context of the application of the reasonableness *simpliciter* standard to review of the Tribunal's application of the **Law** analytical framework to make its determination on an issue of mixed law and fact, that is, whether there was a *prima facie* case of discrimination.

[81] For the court to apply the patent unreasonableness test to its review of the fact part of this issue of mixed law and fact, and the reasonableness *simpliciter* test to the law part results in a new blended standard of review. Application of such a standard is both conceptually difficult and contrary to the conclusion in **Ryan** that a plethora of nuanced standards of review between correctness and patent unreasonableness is to be avoided. It is difficult to conceive how the Tribunal's

findings of fact on this issue of mixed fact and law could be found by the reviewing court to be unreasonable, but not patently so, and yet its ultimate conclusion, based on these unreasonable findings of fact nevertheless found to be reasonable applying the reasonableness *simpliciter* standard.

[82] I find reasonableness *simpliciter* is the appropriate standard of judicial review of the Tribunal's application of the **Law** analytical framework, including the "appropriate subjective-objective perspective" respecting the impact of Rape Relief's exclusion of Ms. Nixon's from its peer counsellor training program on "human dignity".

[83] I reach that conclusion mindful of recent comments in ***Toronto (City of) v. Canadian Union of Public Employees, Local 79*** 2003 SCC 63 concerning the "epistemological confusion" over of standards of review developed over the last 25 years by the Supreme Court of Canada. In that case, LeBel J. for two of nine judges concurring in the result, noted at para. 65 that the distinction between patent unreasonableness and reasonableness *simpliciter* "remains a nebulous one" and at para. 67 that "... certain fundamental legal questions - for instance, constitutional and human rights questions and those involving civil liberties ... - typically fall to be decided on a correctness standard."

[84] Rape Relief characterizes itself as an equality seeking organization which promotes the equality of women by inculcating its political beliefs through peer counselling of female victims of male violence. Ms. Nixon and the Tribunal explicitly accept Rape Relief's asserted belief in its right to exclude men from its premises and its peer counselling program because Rape Relief promotes the interests and welfare of women as an "identifiable group" pursuant to s. 41 of the *Code*.

[85] As an organization entitled to exclude persons based on sex, Rape Relief asserts its determination of where on the sex continuum its line of exclusion is to be drawn based on those persons' sexual characteristics cannot be discrimination contrary to the *Code*.

[86] Rape Relief's written argument asserted that applying the "purposive contextual analysis required by *Law*" could lead to only one reasonable conclusion, that no *prima facie* case of discrimination was established on the facts of its exclusion of Ms. Nixon.

[87] That submission is based on the proposition that if Rape Relief's exclusion of males is not *prima facie* discriminatory and sex is not a binary concept but a continuum, then exclusion of male to female transsexuals can be no more

discriminatory than exclusion of males, since both males and male to female transsexuals represent points on the continuum distinct from persons who have experienced their whole lives as females.

[88] Implicit in this submission are the propositions that "women", defined as those persons who have lived their whole lives as females, constitute an "identifiable group" and that Ms. Nixon can be identified as a person who is not part of that group.

[89] Ms. Cormier so identified Ms. Nixon based on her appearance. Ms. Nixon so identified herself, indignantly, when questioned by Ms. Cormier. Ms. Nixon could have been so identified by other means, such as questioning her family and acquaintances.

[90] In short, Rape Relief had various means, none of which were illegal, to identify Ms. Nixon as a person who was not a member of its self-defined "identifiable group" of women. Rape Relief therefore had a basis for excluding Ms. Nixon from that group since her sexual characteristics placed her on the continuum of sexual characteristics outside those of the members of that "identifiable group".

[91] As noted at paras. 47-53 above, there is no explicit statutory provision prohibiting Rape Relief from considering Ms. Nixon's pre "trans-sexual surgery" characteristics in identifying its identifiable group or those outside that group.

[92] Evidence accepted by the Tribunal showed Rape Relief regarded eligibility for membership in its "collective" as a criterion for participation in its peer counsellor training program which Ms. Nixon sought to enter, and that prior to her application Rape Relief had no policy regarding eligibility of persons who had undergone male to female "trans sexual surgery" to participate in that program. Nevertheless, the Tribunal accepted that lack of such an established policy did not preclude Rape Relief from asserting its exclusion of Ms. Nixon was a *bona fide* reflection of its collective political beliefs.

[93] In this respect Rape Relief is in the same position as any other non-profit organization under s. 41 of the **Code**, making the inevitably fine distinctions necessary to determine which persons are within an "identifiable group" defined by race, religion, ancestry, colour and so on. What distinguishes this case is the fact that "sex" has been conventionally viewed as a binary concept but is no longer,

whereas race, religion, ancestry and certainly colour have subgroups, sects, combinations and hues which are long established or more or less obvious.

[94] The difficult question of how to determine membership in an "identifiable group", the identifying characteristics of which were not well-established, was recently addressed in *R. v. Powley* 2003 SCC 43 ("**Powley**") in which the Supreme Court of Canada determined how membership in an "identifiable group", a local Métis community, was to be established.

[95] In *Powley*, the right claimed was the right to hunt available to members of the local Sault Ste. Marie Métis community. Here the right claimed is the right to participate in Rape Relief's peer counsellor training program. It is a service or employment offered to those eligible for membership in the Rape Relief collective.

[96] The Court in *Powley* adopted a three part test for determining who was a member of the Sault Ste. Marie Métis community, stating at para. 49 the Métis identity of a claimant "should be determined on proof of self-identification, ancestral connection, and community acceptance."

[97] In this case with respect to the first criterion, Rape Relief acknowledges Ms. Nixon self-identifies as a female, but the evidence shows she also identified herself to Ms. Cormier as someone who had not always lived exclusively as a female.

[98] "Ancestral connection" is an objective criterion apparently including genetic characteristics and life experience as a member of a group identifiable by those characteristics. At para. 32 of *Powley*, the Court noted "the claimant must present evidence of an ancestral connection to a historic Métis community. This objective requirement ensures that [claimants] have a real link to the historic community whose practices ground the right being claimed. We would not require a minimum "blood quantum", but we would require some proof that the claimant's ancestors belonged to the historic Métis community by birth, adoption, or other means."

[99] The Court rejected "blood" or genetics as the sole basis for meeting the ancestral connection criterion, by acknowledging ancestral adoption or "other means", but left undecided what might be an alternative objective requirement. If genetic characteristics are a legitimate criterion which must be objectively proved, it would seem that absence of pre transsexual surgery male characteristics is at least arguably

an objective basis for determining membership in an "identifiable group" of women.

[100] The third criterion, "community acceptance", clearly refers not to acceptance by the wider Métis population (however defined) but by the specific Métis community, membership in which confers the right claimed.

[101] The analogy would be acceptance of Ms. Nixon by Rape Relief, as either a member of the collective or as a person eligible for participation in its peer counsellor training program.

[102] At para. 33 of *Powley*, the Court described this criterion as follows:

Third, the claimant must demonstrate that he or she is accepted by the modern community whose continuity with the historic community provides the legal foundation for the right being claimed. Membership in a Métis political organization may be relevant to the question of community acceptance, but it is not sufficient in the absence of a contextual understanding of the membership requirements of the organization and its role in the Métis community. The core of community acceptance is past and ongoing participation in a shared culture, in the customs and traditions that constitute a Métis community's identity and distinguish it from other groups. This is what the community membership criterion is all about. Other indicia of community acceptance might include evidence of participation in community activities and testimony from other members about the claimant's connection to the

community and its culture. The range of acceptable forms of evidence does not attenuate the need for an objective demonstration of a solid bond of past and present mutual identification and recognition of common belonging between the claimant and other members of the rights-bearing community.

[103] If the Rape Relief collective is analogous to a community, quite clearly Ms. Nixon did not meet Rape Relief's community membership criterion.

[104] In *Powley*, the Sault Ste. Marie Métis community accepted the two claimants' ancestry and membership in the community. Had that community excluded them based on their lack of ancestral connection including race or genetic origin and had the Powleys demonstrated that exclusion constituted discrimination under s. 15 of the *Charter*, that would still not have overcome their exclusion on the basis of the community acceptance criterion, except perhaps on a demonstration of *mala fides* on the part of the community which excluded them.

[105] The Tribunal found no *mala fides* in Rape Relief's exclusion of Ms. Nixon. At paras. 192 to 195 of the decision, the Tribunal found the members of Rape Relief present when she was excluded from the peer counsellor training program "had a *bona fide* belief that Ms. Nixon was not an appropriate volunteer because she was a male to female transsexual" and

concluded "nothing in the evidence suggests to me that there was *mala fides* in the actions of Rape Relief... There was no suggestion Rape Relief adopted the standard as a means of discriminating against Ms. Nixon in her individual capacity. Rather, their policy was adopted because Rape Relief believed that people who are transgendered are inappropriate for inclusion in their organization."

[106] At paras. 69 and 82 of the decision the Tribunal noted that a small proportion of all volunteer trainees join the collective. Rape Relief will not permit a trainee to remain after three months as a peer counsellor without seeking to join the collective. Exclusion of volunteer trainees from membership in the Rape Relief collective is therefore the exception rather than the rule, so it cannot stigmatize a volunteer.

[107] If the **Powley** test for membership in an "identifiable group" were applied in this case, Ms. Nixon would be excluded from Rape Relief's self-defined "identifiable group" of women who have always lived exclusively as girls and women, perhaps on the ancestral criterion and certainly on the community acceptance criterion.

[108] Based on the **Law** analytical framework and the outcomes in **Law**, **Reaney**, and **Lovelace v. Ontario**, [2000] 1

S.C.R. 950, Rape Relief's counsel argued that just as in each of those cases where claimants were denied benefits, here Rape Relief's exclusion of Ms. Nixon was based not on stereotyping but on the actual circumstances of individuals.

[109] So, for example in *Reaney*, the distinction between new mothers who had given birth and adoptive parents was found not to be discriminatory under the *Code* in respect of new parents' leave and allowance entitlements under a collective agreement.

[110] The fact that such a distinction may be made for purposes of conferring additional parental benefits on those mothers who give birth does not mean the same distinction would be non-discriminatory for a purpose which has nothing to do with the rigors of child birth.

[111] The issue in *Reaney* was not whether a distinction might be made for any and all purposes on the basis of a sexual characteristic experienced by some females (giving birth to a child) but whether that distinction might be made for a particular purpose (maternity benefits) without being discriminatory in contravention of the *Code*.

[112] Here however, it is acknowledged by Ms. Nixon and the Tribunal that Rape Relief may exclude persons from all its

services and employment, that is in effect for all purposes, because they have male sexual characteristics. The basis of that acknowledgment is the s. 41 "group rights exemption" provision of the *Code*.

EFFECT OF S. 41 OF THE CODE

[113] At paras. 208 to 224 of the decision, the Tribunal concluded s. 41 did not "exempt Rape Relief's conduct" because the evidence did not establish that Rape Relief's primary purpose was "the promotion of women who fit their political definition of what it meant to be a woman."

[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 of 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.

[121] While this finding is dispositive of the petition, in the event I am wrong, I will continue to consider the issue of whether Rape Relief's exclusion of Ms. Nixon was discrimination prohibited under the *Code*.

"DIGNITY" UNDER THE "LAW" ANALYTICAL FRAMEWORK

[122] In its written argument Rape Relief asserts that drawing a distinction based on life experience does not involve harm to dignity or stereotyping, noting that the Tribunal recognized that the test of whether dignity had been harmed, is both subjective and objective and must therefore involve consideration of whether a reasonable person in the circumstances of the complainant would regard his or her

dignity compromised by exclusion from Rape Relief's peer counselling program.

[123] Rape Relief asserts that reasonable person is an "informed and right-minded member of the community" who "supports the fundamental principles [of the Charter]" citing *R. v. R.D.S.*, [1997] 3 S.C.R. 484 at para. 50 and that "'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." (*Minister of Indian and Northern Affairs Canada et al. v. Corbiere et al.*, [1999] 2 S.C.R. 203 at para. 65)

[124] The Tribunal found Ms. Nixon 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". This, Rape Relief asserts, suggests Ms. Nixon was unable to view her exclusion from Rape Relief's peer counselling objectively, a factor not taken into account by the Tribunal with respect to the impact on dignity.

[125] Under the *Law* analytical framework, Rape Relief further asserts, Ms. Nixon 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 SCC 23 at para. 47) and since the majority of persons in British Columbia (all men and those women who do not share Rape Relief's political beliefs) would be excluded from participation in the training program, no reasonable person in Ms. Nixon's situation would regard it as an indignity to be excluded. A reasonable person excluded for having experienced part of her life as a male, according to this argument, would recognize that what I characterize as Rape Relief's "article of faith" as to the political and therapeutic significance of the experience of living exclusively as a female, the basis for exclusion, did not compromise the excluded person's dignity.

[126] My conclusion that the **Law** analytical framework, in light of *Reaney*, ought to have been applied by the Tribunal means the primary issue on this point is whether the Tribunal's alternative determination that there was a *prima facie* case of discrimination passes the standard of reasonableness *simpliciter*.

[127] Application of the **Law** analytical framework presents difficulties in this case because it was articulated in **Law** as the appropriate analysis for **Charter** scrutiny of exclusion from financial benefit entitlement legislation, not for scrutiny of exclusion from a service or employment provided by

a non-governmental entity such as Rape Relief, alleged to be discrimination under the **Code**.

[128] For example, in **Law** the Court recognized that Parliament may premise such remedial legislation on "informed statistical generalizations" about the plight of those eligible for entitlement to benefits without "running afoul of s. 15(1) of the **Charter** and being required to justify its position under s.1."

[129] Rape Relief cannot similarly rely on "informed statistical generalizations" about the asserted adverse effect of male to female transsexuals' participation in its peer counselling program on its clientele of female victims of male violence. The asserted adverse effect was not the subject of any statistical evidence. So any informed generalizations which may be applied under the **Law** analytical framework can have no statistical basis in this case. Any such generalizations must be based on anecdotal evidence or impression or *bona fide* belief as an "article of faith".

[130] The Court in **Law** recognized that while claimants bear the onus of establishing infringement of their s. 15(1) **Charter** equality rights, it is not necessarily the case that the claimant must adduce evidence to show a violation of human dignity or freedom, particularly where differential treatment

is based on an enumerated ground and it will be evident on the basis of judicial notice and logical reasoning that the distinction is discriminatory.

[131] Nevertheless, Ms. Nixon introduced evidence before the Tribunal to show the impact of her exclusion on human dignity rather than relying on judicial notice and logical reasoning.

[132] Rape Relief seeks to rely on judicial notice of what Ms. Nixon and the Tribunal must implicitly acknowledge (through their acceptance of Rape Relief's women only policy as permitting it under s. 41 to exclude men) that no reasonable man would experience a loss of dignity from exclusion by Rape Relief. Rape Relief argues that logical reasoning from that fact about the objective component of the subjective-objective perspective on the impact on human dignity, counteracts Ms. Nixon's subjective evidence of impact on her dignity and leads to only one reasonable conclusion, that no reasonable person in her situation would experience such a loss of dignity.

[133] This raises the question of which reasonable persons are similarly situated to Ms. Nixon to serve as the comparator group for purposes of considering the objective part of the subjective-objective perspective impact on dignity.

[134] Rape Relief is no doubt correct that no reasonable man, even one who was from a traditionally disadvantaged group of men such as a racial minority, would experience a loss of dignity as a result of being excluded from Rape Relief's peer counselling training program on the basis of his masculine characteristics.

[135] Ms. Nixon and this reasonable man are not similarly situated. She is not a man. She self-identifies as a woman. Medical assessment resulted in her surgical reassignment consistent with her assertion of womanhood. As a result, she now has birth certification as a female. Ms. Nixon presented herself as a woman who accepted Rape Relief's collective political beliefs, not as man or as a woman who rejected those beliefs. She presented herself to Rape Relief as a member of the identifiable group, women who accept its four political beliefs set out at para. 8 above, which Rape Relief seeks to champion for purposes of seeking equality. Her presentation was not bogus. She was not a man in disguise.

[136] However, Ms. Nixon appeared to Ms. Cormier to be a person who had not lived her whole life as a female and she acknowledged to Ms. Cormier that was the case. Ms. Nixon's characteristics resulting from her male sexual anatomy at

birth were the basis for Rape Relief's exclusion of Ms. Nixon from the peer counsellor training program.

[137] Rape Relief does not take issue with the Tribunal's finding that Ms. Nixon felt, subjectively, that her exclusion was an injury to her dignity. Rape Relief's submission is that the Tribunal's application of the **Law** analytical framework did not include the objective component of the dignity analysis or the contextual factors set out in **Law**. So although the Tribunal stated it was applying the appropriate subjective-objective perspective to the "overarching issue of impact on human dignity" it did not do so.

[138] As previously noted, application of the **Law** analytical framework to determine if the exclusionary action of a non-governmental entity such as Rape Relief discriminates under the **Code**, rather than to determine if legislated exclusion from benefits entitlement violates s. 15 of the **Charter**, presents difficulties. Perhaps because of these difficulties, the Tribunal did not, at paras. 133 to 148 of the decision, address all of the factors mentioned in **Law** which bear on the issue of discrimination.

[139] The fact the Tribunal did not expressly address each of these factors does not mean its conclusion is necessarily unreasonable. It is the outcome of the Tribunal's application

of the **Law** analytical framework, rather than the strictness of its adherence to the **Law** analytical framework, which must be judged against the standard of reasonableness *simpliciter*.

[140] In this case a formal distinction was drawn between Ms. Nixon and others on the basis of her personal characteristics and differential treatment was based on one of the enumerated grounds, sex, so the third of the three steps summarized by Iacobucci J. at para. 39 of **Law** "does the differential treatment discriminate in a substantive sense, bringing into play the purpose of s. 15(1) of the **Charter** in remedying such ills as prejudice, stereotyping and historical disadvantage?" [emphasis in original] is the focus of the requisite analysis.

[141] The **Law** analytical framework was recently applied in **Nova Scotia (workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board v. Laseur** 2003 SCC 54 ("**Martin**"). As in **Law**, the case involved s. 15 **Charter** scrutiny of a statutory financial entitlement program. Workers' compensation benefits were curtailed by the impugned legislation, specifically for persons with chronic pain as opposed to other work-related ailments.

[142] At para. 84, Gonthier J. for the Court, explained that differential treatment violates s. 15 of the **Charter** only

when it is "truly discriminatory" and that "discrimination may be described as a distinction ... based on grounds relating to personal characteristics of the individual ... which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access or opportunities, benefits, and advantages available to other members of society.

Distinctions based on personal characteristics attributed to an individual based solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed".

[143] At para. 85 of *Martin*, Gonthier J. stated "Human dignity, in turn, is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits" and " ... the goal of the analysis in each case [is] to determine whether a reasonable and dispassionate person, fully apprised of all the circumstances and possessed of similar attributes to the claimant, would conclude that his or her essential dignity had been adversely affected by the law."

[144] Although in this case Rape Relief's exclusion of Ms. Nixon is not a "law", application of the *Law* analytical

framework to non-governmental conduct alleged to be discriminatory under the **Code** requires that it be treated as such for analytical purposes.

[145] However, exclusion by a small relatively obscure self-defining private organization cannot have the same impact on human dignity as legislated exclusion from a statutory benefit program. This is because any stereotyping or prejudice arising from legislated exclusion bears the *imprimatur* of state approval and therefore some wide public acceptance.

[146] Under the **Law** analytical framework exclusion from a small self-defined "identifiable group" like the Sault Ste. Marie Métis community in **Powley** or Rape Relief in this case, cannot on the basis of objective scrutiny, impact negatively on the dignity of any person excluded. This is particularly so where as noted in **Powley** at para. 29 "it is imperative that membership requirements become more standardized so legitimate [membership claimants] can be identified", that is, where the "identifiable group" has no articulated rules or policy of exclusion at the time the claimant seeks membership in the group.

[147] Exclusion by state action has a potential impact on human dignity which exclusion by a self-defining organization

like Rape Relief never could have. Legislated exclusion is there for all to see. Rape Relief's exclusion of Ms. Nixon was private. That does not mean it was subjectively less hurtful to her, but it was not a public indignity.

[148] In *Martin*, at para. 85 and following Gonthier J. considered the four non-exhaustive factors under the *Law* analytical framework to determine whether the "challenged legislation" demeans essential human dignity.

[149] The Tribunal at paras. 133 to 148 of the decision considered evidence which addressed the same four factors. This included that of Dr. Becki Ross about sociological studies of the "extent of the stigma transsexuals experience in our culture", a "Brandeis Brief" which included a March 1996 report entitled *Finding Our Place: Transgender Law Reform Project Reform* and a March 2000 Ontario Human Rights Commission *Policy on Discrimination and Harassment Because of Gender Identity*.

[150] Despite acknowledging that "These materials do not establish the particular impact of Rape Relief's conduct on Ms. Nixon", based on these documents and the evidence of Ms. Nixon and Dr. Ross, the Tribunal concluded "that the actions of Rape Relief impacted on the dignity of Ms. Nixon and denied

her the opportunity to participate fully and freely in the economic, social and cultural life of British Columbia."

[151] The second part of this conclusion, the finding regarding the objective impact on human dignity, unreasonably exaggerates the objective impact of Rape Relief's exclusion of Ms. Nixon on her dignity. No objective male to female transsexual, standing in Ms. Nixon's shoes, could plausibly say: "Rape Relief has excluded me. I can no longer participate fully in the economic, social and cultural life of the province."

[152] In this regard, the situation is analogous to exclusion from the Métis community in *Powley*. Such exclusion (had it occurred) would have deprived the Powleys of the special hunting rights enjoyed by a self-defined "identifiable group" of Métis. It might have impacted on the Powleys' self-esteem as persons who regarded themselves as members of that group who shared Métis heritage, but it would not have deprived them of full participation in the economic, social and cultural life of their province. Their hunting rights would be the same as those of most other people.

[153] The Sault Ste. Marie Métis community's right of self-definition as an "identifiable group" is equivalent to any non-profit group's right of association under the *Charter*

and any such group's right to maintain its exclusivity under s. 41 of the **Code**, in order to promote the interests and welfare of its members, without contravening the **Code** by discriminating contrary to ss. 8 and 13.

[154] Rape Relief provides access to only a tiny part of the economic, social and cultural life of the province. By reason of Rape Relief's self-definition, perhaps reflected in its small number of members, exclusion from its programs is quite evidently exclusion from a backwater, not from the mainstream of the economic, social and cultural life of the province. It may be an important backwater to its members and to Ms. Nixon, but that is a subjective assessment.

[155] Exclusion from a self-defining "identifiable group" is in no objective sense equivalent to legislated exclusion from a public program of benefit entitlement such as was considered in **Martin**.

[156] The nature of Rape Relief as a political organization and the nature of the dispute between Rape Relief and Ms. Nixon as essentially a political one over membership criteria are other components of the objective aspect of the subjective-objective perspective on human dignity to be considered.

[157] *Gould v. Association of Yukon Pioneers*, [1996] 1 S.C.R. 571 suggests it is not the function of the **Code** to provide a referee with authority to impose state-sanctioned penalties in political disputes between private organizations established to promote the interests of self-defined "identifiable groups" and their members or prospective members. It took several years and must have cost the parties and public purse dearly to attempt to resolve this dispute. This case illustrates how ill-suited the **Code** is for resolution of such disputes.

[158] This is quite a different case from, say, Ms. Nixon being excluded from a restaurant because of her transsexual characteristics. Unlike a for-profit business providing services or recruiting employees from the general public or a volunteer organization open to all, Rape Relief defined itself as a women only organization with the express approval of the state as noted at para. 21 above. That is the very reason participation in its peer counsellor training program was attractive to Ms. Nixon. It would vindicate her womanhood. Her participation clearly had a political dimension as the Tribunal recognized at para. 146 of the decision.

The denial of the opportunity to participate in the training of Rape Relief, a denial which was because she was not "woman" enough to be a peer of the women

at Rape Relief, can only be understood in the context of the struggle that Ms. Nixon described to achieve congruence between her body and her female identity and the historical pattern of discrimination that the transgendered among us have experienced.

[159] Ms. Nixon ultimately left BWSS, where she had participated in the training program and support groups, after a dispute over the role of transgendered women at BWSS, triggered by circulation in that organization of what Ms. Nixon considered to be "hate" literature denigrating transsexuals. That too was a political dispute within a volunteer organization, as a result of which Ms. Nixon left BWSS. She did not resort to the **Code** for vindication of her position. She presumably felt no indignity in her self-exclusion from BWSS in a dispute over the role of transgendered women there. From an objective perspective, her exclusion from Rape Relief, a similar volunteer organization, over a similar political issue, can have had no bigger impact on her human dignity.

[160] Groucho Marx once famously observed on resigning from a club, that he did not want to be a member of any club that would accept someone like him as a member. The club's acceptance and his resignation were matters of his self-esteem that is, his subjective sense of dignity or self worth, just as Ms. Nixon's departure from BWSS no doubt was for her.

[161] However, Rape Relief's exclusion of Ms. Nixon from its club-like sisterhood cannot be equated with legislated exclusion from entitlement to public benefits (as occurred in *Martin*) in terms of its objective impact on human dignity. It attracted publicity and took on political significance outside the private relationship between Rape Relief and Ms. Nixon, only because Ms. Nixon chose to initiate a complaint under the *Code*.

[162] The Tribunal's finding of discrimination by Rape Relief lent and aura of objectivity to Ms. Nixon's subjective sense that her dignity had been compromised by Rape Relief's exclusion of her. The Tribunal's imposition of state sanction vindicated Ms. Nixon's political position in her dispute with Rape Relief over how it should self-define as an "identifiable group".

[163] Part of the Tribunal's task under the *Law* analytical framework was to determine if there was any objective impact on Ms. Nixon's human dignity. I find the Tribunal failed to reasonably assess the objective aspect of the subjective-objective perspective on human dignity according to the *Law* analytical framework.

[164] I have already found that the Tribunal was obliged by the decision of the Court of Appeal in *Reaney* to apply the

Law analytical framework to the determination of whether Rape Relief's exclusion of Ms. Nixon was *prima facie* discrimination under the **Code**.

[165] The Tribunal undertook to do so in its alternative analysis at paras. 133 to 148 of the decision, but did not reasonably weigh the objective impact on human dignity occasioned by Rape Relief's exclusion of Ms. Nixon

[166] I therefore find The Tribunal's conclusion that Rape Relief's exclusion of Ms. Nixon from its peer counsellor training program was discriminatory under its alternative analysis at paras. 133 to 148 of the decision was unreasonable. It follows that the Tribunal's finding that Rape Relief discriminated against Ms. Nixon contrary to the **Code** cannot stand on a proper application of the **Law** analytical framework.

[167] In light of the long time this case has been before the Commission, the Tribunal and the court and the likelihood of further appeal, I decline to exercise the court's discretion pursuant to s. 5 of the **Judicial Review Procedure Act** to direct the Tribunal to reconsider the matter.

[168] The Tribunal's order pursuant to s. 37(2) of the **Code** that Rape Relief refrain from the same or a similar

contravention and its order pursuant to s. 37(2)(d)(iii) that Rape Relief pay Ms. Nixon \$7500 compensation are set aside.

[169] The parties made submissions on costs at the hearing of the petition. I invite further submissions, in writing, should Rape Relief decide to pursue costs. If counsel cannot agree on a schedule for submissions, I will set one.

"Dohm, A.C.J. for Edwards J."

The Honourable Mr. Justice E.R.A. Edwards