

Vancouver Rape Relief and Women's Shelter Legal Argument Part II

presented by Victoria Gray, January 24-26, 2001

IN THE MATTER OF THE HUMAN RIGHTS CODE, R.S.B.C. 1996, c.210, AND
IN THE MATTER OF A COMPLAINT BEFORE THE BRITISH COLUMBIA
HUMAN RIGHTS TRIBUNAL BETWEEN: KIMBERLY NIXON COMPLAINANT
AND: VANCOUVER RAPE RELIEF SOCIETY doing business as "RAPE RELIEF
AND WOMEN'S SHELTER" RESPONDENT AND: BRITISH COLUMBIA HUMAN
RIGHTS COMMISSION (DEPUTY CHIEF COMMISSIONER) PARTY

OUTLINE OF ORAL ARGUMENT OF THE RESPONDENT ON ISSUES OF
BFOR/BFRJ, SECTION 41 EXEMPTION, and REMEDY

Introduction

1. Rape Relief's defences, of BFOR/BFRJ and section 41, bring into consideration the constitutionally-protected interests of its callers and its members in equality (including privacy) and in freedom of association.
 - A. BFOR/BFRJ (paras. 137-177 of Rape Relief's Notes of Argument)
2. Rape Relief submits that the defences of BFOR and BFRJ recognize the rights of Rape Relief's callers to suitable rape relief services, and the interests of Rape Relief in the proper performance of that work.
3. See Rape Relief's Appendix, which details key evidence by issue, and corrects a number of assertions made in the reply argument of the Complainant. See in particular paragraphs 1, 2, 4, 5, 7, 8, 10-12, 14, 15, 17-20, 24-42, 68-70, and 71.
4. One can consider that rape crisis and sexual assault services exist on a continuum with varying degrees of a medical or political approach. At one end of the continuum are services which approach the work and the therapy from a solely medical/therapeutic basis. While the prevailing view is that such services should be women-only at least in the early stages (as at Women's Hospital, Vancouver Hospital, Dr. Pacey's evidence, even Dr. Watson's evidence), some women might be willing and able to obtain assistance from, for example, a male therapist. Further along the continuum would be organizations with some political basis in addition to the medical/therapeutic basis. Rape Relief may be at the political extreme of such a continuum, with an approach that includes a significant consciousness-raising aspect. Rape Relief's approach is integrated and blended with its political belief that women suffer oppression from birth and should resist male violence by working together with others who are peers in their experience of that oppression. This approach is apparent in Rape Relief's

approach to its work and the consistency between the way it works and its political beliefs, such as its offering of "Support, Education and Action" groups.

5. Life experience of the social subordination as a girl and woman (and no experience of enjoying male privilege) is necessary for Rape Relief's work for at least these reasons (roughly organized as first factors which are more medical/therapeutic and then those which are more political):

(a) Male violence against women, and particularly sexual assault, is gendered. A male presence can trigger Post Traumatic Stress Disorder (as agreed by both Drs. Pacey and Watson).

(b) Women can be fearful of men and of people that they think are men. Even the Complainant described a fear of men (at paragraph 65 of the Appendix). Ms. Gilhooly's evidence demonstrated that women fear a man in a female-only space, although they can make mistakes in a setting of only brief visual contact.

(c) Women who have suffered male violence should be entitled to maintain the privacy of their stories and to choose to whom they tell their stories. Women like Ms. Swain cannot be honestly reassured that a transgendered person has lived as a woman.

(d) At this stage it is simply experimental to have a transgendered woman providing services in an autonomous woman-only rape crisis service (See paras. 24-42 in Appendix), and Rape Relief submits that it is not appropriate for it to be ordered to experiment, particularly when the result may be to silence women like Ms. Swain and is inconsistent with Rape Relief's political beliefs;

(e) Consciousness-raising by groups of people with a common life experience can help women deal with the trauma following an experience of male violence, as described by Ms. Lakeman in connection with "politicized" women (See para. 10 in Appendix);

(f) Consciousness-raising by groups of people with a common life experience promotes open discussion by people who may otherwise be silenced, which was one of the main reasons for consciousness raising groups in the women's movement (See Rebick). Women can be silenced by the presence of men (See Rebick and Watson evidence).

(g) Discussion of common life experience can expand knowledge and inform political and other action. One of the products of Rape Relief's work is the information about women's experience with male violence, and that informs all its work. Similar products would likely result from groups of transgendered people or other people with a common life experience.

(h) The question of whether a person with a different life experience should be included in a consciousness-raising type of group should depend on the nature of the group and its subject matter. Rape Relief says that because its work is focused on working with peers in lifelong sexist oppression to fight that oppression, it is not appropriate to include a person who has been treated as a man. Rape Relief does not have an opinion about people being rape crisis counsellors in other situations. Rape Relief has an opinion about its own political service group, and by logical extension, about autonomous women's groups (Lakeman, Jan. 8, p. 31, L. 22-40).

(i) Rape Relief's work clearly includes the production of knowledge (through information gained from callers, often in a consciousness-raising type of situation) and the dissemination of that knowledge (through local, national, and international consultations and representations, as well as to individual women). In that way, Rape Relief is similar to research and educational institutions like universities. See (Exhibit 35) Rape Relief's objects, which include 2B. "as a force for social change: a) to work towards making attitudinal changes in the way society views the rape victim and rape in general" and E "To print, publish, distribute and display information for the purpose of making the public aware of Vancouver Rape Relief's objectives." Rape Relief submits that it is apparent from the nature of political work based on grassroots experiences that including a person with different experiences would change the work. Just as the medical profession ought to be able to study the effect of a drug on people born with ovaries, so too Rape Relief ought to be able to engage in consciousness-raising with people of a relevant similar life experience, undiluted by the experience of male privilege. Of course, transgendered people ought to be able to do the same if it is relevant to the nature of their work.

6. The parties appear to agree that the analysis relating to BFOR is the same as that relating to BFRJ.

7. The parties appear to agree that the leading applicable case is Meiorin, while disagreeing on the application of the test in that case to the facts in the case now before the Tribunal. Rape Relief asserts that the proper analysis in this case must take into account a number of features unique to this case, including the following:

(a) Rape Relief is a small non-profit group, consisting at the time of the incident in 1995 of about 12 members, in contrast to government or employers in the circumstances in most other human rights complaints;

(b) it was new and novel for Rape Relief to have a transgendered person presenting herself to Rape Relief for volunteer training;

(c) what Rape Relief submits is a BFOR/BFRJ is not something susceptible to correction.

8. Rational connection:

There are many interconnected facts relating to rational connection (referred to in Meiorin at paras. 57-59). See the evidence of Dr. Pacey and Dr. Watson (Appendix, paras. 49-70) and Ms. Swain in particular connection with the medical/therapeutic aspect of Rape Relief's work, and the evidence of Ms. Lakeman, Ms. Cormier, Ms. Sawatzky and Ms. McIntosh in respect of the political aspects of its work.

gendered nature of sexual assault (Recognized by the Supreme Court of Canada in R. v. Osilin (1993), 109 D.L.R. (4th) 478 at p. 519, first paragraph)

privacy and dignity (paras. 156-163 of Rape Relief Notes of Argument)

special nature of organization (eg. Caldwell) (paras. 164-166 of Notes of Argument)

impact on women seeking help, like Edith Swain and women suffering PTSD (para. 167 of Notes of Argument)

9. This inquiry requires consideration of the general purpose of the "employer's" more general purpose. Rape Relief submits that the general purpose of its standard for requiring lifelong experience of subordination as female is to ensure that Rape Relief can work effectively, promoting its political ideology and providing a safe and supportive environment for its callers. Rape Relief submits that there is a rational connection between its standard and the performance of the work of the Rape Relief volunteer peer counsellor.

10. Honest and good faith belief is referred to in Meiorin at paras. 60 and 61. This requires examination of the particular standard itself.

11. Regarding Rape Relief's honest and good faith belief that the life experience of the social subordination as a girl and woman (and no experience of enjoying male privilege) is necessary for Rape Relief's work, Rape Relief called as witnesses the three individuals present on the night of the incident, and an individual who was a member of the collective at that time and still today. Rape Relief accordingly called as witnesses one-third of the members of its collective at the time of the incident, being Danielle Cormier, Karen Sawatzky, Tracey

McIntosh (see Appendix, para. 71-77) and Lee Lakeman. Consider also Rape Relief's efforts to inform itself and to invite dialogue from other feminists (Appendix, para. 21-23).

12. Rape Relief submits that all of these witnesses demonstrated the honest and good faith belief that the standard was necessary to the accomplishment of Rape Relief's purpose. There was no evidence that any of them made a stereotypical assumption, such as the assumption that a person who was transgendered lacks empathy.

13. Reasonable necessity is referred to in Meiorin at paras. 62-68.

14. Reasonable necessity of requirement that volunteer have the lifelong experience of being treated as female, and no experience of being treated as male. This is not the kind of case where the deficiency in life experience can be solved by equipment, money, training, or reorganization of work. Rape Relief's integrated process of dealing with callers fits its political beliefs and therapeutic goals. If the Complainant accepted Rape Relief's political belief that women who have suffered sexist oppression from birth should organize with peers in that experience to resist sexism, she would not consider herself an appropriate peer counsellor volunteer, and would be suitably accommodated in the House Funding Committee. Others who support Rape Relief's political views but who do not have the appropriate life experience, like Brian Cross, support Rape Relief through that group.

B. Section 41 Exemption (paras. 178-202 of Rape Relief's Notes of Argument)

15. Section 41 of the Code provides for exemptions as follows:

If a charitable, philanthropic, education, fraternal, religious or social organization or corporation that is not operated for profit has as a primary purpose the promotion of the interests or welfare of an identifiable group or class of persons characterized...by a common...sex..., [or] political belief...that organization or group 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.

16. There appears to be no issue that Rape Relief is a "charitable ... organization .. that is not operated for profit." The parties appear to differ about what are Rape Relief's "primary purposes" and whose welfare and interests those purposes promote.

Political Belief (paras. 185-190 of Rape Relief Notes of Argument)

17. Rape Relief first considers the application of section 41 in other circumstances. It appears uncontroversial that section 41 would protect the

Liberal Party of Canada. Rape Relief submits that is because a person who supports the political views of the federal Liberals is a member of a distinct group whose interests are promoted by the work of the federal Liberals through the promotion of Liberal ideology. Even though the work of the federal Liberals would also have a primary purpose of advancing the interests of all Canadians, the promotion of the political ideology is the primary purpose to which section 41 would apply. (See the examples discussed by the Supreme Court of Canada in *Brossard* at p. 646 D.L.R., Tab 1 of Rape Relief Authorities, Vol. 1)

18. The Mamela case provides a decided example of section 41 protecting a group that does work that may benefit more than the members of the group. In Mamela, membership was not a requirement for obtaining access to the library and other services of the Vancouver Lesbian Connection. Tribunal Member Iyer found that section 41 protected the VLC's restriction of membership to "self-identified lesbian/queer women."

19. Similarly, Rape Relief submits that the evidence demonstrates that Rape Relief has a number of "primary purposes." One of those purposes is the promotion of the interest and welfare of people who share its distinct political beliefs. In other words, it is in the interest of the segment of the public which is characterized by a political belief in the status of women as a matter of life experience for Rape Relief to carry on its work consistent with that political belief. People outside Rape Relief's collective, here including Brian Cross, are members of the group whose interests and welfare are promoted by Rape Relief's work.

20. Rape Relief submits that there is a distinct contrast between its political belief and the political belief which may be seen to underlie the Complainant's claim to relief. Rape Relief works to destabilize the power relationship reflected in the assignation of certain people to the social status of being female from birth, rather than to destabilize the boundaries of what constitutes "female." The Complainant relies on a category (women) being sufficiently stable and identifiable to make sense of a claim for inclusion of her and to justify exclusion (of men), and yet relies on a strategy of destabilization of the distinction between male and female, on the basis that it can change through surgery and upon self-identification.

Sex (paras. 181-184 of Rape Relief Notes of Argument)

21. Similarly, Rape Relief submits that the interest and welfare of those who have the lifelong experience of being subject to sexist subordination are promoted by its work. As described more fully in the Notes of Argument, people who share that experience can be seen to have similar characteristics relating to "sex" as that term has meaning in the Code.

22. Common experience may vary from group to group. For example, it may be appropriate for a group of people who have all borne children to organize into a "post-partum depression group" on the basis that they having a common experience relating to "sex" in the Code. Similarly, it may be appropriate for a group of people who have grown up transgendered to organize on the basis of that common experience relating to "sex". Rape Relief organizes on the basis of the common experience regarding "sex" relating to commonalities such as childhood socialization, life-long experience of the cultural meaning associated with female biology, social and physical relationship to reproduction, and experience of a particular type of subordination (of women) rather than another (such as of transgendered people).

23. Rape Relief submits that one of its primary purposes is to promote the interests of the members of the group which is together along the gender continuum as those who have been treated as female and self-identify as such, and who therefore have a common experience relating to "sex." Rape Relief pursues that purpose by assembling and disseminating knowledge about people with the common experience of the lifelong subordination on the basis of sex.

Effect

24. Rape Relief submits that the effect of Section 41 is that individuals are entitled to the freedom of association a) to promote the interests and welfare of people with Rape Relief's political beliefs and b) to promote the interests and welfare of people who share a common place on the gender continuum as people who have always been treated and identified as female. Section 41 permits Rape Relief to exclude people who are not members of those groups, just as the school's exclusions of the teacher in Caldwell was acceptable because she was not following Catholic doctrine.

C. Remedy (paras. 203-223 of Rape Relief Notes of Argument)

25. Rape Relief relies on its written submissions on the issue of remedy, but will address in reply any further submissions made by the Complainant or the DCC on that issue.