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Unprincipled Exclusions: Feminist Theory, Transgender Jurisprudence, and Kimberly Nixon

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En 1995, Kimberly Nixon a déposé une plainte de discrimination contraire aux droits de la personne contre la Vancouver Rape Relief Society (ci-après VRRS), un organisme sans but lucratif offrant divers services aux femmes victimes de violence de la part des hommes, lorsqu'on lui a refusé l'accès à une formation en vue de devenir conseillère. Nixon est née biologiquement mâle, mais elle a suivi des traitements hormonaux et a subi des interventions chirurgicales afin de compléter sa transformation de genre. Le VRRS a adopté une politique de recrutement de femmes exclusivement, en vertu de l'article 41 (autrefois l'article 22) du Human Rights Code de la Colombie-Britannique. L'autodéfinition de Nixon comme femme a d'abord été entérinée par le Tribunal des droits de la personne en 2002, décision infirmée par la Cour d'appel de la Colombie-Britannique en 2005. La Cour suprême du Canada a refusé d'accorder la permission d'interjeter appel en 2007. En dépit d'arguments juridiques complexes présentés à tous les stades de l'action, la question en litige porte essentiellement sur le droit de Nixon de se définir comme femme et de pénétrer dans les lieux réservés aux femmes. Le présent article explore les complexités du sexe, du genre et de l'identité transgénérée. La décision Kimberly Nixon c. Vancouver Rape Relief and Women's Shelter est replacée dans son contexte historique en analysant toute la jurisprudence actuelle au Canada mettant en cause des personnes transgénérées. La décision elle-même est ensuite examinée de façon détaillée. Les réactions féministes à la décision font l'objet de critiques et l'article conclut que l'affirmation de sa propre identité doit suffire aux fins d'inclusion et que l'appareil juridique devrait reconnaître le droit de déterminer son propre genre.

In 1995, Kimberly Nixon initiated a human rights complaint against the Vancouver Rape Relief Society (VRRS), a non-profit organization providing services to women who are victims of male violence, when she was denied the opportunity to train as a peer counsellor. Nixon was born a biological male but underwent surgery and hormone treatments in order to complete sex reassignment. The VRRS maintains a women-only hiring policy under section 41 (formerly section 22) of the British Columbia Human Rights Code. Nixon's self-definition as a woman was first upheld by the Human Rights Tribunal in 2002, then overturned by the Supreme Court of British Columbia in 2003, and

was again under dispute before the British Columbia Court of Appeal in 2005. In 2007, her leave to appeal to the Supreme Court of Canada was denied. Despite complex legal arguments presented at all levels of the proceedings, the central issue under dispute was Nixon's right to define herself as a woman and enter woman-only space. This article explores the complexities of sex, gender, and transgender identity. *Kimberly Nixon v. Vancouver Rape Relief and Women's Shelter* is placed in historical context by examining all extant Canadian transgender jurisprudence. The case itself is then explored in detail. Feminist responses to the case are critiqued, and the article concludes with the assertion that self-identification must be sufficient for inclusion and that the law should recognize a right to determine one's own gender.

In 1995, Kimberly Nixon initiated a human rights complaint against the Vancouver Rape Relief Society (VRRS), a non-profit organization providing services to women who are victims of male violence. Kimberly Nixon identifies herself as a woman.¹ She was born a biologically read man² and underwent surgery and hormone treatment in order to complete sex-reassignment.³ In accordance with the *Vital Statistics Act* of British Columbia, she changed her birth certificate after the completion of surgery.⁴ The VRRS maintains a women-only hiring policy under section 41 (formerly section 22) of the British Columbia *Human Rights Code*.⁵ Nixon was denied the opportunity to serve as a volunteer peer rape counsellor on the basis that she had lived part of her life

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1. Throughout this text, Kimberly Nixon is referred to in the feminine pronoun. This reference, however, is not to be understood as an acceptance of the gendered system. The very question as to what pronoun is suitable has to be answered only because our society reifies notions of dichotomous sex. Linda Wayne, "Neutral Pronouns: A Modest Proposal Whose Time Has Come" (2005) 24(2/3) *Canadian Woman Studies* 89.
 2. I use the term biologically read man both to respect Kimberly Nixon's assertion that, from the age of five, she knew herself to be a woman and to emphasize the importance placed by our society on the reading of the body at birth based on genitalia.
 3. *Kimberly Nixon v. Vancouver Rape Relief and Women's Shelter*, [2002] B.C.H.R.T.D. No. 1, para. 10 [*Nixon*].
 4. *Vital Statistics Act*, R.S.B.C. 1996, c. 469. Section 27(1) reads: "If a person in respect of whom trans-sexual surgery has been performed is unmarried on the date the person applies under this section, the director must, on application made to the director . . . change the sex designation on the registration . . . in such a manner that the sex designation is consistent with the intended results of the trans-sexual surgery."
 5. The British Columbia *Human Rights Code* allows a "charitable, philanthropic, educational, fraternal, religious or social organization . . . that has as a primary purpose the promotion of the interests and welfare of an identifiable group or class of persons . . . [to grant] preference to the identifiable group or class of persons." *Human Rights Code*, S.B.C. 1995, s. 41. This revised code was enacted after the initiation of the *Nixon* case, but it is important to note that the relevant sections were not substantively changed from earlier versions of the code. It is also important to understand that other provinces do not have identical sections in their *Human Rights Codes* and that a precedent set in British Columbia might not be applicable elsewhere. For extensive detail regarding the differences in codes with regard to this exemption, see Alvin Esau, "Islands of Exclusivity: Religious Organizations and Employment Discrimination" (2000) 33 *University of British Columbia Law Review* 719.

as a man. Ultimately, despite the complex arguments raised throughout the hearing and trials, it was Nixon's self-definition as a woman that was upheld by the BC Human Rights Tribunal in 2002, overturned by the Supreme Court of British Columbia in 2003, and disputed before the British Columbia Court of Appeal in 2005. Who, it had to be determined, is a "real" woman with the right to enter women-only spaces? The case was the subject of considerable popular debate, much of it, sadly, marked by disrespect for Kimberly Nixon and her claim. It also sparked dissent within feminist communities.⁶

This article begins by exploring the complexities of defining sex, gender, and transgender identity. I place *Kimberly Nixon v. Vancouver Rape Relief and Women's Shelter* in historical context by examining all Canadian transgender jurisprudence that preceded the case. I then explore the details of the *Nixon* case at all levels of proceedings. The responses of popular and academic feminist commentators to Kimberly Nixon are critiqued. Finally, the legal reasoning employed by the VRRS and accepted in part by the British Columbia Court of Appeal is challenged. I conclude that self-identification must be sufficient for inclusion and that the law should recognize a "fundamental right to determine one's gender."⁷ I also assert that groups protected under section 41 should not be exempt from review under the *bona fide* occupational requirement—organizations that have as their purpose the amelioration of discrimination in society should not be permitted to engage in discriminatory practices. If we are to take equality seriously, we must "question our own exclusions, and contemplate their cost."⁸

Sex, Gender, and Transgender Identity

Transgender equality claims bring into question the stability and coherence of the category "woman." Responses to the *Nixon* case reflect many of the fractures and debates within feminist theory. One of the fundamental assertions of early feminism (and perhaps the idea that has had the greatest popular acceptance and influence in the court) is the idea that "sex" defined as biology and "gender" defined as the attributes constructed around biology are separable—in other words, that "woman is made, not born."⁹ If gender is a social construct, "the content of which is radically

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6. See Patricia Elliot, "Who Gets to Be a Woman? Feminist Politics and the Question of Trans-Inclusion" (2004) 29(1) *Atlantis: A Women's Studies Journal* 13; and Carissima Mathen, "Transgendered Persons and Feminist Strategy" (2004) 16(2) *Canadian Journal of Women and the Law* 291.
 7. Katherine Franke, "The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender" (1995) 144(1) *University of Pennsylvania Law Review* 8.
 8. Ralph Sandland, "Feminism and the *Gender Recognition Act*, 2004" (2005) 13(1) *Feminist Legal Studies* 45.
 9. Simone de Beauvoir, *The Second Sex*, translated by H.M. Parshley (New York: Vintage, 1953).

contingent,”¹⁰ then the potential exists for dramatic change. It was under the influence of this emphasis on the social construction of gender that most early feminists and legal scholars concerned with discrimination against women “treated women as a homogenous group and recognized that collectively women were differently situated from men.”¹¹ Ironically, biological sex, in these arguments, was at times constructed as being immutable and was consistently under-theorized.¹²

The first challenges within feminism to this essentialist construction came from women of colour and lesbians who felt excluded under the “universal” and homogenizing term “woman.”¹³ Incorporation of the insights of marginalized women into feminist thought was a contested, and often painful, process both in academic circles and for front-line activists.¹⁴ While problems remain, intersectional, transnational feminist theory now acknowledges that “the interactions of gender, race and class are ultimately so complex that they

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10. Anonymous, “Patriarchy Is Such a Drag: The Strategic Possibilities of a Postmodern Account of Gender” (1995) 108(8) *Harvard Law Review* 1973.
 11. Jessie Knouse, “Using Postmodern Feminist Legal Theory to Interrupt the Reinscription of Sex Stereotypes through the Institution of Marriage” (2005) 16(2) *Hastings Women’s Law Journal* 163. The critiques of this position that follow are not intended to ignore or minimize the many substantive improvements in women’s lives that were hard-fought on the basis of this idea of shared identity.
 12. Both first-wave and second-wave feminism can be categorized in this way. First-wave feminism was closely associated with liberal ideology and with the idea that sexual differences can be minimized and barriers to women’s equality successfully dismantled. See Susan Miller Okin, *Justice, Gender and the Family* (New York: Basic Books, 1989); and Angela Miles, “Feminism, Equality and Liberation” (1985) 1 *Canadian Journal of Women and the Law* 42. Second-wave feminism accepted biology as a given and emphasized the cultural creation of gender, either by celebrating a feminine ethos of care—see Carol Gilligan, *In a Different Voice* (Cambridge: Harvard University Press, 1982)—or by seeking to break down social structures that promote male dominance—Catharine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge: Harvard University Press, 1987); and Catharine MacKinnon, “Feminism, Marxism, Method and the State: Towards Feminist Jurisprudence” (1983) 8 *Signs* 635.
 13. There is an expansive literature in which the challenges to white, middle-class, heterosexual feminism are explicated. For further discussion of the impact of race, in particular, on feminist and legal conceptions of “woman,” see Nitya Duclos, “Disappearing Women” (1993) 1 *Canadian Journal of Women and the Law* 25; Angela Harris, “Race and Essentialism in Feminist Legal Theory” (1990) 42 *Stanford Law Review* 583; b. hooks, *Feminist Theory: From Margins to Center* (Boston: South End Press, 1984); Nitya Iyer, “Categorical Denials” (1994) 19 *Queen’s Law Journal* 179; Audre Lorde, “The Master’s Tools Will Never Dismantle the Master’s House,” in Audre Lorde, ed., *Sister Outsider: Essays and Speeches* (Berkeley: Crossing Press, 1984); Tracey Lindberg, “Not My Sister: What Feminists Can Learn from Indigenous Women” (2004) 16(2) *Canadian Journal of Women and the Law* 342; Lee Maracle, *I Am Woman: Native Perspective on Sociology and Feminism* (Vancouver: Press Gang, 1996); Jennifer Nedelsky, “The Challenges of Multiplicity” (1991) 89 *Michigan Law Review* 1591; Denise Riley, *Am I That Name?* (Minneapolis: University of Minnesota Press, 1988); and Elizabeth Spelman, *Inessential Woman: Problems and Exclusions in Feminist Thought* (Boston: Beacon Press, 1988).
 14. For a very personal account of this process, see Kathy Rudy, “Radical Feminism, Lesbian Separatism, and Queer Theory” (2001) 27(1) *Feminist Studies* 191.

threaten...the category 'woman.'"¹⁵ For many theorists, however, such challenges do not disrupt a fundamental belief that women can be defined by the social denigration that cuts across racial, linguistic, and class boundaries.¹⁶

Recently, "third-wave" feminism,¹⁷ queer theory,¹⁸ critical gender theory,¹⁹ and the post-modern "linguistic turn" have challenged the once-foundational notion that "woman" is a self-evident category for analysis. Biological sex,²⁰ like gender, is contingent, unstable, and mutable.²¹ The biological criteria that we usually associate with sex, including "genetics/chromosomes, gonads, internal reproductive morphology, external reproductive morphology, hormones, and phenology/secondary sex features,"²² are infinitely variable and can be contradictory. The inadequacy of the male/female dichotomy is perhaps best illustrated through reference to inter-sexed bodies that "do not conform to the bedrock notion of sexual dimorphism."²³ Although sex dichotomy "has become crystallized in language and pervades every institution signified by human authority,"²⁴ this dichotomy is created by culture,

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15. Jennifer Nedelsky, "Embodied Diversity and Challenges to the Law" (1997) 42 McGill Law Journal 91 at para. 2. To assert that these problems are now acknowledged in most feminist writing is not to say that issues of racism—or concerns with regard to the marginalization of some women on the basis of economic status, sexual orientation, or other intersecting areas of oppression—have been overcome within feminist communities.
 16. Catharine MacKinnon has been a particularly vocal advocate of this position and has been influential in Canadian legal reform. Her work, however, has been subjected to sustained critique for its failure to recognize differences between women. Harris, *supra* note 13.
 17. For example, see Laura Grenfell, "Making Sex: Law's Narratives of Sex, Gender and Identity" (2002) 76 Legal Studies 66.
 18. See Judith Butler, *Gender Trouble: Gender and the Subversion of Identity* (London: Routledge, 1990); and Eleanor MacDonald, "Critical Identities: Rethinking Feminism through Transgender Politics," in Barbara Crow and Lise Gotell, eds., *Open Boundaries: A Canadian Women's Studies Reader* (Toronto: Prentice Hall, 2000), 282.
 19. Terry S. Kogan, "Transsexuals and Critical Gender Theory: The Possibility of a Restroom Labelled Other" (1997) 48 Hastings Law Journal 1223.
 20. For a discussion of the historical development of the concept of biological sex, see Anne Fausto-Sterling, *Myths of Gender: Biological Theories about Women and Men* (New York: Basic Books, 1992).
 21. Despite scientific acknowledgment of the complexity of sex and gender, transgender identification continues to be defined by the medical community as mental illness. In 1980, the American Psychiatric Association codified transsexualism as "a persistent sense of discomfort and inappropriateness about one's anatomical sex and a persistent wish to be rid of one's genitals and to live as a member of the other sex." *Diagnostic and Statistics Manual of Mental Disorders III* (Arlington, VA: American Psychiatric Association, 1980) at 261–2.
 22. Dylan Wade, "Expanding Gender and Expanding the Law: Towards a Social and Legal Conceptualization of Gender That Is More Inclusive of Transgender People" (2005) 2(2) Michigan Journal of Gender and the Law 280.
 23. Paisley Currah, "The Transgender Rights Imaginary" (2003) 4 Georgetown Journal of Gender and the Law 709.
 24. Ajneesh Prasad, "Reconsidering the Socio-Scientific Enterprise of Sexual Difference: The Case of Kimberly Nixon" (2005) 24(2/3) Canadian Woman Studies 80. As this article also points out, the naturalizing of the sex dichotomy was closely linked both to the social subordination of those read as women and to racialized conceptions of other that served to

not nature.²⁵ Moreover, psycho-social aspects of identity and experience do not inevitably correspond with any particular aspect of one's biological makeup. Third-wavers, queer theorists, and critical gender theorists assert that woman is not only made, not born, but also that 'woman' is an artificial category.²⁶ Post-modern, deconstructionist (post-Derrida) theorists posit that gender is performative and that our repetitions of specific socially gendered behaviours can both underpin and subvert gender norms.²⁷ These ideas have created tension within feminist communities. Importantly, however, theoretical insights into the mutability of sex and gender do not dismantle the social signification of "man" and "woman." This is particularly true with regard to law. Transgendered (as well as inter-sexed) persons embody complexity and contradictions and challenge us to think in new ways about sex, gender, and legal categorization.

Transgender identity, not surprisingly, is fluid and variable and reflects the contingent nature of both sex and gender: "Transgender is an umbrella term used to describe a range of identities and experiences, including but not limited to preoperative, postoperative and nonoperative transsexual people; male and female cross-dressers; intersex individuals; and men and women, regardless of their sexual orientation, whose appearance, behavior, or characteristics are perceived to be different than that stereotypically associated with their sex assigned at birth."²⁸ Within the wider category of "transgendered" persons, Kimberly Nixon is a transsexual because she identifies as a woman.²⁹ Since she

justify imperial conquest. For further information, see Anne McClintock, *Imperial Leather: Race, Gender and Sexuality in Colonial Contest* (New York: Routledge, 1995); Edward Said, *Orientalism* (New York: Pantheon Books, 1978); and Ann Stoler, *Carnal Knowledge and Imperial Power: Race and the Intimate in Colonial Rule* (Berkeley: University of California Press, 2002).

25. For further information on science and ideas about sexual dimorphism, see Thomas Laqueur, *Making Sex: Body and Gender from the Greeks to Freud* (Cambridge: Harvard University Press, 1990); Londa Schiebinger, *Has Feminism Changed Science?* (Cambridge: Harvard University Press, 1999); and Londa Schiebinger, *The Mind Has No Sex? Women in the Origins of Modern Science* (Cambridge: Harvard University Press, 1989).
26. Linked to this assertion are arguments by transactivists that language must change to dismantle the sex dichotomy: "Activists'demand for pronoun neutrality is in many ways a continuation of the feminist commentary on sexist language since it mobilizes the critique that the pronouns he/him/his are never truly sex-indefinite regardless of grammarians' claims." Wayne, *supra* note 1 at 85.
27. Butler, *supra* note 18.
28. Nan Hunter, Courtney Joslin, and Sharon McGowan, *The Rights of Lesbians, Gay Men, Bisexuals and Transgender People* (Carbondale: Southern Illinois University Press, 2004) at 172.
29. Ms. Nixon was born in 1957. She asserts that from the age of four or five she knew that she was a woman and that by eight she was praying that she would "wake up with a different body." From about twenty-two years of age, she lived two lives, "her public life as a man and her private life as Kimberly." In 1986, she started living full time as a female, and she completed gender re-assignment surgery in 1990. At the time of the hearing by the tribunal, she was in a heterosexual relationship and co-parenting a child. Nixon, *supra* note 3 at para. 10–12.

has undergone sex-reassignment surgery, her case is more readily understood within the binary sex/gender system. At the same time, however, her very existence challenges this system because “by attesting that her gender identity did not reflect her genitalia, Nixon refutes biological determinism and provokes disorder and anxiety.”³⁰ Ironically (but not surprisingly, given the epistemology of law), she relied heavily on evidence of bodily transformation in making her legal claim.³¹ Yet the outcome of her case has implications beyond the post-operative male-to-female (MTF) individual. At issue is when and how we draw lines around women-only space. If all sex/gender identification exists on a continuum, how are such distinctions to be made? Is the transgendered person defined—in society, in law, at the rape crisis centre—by biology (which might itself be contradictory), by gender presentation, by surgical intervention, by public perception, or by self-naming? Is a fixed identity—male or female—even necessary in adjudicating claims of discrimination? And in a world in which sex difference (however artificial its construction) remains pervasive, how do we continue to challenge the limitations that sex differences impose upon women, while recognizing that the category itself does not hold? These are not questions that feminists can afford either to ignore or to trivialize.

Transgender Jurisprudence before Nixon: The Marriage/Cohabitation Cases

Transgender jurisprudence is a relatively new branch of law. The early cases emerged in “the context of the practice and legitimization of sex-reassignment surgery in the West,”³² usually in circumstances in which the validity of the marriage of a transgendered person was in question. The 1970 British case, *Corbett v. Corbett*, is the first reported case in which gender was determined by a common law court.³³ In this case, a man had married a post-operative MTF. The woman had undergone sex-reassignment surgery and had been issued a national insurance card as a woman, but Ormrod J. determined that social appearance, gender identity, and psychological considerations were irrelevant in the determination of sex. Expert medical testimony was used in Ormrod J.’s determination that biological sex, as illustrated by a chromosome test, “is fixed at birth and cannot be changed, either by the natural development of the organs of the opposite sex or by medical or surgical means.” This case therefore set the legal precedent that the transgendered

30. Prasad, *supra* note 24 at 83.

31. As Carissima Mathen asserts, “Nixon’s is the most secure case from which to launch an equality rights or anti-discrimination claim.” Mathen, *supra* note 6 at 307.

32. Andrew Sharpe, *Transgender Jurisprudence: Dysphoric Bodies of Law* (London: Cavendish Publishing, 2002) at 3–4.

33. *Corbett v. Corbett*, [1970] 2 All. E.R. 33 (P.B.D.).

MTF was unrecognizable in her chosen gender and that biology (as expressed through the chromosome test) was immutable—the essential determinative factor in gender assignment. Canadian marriage cases alternately reflected and contradicted the *Corbett* precedent.

The first reported transgender case in Canadian law involved a husband who sought a declaration of nullity of his marriage. The wife disclosed to her husband that she “was a transsexual who intended to live her life henceforth as a man.”³⁴ S/he changed his name, registered in an educational program in his new male name, and underwent treatment at the Clarke Institute in Toronto to assist in transition. He also stated a clear intention to undergo reconstructive surgery.³⁵ On the face of it, the marriage had been voluntarily entered into by a man and woman without any impediments. Nonetheless, on the assertion that the law “stipulates that the capacity for natural heterosexual intercourse is an essential element and, if there exists an incapacity with regard to the physical capacity to engage in that essential element, then the marriage is void or voidable,”³⁶ McQuaid J. annulled the marriage. He thus avoided the possibility that two men might be married but contradicted the precedent articulated in *Corbett*. After all, if the woman remained a woman, the marriage should have continued to be valid under then-existing marriage law.

In the 1990 case, *B. v. A.*, two biological women had lived together with their children for twenty-one years. B. had had a double mastectomy, hysterectomy, and cosmetic surgery. When the couple separated A. had control of the assets of the relationship, and B. sought interim support under the *Family Law Act*.³⁷ The court had to decide whether or not B. was a “man” under the definition of “spouse” in the act, which recognized only opposite-sex spouses. The judge denied the claim and found that the *Vital Statistics Act* of Ontario permits the change of sex on birth registration documents only after sex reassignment surgery.³⁸ However, as Shauna Labman asserts, it seems “absurd to use the reconstructed penis as the benchmark of maleness.”³⁹ Would a male who lost his penis through an accident then become a female or does the absolute requirement regarding a penis apply only to FTMs? Moreover, given the difficulties associated with phalloplasty, and the emphasis of the court on “natural” coition, it is not clear that even had B. undertaken surgery that his penis would have been considered functional in the context of the determination of conjugality.

34. *M. v. M.*, [1984] P.E.I.J. No. 9.

35. The changed pronouns in this text reflect the changed identity of the wife/man.

36. *M. v. M.*, *supra* note 34.

37. *Family Law Act*, S.O. 1986, c. 4.

38. *B. v. A.*, [1990] 29 R.F.L. 3d 262 at 266. *Vital Statistics Act*, R.S.O. 1990, c. V.4, s. 36.

39. Shauna Labman, “Left in Legal Limbo: Transsexual Identity and the Law (2001) 7 Appeal: Review of Current Law and Law Reform 70.

In the 1993 case, *R. v. Owen*, the federal court had to establish the validity of a marriage between O., who had been born male but had lived as a woman, and a man. When her partner died, O. applied for a widowed spouse's allowance, which she was denied on the basis that the benefit was only available to spouses of the opposite sex. O. had not completed sex-reassignment surgery or changed her birth certificate. Although she had lived as a woman since 1951, O. was denied the benefits to which she should have been entitled.⁴⁰ Lived experience as a widow was irrelevant to the court.

These decisions reflect an obsessive emphasis on reading the body "correctly" and on preventing the possibility of same-sex marriage.⁴¹ Reticence in accepting the self-defined gender of transgendered persons is also clear. None of the parties in these cases had undergone sex-reassignment surgery (the construction of a vagina or a penis). Yet the court did not consider either the medical challenges faced by FTM individuals seeking phalloplasty (in particular, in *B. v. A.*) or the reality of shared lives/evidence of ongoing cohabitation and interdependence (in particular, in *R. v. Owen*).⁴² The failure to consider evidence of cohabitation is striking given the degree to which the court has debated the meaning of cohabitation and its parallels with legal marriage. Nor at any time was it made explicit that someone who had undergone sex-reassignment surgery would be recognized in their chosen gender for the purposes of marriage. More than immutability of biology, these cases reflected and expressed popular fears of same-sex marriage. However, the emphasis on surgery, and the suggestion, which is implicit in these cases, that *Corbett* could be overturned, might have encouraged Kimberly Nixon.

40. *R. v. Owen*, [1993] 110 D.L.R. (4th) 339.

41. For an extended discussion of the connections between homophobia and the refusal to recognize transgender identity throughout the common law world, see Sharpe, *supra* note 32. In the most recent British marriage case, a male to female (MTF) petitioned the court for a declaration that her twenty-two-year marriage to a man was valid. She had been married to a woman, divorced and subsequently undergone sex-reassignment surgery. Her appeal to the House of Lords was dismissed on 10 April 2003. *Bellinger v. Bellinger*, [2003] All E.R. 593. For further discussion, see Sharon Cowan, "That Woman Is a Woman": The Case of *Bellinger v. Bellinger* and the Mysterious (Dis)Appearance of Sex" (2004) 12 Feminist Legal Studies 83. In the United Kingdom, the *Gender Recognition Act* received royal assent on 1 July 2004. By this act, a regulatory scheme is created under which a transperson can apply for legal recognition in their new gender. But such recognition is to be granted by a panel of medical and legal experts and depends upon evidence that the applicant has been diagnosed with gender dysphoria, has lived as the new gender for at least two years, and intends to live the remainder of his/her life in the new gender. This constructs the human rights of transpersons as flowing from the medical construction of transsexualism as mental illness. Sandland, *supra* note 8 at 49. It also, moreover, codifies sex-reassignment as the pivotal moment in the (re)definition of gender and reifies the two gender system.

42. There is an extensive legal literature on this subject. See, for example, Nicholas Bala, "Controversy over Couples in Canada" (2003) 29 Queen's Law Journal 41; and Brenda Cossman and Bruce Ryder, "What Is Marriage-Like?" (2001) 18 Canadian Journal of Family Law 269.

After all, she was post-operative, with a functional vagina, and had changed both her name and her birth certificate.⁴³ Moreover, she did not seek rights arising out of marriage but, rather, protection from discrimination.

Transgender Jurisprudence before Nixon: The Discrimination Cases

Transgender people face severe social and economic discrimination.⁴⁴ Despite this fact, “until very recently, most courts have held that transgender people are excluded from basic civil rights protections.”⁴⁵ Canadian human rights tribunals have made some attempt to move beyond determining the sex/gender of the complainant and, instead, have attempted to address the real concerns faced by transgendered people in a world in which they remain a misunderstood and maligned minority.⁴⁶ A case heard in Montreal in 1998 paved the way for a new interpretation of discrimination against a transgendered person as a sub-category of sex discrimination. In determining that a post-operative MTF had been discriminated against when her work as an outreach street worker for youth was terminated, the tribunal asserted that “a transsexual person who is a victim of discrimination based on his being a transsexual may benefit from provisions against discrimination based on sex, once his transformations have been completed or, if you like, once his identification is perfectly unified.” Further, in recognizing that sex and gender are relative concepts, the tribunal held that “what is more, discrimination based on the process of the unification of disparate and contradicting criteria may also constitute sex-based discrimination while sex is at its most

43. Marriage cases, it must be noted, are now moot in Canada, as same-sex marriage is legal, and the parties to a marriage need not establish the gender/sex of either party in order to enter into a valid, legally recognized union. This is not true, however, in the majority of other common law jurisdictions.

44. For a detailed discussion of such discrimination and hostility, see Barbara Findlay, *An Introduction to Transgender Women* (Vancouver: LEAF Forum, November 1999); and Jamieson Green, “Introduction,” in Paisley Currah and Shannon Minter, eds., *Transgender Equality: A Handbook for Activists and Policymakers* (Policy Institute of the Gay and Lesbian Task Force, 2000).

45. Hunter, Joslin, and McGowan, *supra* note 28 at 171.

46. The first quasi-discrimination case regarding a transgendered person involved an application for a name change in Ontario. In *Re Reid* heard by the Ontario District Court in August of 1986, an application for a name change by a MTF person awaiting sex change surgery was upheld; *Re Reid*, [1986] 56 O.R. (2d) 61. In another case, a MTF father was granted primary custody of his children, with her former wife having liberal access. The children expressed their desire to live with their father, and after considerable discussion of the potential impact of gender dysphoria on the children, it was determined by the court that gender dysphoria did not preclude positive parenting. See *Ghidoni v. Ghidoni*, [1995] B.C.J. No. 2136. Similarly, in 1996, an Ontario court determined that “the father’s change of gender, in itself, is not relevant except as it affects the child” and restored access to the MTF father. See *Morgan v. Wythe*, [1996] O.J. No. 1510. Since these cases did not engage constitutional questions regarding discrimination, however, they are not discussed further.

vaguely defined.”⁴⁷ This case, therefore, explicitly overturned the essentialist interpretation of gender set out in *Corbett*. Gender, the tribunal admitted, is mutable through surgery (and perhaps even without surgery). The right of the pre-operative, or non-operative, transgendered person to protection from discrimination was explicitly articulated by the BC Human Rights Tribunal in three cases heard in 1999.

In *Sheridan v. Sanctuary Investments*, the complainant was a MTF who was preparing for sex-reassignment surgery. She had been denied access to the women’s washroom at a gay and lesbian nightclub and on one evening had been denied entry to the club itself on the basis that her driver’s license still had her male picture and name on it. The tribunal determined that discrimination against a transsexual is discrimination on the basis of sex on the grounds that transsexuals receive differential treatment because they fall outside the traditional male/female dichotomy. It was also determined that Sheridan had been discriminated against on the basis of “physical or mental disability” on the grounds that gender identity disorder is defined (however inappropriately, I would argue) as a mental disorder. It was found that the washroom policy contravened section 8 of the *Human Rights Code* but that exclusion from the club was not discriminatory, since anyone whose identification did not match their appearance would be excluded.⁴⁸ The essential issue was not whether the woman had undergone surgery, or even to which gender she belonged, but whether she had faced discrimination on the basis of gender difference.

In *Mamela v. Vancouver Lesbian Connection*, a pre-operative MTF lesbian launched a complaint against the Vancouver Lesbian Connection (VLC), claiming she had been discriminated against on the basis of her sex and/or political beliefs. She attended the centre on a regular basis, doing volunteer work, and eventually wrote an article in which she outlined her beliefs as a transsexual lesbian. The collective found her beliefs inappropriate and asked her to leave the centre. It was decided that she had not been discriminated against in the employment context, since the VLC had not employed her. However, discrimination with regard to provision of service was found to have occurred. The VLC had made it clear that their services were available to “self-identified lesbian, bisexual and transsexual queer womyn.”⁴⁹ The decision in this case hinged, at least in part, on the fact that Mamela

47. *M.L. and Commission des droits de la personne et les droits*, [1998] J.T.D.P.Q. No. 31, para. 113 and 114.

48. The night club was ordered to pay Sheridan \$2,000 in compensation for her injury to dignity, feelings, and self-respect. *Sheridan v. Sanctuary Investment Ltd (c.o.b B.J.'s Lounge)*, [1999] B.C.H.R.T.D. No. 43. For a further discussion of this case, see barbara findlay, “Real Women: Kimberly Nixon v. Vancouver Rape Relief” (2003) 36(1) University of British Columbia Law Review 62.

49. The Vancouver Lesbian Connection was ordered to refrain from committing a similar contravention and to pay \$3,000 to Mamela in compensation for injury to her dignity,

was “enrolled in the Gender Clinic and therefore medically certified as female.”⁵⁰ Yet human rights protection should not depend upon a medical diagnosis. Although the tribunal phrased its decision in a way that was intended to be respectful of the self-identity of the complainant, and deliberately avoided an explicit determination of her gender, it did not “provide clear guidelines as to what exactly is a transsexual person and whether it is or should be completely a matter of self-identification.”⁵¹

In *Ferris v. Office and Technical Employees Union, Local 15*, Leslie Ferris, a MTF, claimed that Local 15 had discriminated against her. A co-worker had complained when she used the women’s washroom, and her company had handled the incident by putting a letter of reprimand in her file. She resigned from her job but later reconsidered and contacted her local union to assist her in rescinding the resignation. The tribunal determined that the union had done a particularly poor job of presenting her case to the employer and that she had been treated differently on the basis of her transgender status and gender difference.⁵² These cases established the precedent that the human rights of pre- and post-operative transgendered people should be protected in the context of employment and provision of services.⁵³ However, the emphasis on difference, without a determination regarding when, how, and by whom gender is to be defined, ensured that these cases are of limited application. Would self-definition be recognized in the context of a conflict of rights?

The problems that might not be adequately met by the reasoning employed by the BC Human Rights Tribunal were evident in a case heard by the Canadian Human Rights Tribunal in 2001. Sylvia Kavanagh, a MTF, brought a discrimination complaint on the basis that she had been housed in a men’s penitentiary and denied hormone treatment and sex-reassignment surgery. At the time of sentencing, she was living as a woman, taking hormone therapy, and conditionally approved for surgery. The trial judge asserted that “simple humanity would justify making such arrangements as will

feelings, and self-respect. *Mamela v. Vancouver Lesbian Connection*, [1999] B.C.H.R.T.D. No. 51.

50. findlay, *supra* note 48 at 62–3.

51. Cowan, *supra* note 41 at 84.

52. The union was ordered to cease its contravention of the *Human Rights Code*, to pay Ferris \$1,000.80 in lost wages, and a further \$5,000 in compensation for the injury to her dignity and feelings of self-respect. *Ferris v. Office and Technical Employees Union, Local 15*, [1999] B.C.H.R.T.D. No. 55.

53. The latest case to be heard by the British Columbia Human Rights Tribunal continues this line of argument. Deborah Magone filed a complaint against the British Columbia Ferry Service when her employment as a deckhand was terminated. The respondents claimed that they had fired Ms. Magone for reasons unrelated to her identity, but Ms. Magone countered that on the basis that she was undergoing sex-reassignment surgery, the employer had held her to an overly stringent employment standard to which others were not subjected. The attempt by the respondent to have the complaint dismissed failed. *Magone v. British Columbia Ferry Services*, [2005] B.C.H.R.T.D. No. 451.

accommodate” [her female identity] and recommended that she be housed in a women’s penitentiary.⁵⁴ Her complaints were settled, but the case was nonetheless heard by the tribunal, and the Correctional Service of Canada was given six months to formulate a new policy on sex-reassignment surgery. Under the new policy articulated by the Correctional Service of Canada, post-surgical MTFs would now be housed in women’s penitentiaries. A pre-operative person (or someone who eschewed gender definition altogether), however, would remain in the facility corresponding with his/her gender at birth, leaving many transgendered people vulnerable (although someone with medical proof of their approval for sex-reassignment surgery would be allowed to proceed with treatment and then be moved to a female facility). Safety concerns with regard to female inmates were seen to outweigh the right of the pre-operative prisoner to live in her chosen gender, despite the fact that pre-operative MTFs are themselves potentially at particular risk in male institutions and despite a failure of the correctional services to provide convincing evidence that a pre-operative MTF would put female inmates at risk (or would even be perceived to do so by female inmates themselves).⁵⁵ If gender/sex exists on a continuum, at what point do we make the (arbitrary) distinction between men and women? Who gets to make such distinctions? And how do we weigh the respective rights of an individual transgendered woman against the group rights of “women,” particularly “women” in spaces considered both women-only and vulnerable?⁵⁶ The flexibility that is evident in the BC tribunal decisions would not resolve these questions, since the fundamental issue hinged on a determination of the gender of the complainant. In such cases, would a court, or a tribunal, now retreat into the essentialist rhetoric of *Corbett* or would the right to protection from discrimination, which was articulated in *Sheridan*, *Mamela*, and *Ferris*, include a right to self-definition even in women-only spaces? The questions raised in the *Kavanagh* case would divide feminist communities after *Nixon*.

54. *R. v. Kavanagh*, [1989] O.J. No. 2620.

55. *R. v. Kavanagh*, [2001] C.H.R.D. No. 21 [*Kavanagh*].

56. One final case involving transgendered persons has been heard by the Canadian Human Rights Tribunal since *Kavanagh*, *ibid*. In this case, the complainant was a MTF who claimed that the respondent refused to hire her because she was a transgendered person. The respondent agreed that the complainant was well qualified for the job but claimed that the refusal to hire her was based upon their belief that she sought the position in order to advocate for transsexuals, was over-qualified, and would quickly leave the position. The tribunal found for the complainant, but no remedy was sought and no determination of the sex/gender of the complainant was required; *Montreuil v. National Bank of Canada*, [2004] C.H.R.D. No. 4.

Nixon

The *Nixon* case began when Kimberly Nixon attended a publicly advertised VRRS training session for volunteers. She had previously passed a screening process intended to identify those who do not agree with the core beliefs of VRRS, in particular, the belief that women are never to blame for the violence to which they are subjected. She was motivated to volunteer her services because of male violence she had experienced both before and after her sex-reassignment surgery. During the training session, a facilitator, solely on the basis of appearance, identified Nixon as transgendered. Nixon was asked to confirm that she had lived her entire life as a woman and, when she responded honestly, was asked to leave. Although Nixon had applied to work as a volunteer, she filed her complaint based on section 13(1) (a) or (b) of the British Columbia *Human Rights Code*, which prohibits discrimination with respect to employment.⁵⁷ She later amended her statement of claim to include the assertion that she had been “denied a service and/or facility customarily available to the public” contrary to section 8(1) (a) or (b) of the code.⁵⁸ The VRRS sought an order from the Supreme Court of British Columbia that the case exceeded the jurisdiction of the BC Human Rights Tribunal, asserting that discrimination on the basis of sex, which was prohibited under the code, did not include discrimination on the basis of gender identity and that the women-only policy of the VRRS was approved under section 41 and not subject to review. These arguments were dismissed.⁵⁹

The complaint was then heard before the BC Human Rights Tribunal. It was, as the tribunal acknowledged, “a very difficult and emotional hearing for all those involved...[and] the complainant was the subject of intense media scrutiny.”⁶⁰ Nixon did not challenge the women-only hiring policy of the VRRS. Rather, she asserted that she was a woman.⁶¹ The VRRS maintained that Nixon was not woman enough to perform peer counselling. They found it irrelevant that Nixon had, as a woman, been subjected to physical and emotional abuse from a male partner and had been the victim of a sexual assault. She also had previous experience working with women in crisis, as she had been a peer counsellor at Battered Women’s Support Services and had worked at a transition house for women dealing with male violence and/or mental health concerns. Uncontested evidence at the hearing confirmed that Ms. Nixon was very effective in

57. British Columbia *Human Rights Code*, S.B.C. 1984, s. 8.

58. *Ibid.*, s. 3.

59. *Vancouver Rape Relief Society v. BC Human Rights Commission*, [2000] B.C.J. No. 1143, para. 52 and 56.

60. *Nixon*, *supra* note 3 at para. 5.

61. *Vital Statistics Act*, R.S.B.C. 1996, s. 27(1) and (2).

such work.⁶² The VRRS, however, considered these life experiences inadequate to compensate for the fact that Nixon had not been born a woman.⁶³ Their essential argument was quasi-biological and socially deterministic. Ironically, it also echoed strongly the *Corbett* reasoning and decision. The VRRS asserted that “there is 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 (seeking counselling) who is already extremely disturbed and afraid.”⁶⁴ Although they were, ostensibly, describing potential future counsellors when making this argument, they did not consider that Kimberly Nixon might be insulted by their descriptions of a transwoman as a man “dressed as a female” or “disguised as a woman.”⁶⁵

The BC Human Rights Tribunal articulated five legal issues requiring resolution as a result of Nixon’s complaint. The first issue was the question of whether a denial of opportunity to volunteer based on sex was a violation of section 13(1)(a) and (b) of the *Human Rights Code*. The VRRS argued that section 13 does not apply to volunteer relationships, but Nixon countered that the *Human Rights Code* must be interpreted broadly. The tribunal found that it would not be within the purposes of the code to hold the VRRS to the anti-discrimination provisions concerning paid employees while allowing them to disregard such provisions with regard to volunteers who perform the same substantive work.⁶⁶ Second, the tribunal had to consider whether the training program offered by the VRRS was a service customarily available to the public and therefore whether or not Nixon’s exclusion constituted a violation of section 8(1)(a) or (b) of the code. The VRRS contended that their volunteers were not receiving a service but, instead, being trained to provide a service.⁶⁷ Nixon countered that the training would constitute a valuable education that she could use elsewhere in the feminist movement.⁶⁸ The tribunal concurred with Nixon.

62. Multiple individuals at both sites confirmed that Ms. Nixon was “able to reach out and support other women in the group” and was “superior to other trainees in her ability on the crisis line.” *Nixon*, *supra* note 3 at para. 33.

63. *Ibid.* at para. 1, 4, 21, 28, 33, and 43.

64. *Ibid.* at para. 157.

65. Nor did they consider that a woman-born woman might also look masculine and raise concerns in the mind of a client, but that to exclude such a volunteer on the basis of appearance would clearly constitute discrimination.

66. The tribunal also referred to the reasoning of Nitya Iyer, a member of the Human Rights Tribunal in *Mamela v. Vancouver Lesbian Connection*, in which she outlined volunteer relationships that could be captured under the definition of employment, including formal recruitment process, training, and agreement to abide by the policies of the organization. *Ibid.* at para. 61.

67. *Ibid.* at para. 76.

68. Ironically, however, in their submissions the Vancouver Rape Relief Society (VRRS) admitted that “the training received at Rape Relief would be very useful elsewhere in the

The third question before the tribunal was whether or not there was a *prima facie* case of discrimination. The VRRS argued that the exclusion of Kimberly Nixon did not constitute discrimination because the human dignity test, confirmed in *Law v. Canada*,⁶⁹ was not met in this case since “no reasonable person would feel that their dignity was impacted by being excluded, like most other British Columbians, from the training program of a small, not-for-profit, women’s shelter.”⁷⁰ The tribunal, however, determined that the dignity requirement in the proof of discrimination does not apply in the human rights context and that once adverse treatment on the basis of a prohibited ground is proven, responsibility is with the respondent to justify his/her conduct. The tribunal found that it was indeed discrimination that the VRRS “applied their stereotypical view that, despite her self-identification as a woman, and her legal status as one, [Ms. Nixon] was not a woman as far as they were concerned.”⁷¹ The VRRS argued that the exclusion of Ms. Nixon did not constitute taking a position on what a woman is, or who a woman is, but was a recognition of the “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.” This argument was rejected by the tribunal.⁷²

Once a finding of discrimination was made, the onus shifted to the respondent to justify exclusion, and the fourth issue that the tribunal had to consider was the validity of the VRRS’s claim that there was a *bona fide* occupational requirement that justified discriminating against Ms. Nixon. This standard requires that the goal of exclusion is rationally connected to the function of the organization; that the exclusion is adopted in good faith; that the exception is reasonably necessary to accomplish work-related goals;

feminist movement and that Rape Relief considers the number of volunteers it trains as one of their contributions to the local women’s movement.” *Ibid.* at para. 82.

69. *Law v. Canada*, [1999] 1 S.C.R. 497 at para. 51.

70. *Nixon*, *supra* note 3 at para. 90. The VRRS argued that the dignity test in *Law* should frame the definition of discrimination in human rights law. But the implications of this argument are worrisome. Effectively, Kimberly Nixon becomes, in this construction, an “unreasonable” person. Not surprisingly, it is easier to construct someone outside the margins of society as unreasonable, thus limiting the ameliorative impact of *Canadian Charter of Rights and Freedoms* litigation, Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11. Carissima Mathen also makes this point. Mathen, *supra* note 6 at 298. It should be noted that the human dignity requirement is applicable only to section 15 cases under the *Charter*, under which state action is evaluated, and has not been incorporated into human rights jurisprudence. It should also be noted that the harm to dignity requirement has been controversial and has been criticized as a vague tool that can have an adverse impact on disadvantaged persons before the court. See Peter Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 2002) at s. 52.7(b); and Sheila Martin, “Balancing Individual Rights to Equality and Social Goals” (2001) 80 Canadian Bar Review 299.

71. *Nixon*, *supra* note 3 at para. 144.

72. See Christine Boyle, “Summary of Arguments,” Part I, available at <<http://www.rapereliefshelter.bc.ca>>.

and that accommodating the person to be excluded would cause undue hardship to the employer.⁷³ The VRRS argued that their goal was to provide a safe environment in which victims of male violence are not silenced. The tribunal accepted this objective and the claim of good faith but asserted that the VRRS had not met the requirement of proving that accommodating Ms. Nixon would cause undue hardship to the organization. The VRRS contended that in order to relate to women in crisis, counsellors must have lived their entire lives as women. The tribunal rejected the position of the VRRS on the basis that their arguments erroneously assumed that “all the women who access Rape Relief for services, and who provide services, have a homogenous common life experience.”⁷⁴ Furthermore, the tribunal noted that “Rape Relief makes no inquiry into a volunteer’s life experience, including whether a prospective volunteer has lived some part of her life as a man, in the screening interview before accepting a volunteer into their training program. Instead, they accept that all women have had a similar life experience and that, unless they present with an appearance that would trigger an inquiry, they are women.”⁷⁵

The final question before the tribunal was whether or not the VRRS was entitled to rely on its exemption under section 41 of the *Human Rights Code*. The VRRS argued that one of the primary purposes of the organization was to organize women “based on common sexual experience as it relates to such things as childhood socialization, the lifelong experience of the cultural meaning associated with female biology, social and physical relationships to reproduction and the experience of a particular type of subordination.”⁷⁶ The tribunal disagreed, finding instead that the primary purpose of the VRRS was to provide a service to rape victims and to be an “educational force for progressive changes in attitudes, laws, institutional procedures, and to work for the prevention of rape.”⁷⁷ The tribunal found that Ms. Nixon shared the political views of the VRRS and “if what Rape Relief is proposing is that Ms. Nixon must share a common experience rather than a system of thought, belief, principle or like-mindedness, they are not, in my view, asserting a

73. The tribunal referred to the standard set in *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees Union*, [1999] 3 S.C.R. 3 [*Meiorin*]. *Nixon*, *supra* note 3 at para. 197.

74. *Nixon*, *supra* note 3 at para. 202.

75. *Ibid.* at para. 223. In legal terms, then, the provision was both over-inclusive, as a woman-born woman might look like a man and therefore be discriminated against, and under-inclusive, as a transgendered woman whose appearance did not trigger an inquiry might already have served as a counsellor for the VRRS. In this context, the exclusion of Ms. Nixon could not meet the standard of being “necessary to the achievement of legitimate work-related or business-related objectives.” *Ibid.* at para. 178. The over-inclusive/under-inclusive argument is also made by Barbara Findlay, *supra* note 48.

76. *Nixon*, *supra* note 3 at para. 215.

77. *Ibid.* at para. 219.

political belief captured by section 41.”⁷⁸ The VRRS was ordered to cease its contravention of the code and to pay Nixon \$7,500.00 for the injury to her dignity, feelings, and self-respect.⁷⁹ The VRRS appealed this decision to the Supreme Court of British Columbia.

In this appeal, the VRRS asserted that a number of errors had been made in the tribunal’s decision. They argued that the tribunal had not understood the primary and political purpose of the organization and that the damages were unwarranted.⁸⁰ Most importantly, it was claimed that the tribunal had erred in its finding of discrimination. The VRRS argued that since “woman” is defined by the VRRS as someone who has lived their entire life as a female, Ms. Nixon was not, and could not ever be, a woman for the purposes of the VRRS. They asserted that the VRRS is entitled to maintain their women-only hiring policy under section 41 and that a reasonable person would not have had their dignity impaired by exclusion from the VRRS. However, as Barbara Findlay, counsel for Kimberly Nixon, put it, the “argument that the dignity interest of a transsexual woman is not engaged by being expelled from a women’s organization is startling. It is the quintessential nature of the oppression faced by transgendered people that their gender and their right to be in or participate in gendered spaces is constantly and derisively challenged. For a transsexual woman to be denied participation in a women’s organization is perhaps the most humiliating experience she can have.”⁸¹

It was held by the Supreme Court of British Columbia that “exclusion by a small relatively self-defining organization cannot have the same impact on human dignity as legislated exclusion from a statutory benefit program”⁸² and that the tribunal had erred in finding discrimination. Rejecting the flexibility inherent in the decisions in *Sheridan*, *Mamela*, and *Ferris*, Edwards J. determined that discrimination had not occurred because Ms. Nixon was not a woman and that gender difference was not a basis for a discrimination claim. Even if Ms. Nixon was determined to be a woman, Edwards J. asserted that the VRRS was entitled to prefer a sub-group of women under section 41. The court relied on the decision in *Re: Caldwell and Stuart* in which the employer “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.”⁸³ Perhaps most importantly, although the BC Human Rights Tribunal had held the VRRS accountable under the *bona fide* occupational requirement criteria, Edwards J. determined that section 41 exempted the VRRS from review under this doctrine. Going beyond legal

78. *Ibid.* at para. 220.

79. *Ibid.* at para. 246.

80. *Vancouver Rape Relief Society v. Nixon*, [2003] B.C.S.C. 1936 at para. 1.

81. Findlay, *supra* note 48 at 69.

82. *Nixon*, *supra* note 3 at para. 145.

83. *Re: Caldwell and Stuart*, [1984] 2 S.C.R. 603.

argument, Edwards J. asserted that the case “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,” blaming the victim for much of her own suffering.⁸⁴ The order of the tribunal was overturned, and Kimberly Nixon appealed to the British Columbia Court of Appeal.⁸⁵

The decision of the BC Court of Appeal was issued on 7 December 2005, ten years after Kimberly Nixon was turned away by the VRRS (a delay that suggests, in itself, that human rights legislation is not as effective as it should be). Kimberly Nixon’s appeal was dismissed. It was determined that while Edwards J. had erred in finding that discrimination had not been established (thereby at least recognizing the personal pain and suffering endured by Kimberly Nixon), exclusion was allowable under section 41 of the *Human Rights Code*.⁸⁶ Saunders J., however, was clearly uncomfortable with some of the arguments raised by the VRRS, prefacing his decision with the assertion that “the question is not one of concurrence with, or approval of, the belief here advanced to exclude Ms. Nixon from the voluntary activity to which she aspired. It is, rather, a question of the meaning of the Code: does it allow the Society to exclude her?”⁸⁷ Did/does section 41 allow a protected organization to prefer a sub-group within a protected category? And who—the individual or the organization—determines the identity/category into which a particular individual is placed?

Saunders J.’s central legal argument with regard to discrimination endorsed the BC Human Rights Tribunal’s view that the *Law* framework, which is applicable in cases regarding challenges to law or government action, might “overpower the relatively discrete event, the nature of the relationship (often between private parties) and the personal affront that is the subject of the

84. *Nixon*, *supra* note 3 at para. 161.

85. It should be noted that the case was also before the court in 2004 with regard to the application of Egale Canada, Women against Violence against Women, the Trans Alliance Society, and the West Coast Society of Human Rights Defenders for leave to intervene in the appeal of the respondent. The applications were denied except with regard to Egale. It is well established by the Supreme Court of Canada that intervenor status should only be granted by parties with a direct interest in the outcome of a case and who can make particular contributions that do not simply replicate the arguments of the petitioner. Egale was allowed such status on the basis that they could make useful submissions with regard to the discrimination test under section 15 of the *Charter* and its applicability in human rights cases and on the proper interpretation of exemptions under the *Human Rights Code*. *Vancouver Rape Relief Society v. Nixon*, [2004] B.C.J. No. 2059.

86. *Vancouver Rape Relief Society v. Nixon*, [2005] B.C.J. No. 2647. Interestingly, this is precisely the outcome predicted by Carissima Mathen: “While Nixon’s claim likely will be recognized as engaging equality and non-discrimination concerns, it is less certain that her particular demand to be accommodated as a ‘woman’ within the Rape Relief collective will be vindicated.” Mathen, *supra* note 6 at 305.

87. *Nixon*, *supra* note 3 at para. 10. He further asserted that “the Legislature could elect to prohibit this behavior” (at para. 11).

human rights complaint, and in this way may have a narrowing consequence unsuited to a human rights context.”⁸⁸ If discrimination is accepted to have occurred, the question becomes whether or not the group rights exemption applies to the VRRS. Saunders J. found that “the reviewing judge was correct in . . . concluding that a group can prefer a sub-group of those whose interests it was created to serve, given good faith and provided there is a rational connection between the preference and the entity’s work or purpose.”⁸⁹ The VRRS “was not required to establish that its primary purpose was to promote the interests of women who have lived their entire lives as females in order to benefit from s. 41,” and it “was entitled . . . to prefer to train women who had never been treated as anything but female.”⁹⁰ All groups protected under section 41 are, under this decision, exempt from review when challenged on issues related to *bona fide* occupational requirements.

Although the decision explicitly acknowledged that failure to recognize Nixon as a woman constituted discrimination, it simultaneously, and I believe ironically, awarded to protected groups the right to make essentialist distinctions that echo *Corbett*. Nixon can say she is a woman, and, in most contexts, the law will support her self-definition. Yet other women, and women’s groups, are under no legal obligation to accept her as the woman she claims to be. The BC *Human Rights Code* is unique in Canada in that section 41 states that, in the case of a protected organization devoted to ameliorating the discrimination faced by an identifiable group, the “organization or group must not be considered to be contravening this code because it is granting preference to members of an identifiable group or class of persons.”⁹¹ For this reason, the decision might not be binding in other jurisdictions and under other human rights codes.⁹² Yet it is important beyond the specifics of the case. The decision reflects a fundamental conflict of rights between identifiable groups and individuals who seek membership in such groups, and this issue deserves more substantive debate than is reflected in the invocation of a blanket exemption (either by the VRRS or by the court). Kimberly Nixon sought and was denied leave to appeal to the Supreme Court of Canada.⁹³ This case raises important issues about the question of self-identification and gender classification in law and about the role of section 41 and the extent of group rights in a society that seeks to minimize discrimination. Although

88. *Ibid.* at para. 35.

89. *Ibid.* at para. 58.

90. *Ibid.* at para. 59.

91. *Human Rights Code*, *supra* note 5.

92. As Alvin Esau argues with regard to the exemption in relation to religious groups, “Canada is a divided territory. The majority of jurisdictions allow only a possible BFOR defence to a religious employer to discriminate on the ground of religion, while a few provinces have exemptions which vary in scope.” Essua, *supra* note 5 at para. 127.

93. *Kimberly Nixon v. Vancouver Rape Relief Society—and—British Columbia Human Rights Tribunal*, 2007 Can. LII 2772 (S.C.C.).

Nixon will not advance, these issues will continue to be debated in the courts and within the feminist movement.

Feminist Responses to Nixon

As Barbara Findlay, lead counsel for Kimberly Nixon, asserted in 2000, “the question of whether and how not only the Complainant, but all transgendered women, can or should participate in women’s organizations is a human rights issue of great importance.”⁹⁴ Instead of engaging in substantive debate about the issues raised by transgender claims, however, prominent feminists who have responded publicly to the case have denigrated Kimberly Nixon.⁹⁵ Michele Landsberg, for example, asserted that “out of politeness, I’d be willing to call that surgically altered person a woman and use the feminine pronoun. But a part of me will always feel outraged that a ‘woman’ could be defined as an outward set of physical characteristics—lack of penis, fake breasts—along with an ultra-sexist ‘female impersonator’ style of clothing and gesture.”⁹⁶ She explicitly positions Kimberly Nixon as an enemy of the women’s movement, comparing her to a rapist: “[W]oman-centred services are besieged with enemies enough in this backlash era. What a twisted irony it is that the latest and perhaps fatal blow should be inflicted by someone who wants to be a woman—but doesn’t hesitate to inflict potential ruin on a woman’s service that tried to say ‘no’ to her unwanted advances.”⁹⁷ Suzanne Jay, who was, and perhaps still is, associated with the VRRS, asserted that “Nixon may have all the compassion in the world, but she can’t possibly know how victimized women really feel,” denigrating Nixon’s personal experience of violence.⁹⁸ Margaret Wentz (whom feminists might not recognize as sharing their perspective, but who certainly has considerable popular following and is a prominent female voice in the media) described Kimberly Nixon in the *Globe and Mail* as “a statuesque brunette with high cheekbones, fluffy bangs, gold hoop earrings, a broad chest, slim hips and a large chin. To the untutored eye she looks a bit like a man in a dress, which is not surprising in that she is

94. *Nixon*, *supra* note 3 at para. 14.

95. There is a substantial history of writing within feminism that denigrates transgendered people, transsexual MTFs in particular. For example, in a classic early statement of this position, Janice Raymond asserted that allowing “castrated men—into their most intimate circles...accepting transsexuals into the feminist community is only a rather unique variation on the age-old theme of women nurturing men, providing them with a safe haven, and finally giving them our best energies.” Janice Raymond, *The Transsexual Empire: The Making of the She-Male* (Boston: Beacon Press, 1979) at 110.

96. Michele Landsberg, “Rape Crisis Centre in B.C. Endures Assault,” *Toronto Star* (23 December 2000) at N1, < <http://www.rapereliefshelter.bc.ca> > .

97. *Ibid.*

98. As quoted, with support, in Mindelle Jacobs, “Should Transsexual Counsel Rape Victims?” *Edmonton Sun* (17 December 2000) and cited at < <http://www.rapereliefshelter.bc.ca> > .

equipped with a full set of XY chromosomes. Ms. Nixon, however, has decided she's a woman."⁹⁹ Reactions to the case reflect a widespread reading of "trans women as men."¹⁰⁰ Some commentators have explicitly accused women such as Kimberly Nixon of engaging in stealth politics. For example, in an article reproduced on the VRRS website, Karla Mantilla urged feminists to refuse to accept the inclusion of MTFs: "[T]o the extent feminists partake in this, we have nursed a viper in our movement which is now out to destroy what precious little women's space we have managed to eek out. We have not come a long way, baby, and we cannot afford to give our movement over just yet to the boys, no matter how they come dressed."¹⁰¹ Such commentary cannot be considered reasoned debate.

More formal academic discussion remains rare and is also deeply polarized (although less overtly vitriolic). Counsel for both Kimberly Nixon, Barbara Findlay,¹⁰² and for the VRRS, Christine Boyle,¹⁰³ have presented their arguments to the wider legal community, but few other legal scholars have engaged in this debate. Carissima Mathen is the exception. For the most part, she offers insightful commentary on the legal implications of the *Nixon* case. However, her analysis is marred by an underlying lack of sympathy for Kimberly Nixon's claim. Mathen admits that "under generally accepted principles and precedents, Nixon's claim is stronger than Rape Relief's defense," but she qualifies this admission by arguing that forcing the VRRS "to accept women such as Nixon, is to adopt a completely formal, decontextualized remedy that is blind to the realities of working and advocating in a feminist space in which sex segregation is deemed to be essential and is permitted by law."¹⁰⁴

99. Margaret Wentz, "Who Gets to Be a Woman?" *Globe and Mail* (14 December 2000), <<http://www.rapereliefshelter.bc.ca>>. The article becomes even more insulting: "Some people are convinced they can only be fulfilled if they have a leg amputated. But most of us believe that amputating their legs is unethical. Maybe some day we will think the same way about the people who encouraged Ms. Nixon to amputate her penis. We can castrate her and shave her Adam's apple. We can give her electrolysis and hormone injections and breast implants. But one thing we cannot do is change her Y chromosome into an X—no matter what the Human Rights Commission says" (at 3).

100. Elliot, *supra* note 6 at 15.

101. Karla Mantilla, "Men in Ewe's Clothing: The Stealth Politics of the Transgender Movement" (April 2000) off our backs 6, <<http://www.rapereliefshelter.bc.ca>>. The promotion of such beliefs on the VRRS website suggests a fundamental hostility to Kimberly Nixon that is muted in the official legal documents of the organization. This same article is extremely derogatory with regard to FTMs, despite the fact that a number of FTMs have a long history of work within the feminist movement: "For a woman to 'feel' more like a man, to want to be a man, is profoundly political. To ignore that men and masculinity have been oppressors of women and to pretend that wanting not just to identify with the oppressors, but actually become like them is, if not anti-feminist, then at least oblivious to feminism" (at 7).

102. Findlay, *supra* note 48 at 57–76.

103. Christine Boyle, "The Anti-Discrimination Norm in Human Rights and Charter Law: *Nixon v. Vancouver Rape Relief*" (2004) 37(1) *University of British Columbia Law Review* 31.

104. Mathen, *supra* note 6 at 314.

Such an argument relies fundamentally on a reading of Nixon as male. Perhaps more disturbingly, Mathen asserts that Nixon should have chosen not to advance her claims in court, that “as a ‘feminist’ apparently committed to the overall betterment of women, Nixon needs to consider what her claim may do to the cohesion and vitality of the feminist movement.”¹⁰⁵ While Mathen is critical of both parties and makes a nuanced argument about the undesirability of recourse to the courts to solve a divisive political issue, nonetheless, asking Kimberly Nixon to sacrifice her claim for the benefit of wider feminism is akin to asking women of colour to pretend all women are white or to asking lesbians to ignore their sexuality. Cohesion and vitality, I contend, cannot be maintained through the suppression of diversity. Instead, we need to engage in a reasoned critique of the arguments that were used to “justify” the exclusion of Kimberly Nixon and to contemplate the cost and implications of these arguments. Both the use of essentialist rhetoric by the VRRS and the broad protection granted under section 41 require analysis. If sex/gender exists on a continuum, who decides what category a particular person belongs to and on what basis does a women-only space legitimately exclude a self-proclaimed woman? Under what circumstances, ultimately, should we allow organizations intended to ameliorate the impact of discrimination to be discriminatory?

“Queering”/Querying the Reasoning in Nixon

The retreat into essentialist language and a quasi-biological understanding of sex/gender, which was advanced by the VRRS, is dangerous to the over-reaching goals of feminism—a woman is not, and cannot be, defined on the basis of “common sexual experience as it relates to such things as childhood socialization, the lifelong experience of the cultural meaning associated with female biology, social and physical relationships to reproduction and the experience of a particular type of subordination.”¹⁰⁶ Critics of Kimberly Nixon have argued that “what is not acknowledged by some trans women appropriating women’s space is that the legacy of male dominance and power is not erased by changing one’s gender or sex.”¹⁰⁷ Yet such assertions assume not only a homogenous “feminine” experience but also a homogenous experience of “masculinity” and power that denies the specificity of transgender experience. As Ajnesh Prasad argues in an insightful critique of the biological assumptions inherent in the VRRS’s argument, the society “invoked notions of ontological sexual difference. They contended that

105. *Ibid.* at 313.

106. *Nixon*, *supra* note 3 at para. 215.

107. Belinda Sweeney, “Trans-Ending Women’s Rights” (2004) 27 *Women’s Studies International Forum* 81.

being born with male genitalia involuntarily consigned Nixon to certain privileges and experiences not delineated to those individuals born female. They failed to consider how identification with the opposite gender may have precluded Nixon from taking advantage of privileges designed to benefit men.”¹⁰⁸ The VRRS therefore denied the very real possibility that transgender women might have particularly keen insights into the gendered construction of womanhood, insights that might be useful not only in the wider feminist movement but also in the specific work of a rape crisis centre. Underlying the exclusion of Kimberly Nixon seems to be the essentialist fear that not only might some women read the complainant as male but also that Nixon herself might in some way “act like a man” in the future.

Beyond the very real problem that essentialist notions are insulting to Kimberly Nixon, essentialism is socially deterministic and inimical to feminist progress. It is disturbing that the VRRS, an organization devoted to the betterment of women’s lives and one that has accomplished much over the years, would resort to arguments that have the potential to be used to our collective detriment. If biology is not destiny, if gender is constructed, and if biology itself is potentially both contradictory and mutable, “we have to make room in our world view for women who were not born with XX chromosomes. To do otherwise is to subscribe to biological determinism.”¹⁰⁹ And biological determinism, as feminists well know, frequently becomes social determinism and has consistently and effectively been used “as a justification for placing limits upon the freedom, intellectual abilities and creative talents of women.”¹¹⁰ The hypocrisy evident in the claim that biology is destiny for Kimberly Nixon, but not for women-born women, cannot be tolerated. If the VRRS wants to exclude Kimberly Nixon, they must do so on a basis other than their assertion that she does not meet their standard of “real” womanhood.

In acknowledging the discrimination to which Kimberly Nixon was subjected, Saunders J. of the BC Court of Appeal rejected, in part, the essentialist arguments presented by the VRRS. However, by continuing to allow a “charitable, philanthropic, educational, fraternal, religious or social organization . . . that has as a primary purpose the promotion of the interests and welfare of an identifiable group or class of persons”—not only to grant

108. Prasad, *supra* note 24 at 82. It is interesting, and disturbing, to note that the opposite argument is used to discredit FTMs. While transwomen remain male because of their experience of masculine privilege, FTMs are constructed as having given up their feminine identity, not as carrying the insights of having lived as a woman into social manhood. For example, Carissima Mathen asserts that “such women have been socialized as women but have turned away from this identity. Have they any role to play in a ‘woman identified’ political movement?” Mathen, *supra* note 6 at 309.

109. Prasad, *supra* note 24 at 1974.

110. Pat Califia, *Sex Changes: The Politics of Transgenderism* (San Francisco: Cleis Press, 1997) at 230–1.

preference to the identifiable group or class of persons”¹¹¹ but also to distinguish within that group—Saunders J. indirectly endorses the VRRS’s view of Kimberly Nixon as not being woman enough. The exception granted under section 41 reflects the belief that women-only space (and spaces defined by other identity criteria) is “essential to our struggle to restore dignity to disempowered women . . . [that we must be able to] freely associate on the basis of life-defining characteristics (such as aboriginality, ethnicity); in relation to political objectives (such as reproductive choice); or around a set of commitments (such as creating safe spaces for rape victims or eradicating poverty).”¹¹²

It is striking that both the VRRS and Kimberly Nixon have defended the right of women’s organizations to maintain women-only space. I do not deny the importance of women-only spaces. Historically, such spaces have been essential in the creation of services and support for many women. I do, however, believe that such spaces should be open to all self-defined women, not policed by a sub-group of women in order to exclude those of whom they do not approve. As Amber Dean argues in another context, “the consequences of excluding . . . risks reproducing the kind of . . . policing that has also at times (and on-again) excluded large numbers of women on the basis of other forms of difference.”¹¹³ If we are going to maintain women-only space based on something other than self-identification, how will it be enforced—through visual inspection to preclude the possibility of penetration of women-only space by a penis? Those who claim female identities are not men, and exclusion of non-women brings into question the binary division that justifies women-only space. In other words, this decision raises pragmatic, as well as theoretical and philosophical, concerns. Ultimately, section 41 is built upon the very contingent foundations that queer theorists and critical gender theorists question.

Section 41 exemptions should be granted—and women-only spaces should be permitted to exclude non-men on the continuum of sex/gender—only when a rational connection can be illustrated between the exclusion and the purposes of the organization. Groups protected under section 41 should not have a blanket exemption from review under doctrines such as the *bona fide* occupational requirement. Endorsing discrimination within protected groups does not promote equality or the objectives for which feminism claims to stand. Saunders J. himself expressed discomfort with the section 41 exemption, asserting pointedly that “the Legislature could elect to prohibit this behavior,” presumably by revoking parts of section 41.¹¹⁴ The *bona fide* occupational

111. *Human Rights Code*, *supra* note 5.

112. Margaret Denike and Sal Renshaw, *Transgender and Women’s Substantive Equality*, NAWL Discussion Paper (Ottawa: National Association of Women and the Law, 2003) at 14.

113. Amber Dean, “Does a Lesbian Need a Vagina Like a Fish Needs a Bicycle? Or, Would the ‘Real’ Lesbian Please Stand Up” (2005) 24(2/3) *Canadian Woman Studies* 100.

114. *Vancouver Rape Relief Society v. Nixon*, [2005] B.C.J. No. 2647.

requirement standard requires that the goal of exclusion is rationally connected to the function of the organization—that the exclusion is adopted in good faith; that the exception is reasonably necessary to accomplish work-related goals; and that forced inclusion will cause undue hardship for the organization.¹¹⁵ If these conditions do not apply, a women-only organization has no justifiable reason for excluding a self-identified woman. The VRRS argued that their goal was to provide a safe environment in which victims of male violence are not silenced. It could be argued that the good faith of the VRRS is in question, given the hostility towards Kimberly Nixon and other MTFs expressed on the organization's website. More importantly, they did not prove that inclusion of Kimberly Nixon would cause undue hardship, nor were they required 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.”¹¹⁶

The tribunal recognized these flaws in the reasoning of the VRRS in the initial hearing. If excluding Kimberly Nixon, a woman with excellent credentials and experience dealing with women in distress¹¹⁷ and who herself has been the subject of sexual violence, is not of benefit to clients seeking the services of the VRRS, on what basis is her exclusion justified, other than to satisfy the particular desires of the members of the collective? This is precisely the argument made by Egale Canada: “Egale affirms the right of the Vancouver Rape Relief Society to establish reasonable policies and criteria to ensure that their staff and volunteers share the organization's commitment to anti-sexist and anti-oppression work; and have an understanding of sexism based on their personal experiences. It is Egale's position, however, that trans women are no less equipped to meet such criteria. In addition, any such policies would need to be genuinely and reasonably related to the goals of the organization and could not be developed as a pretext for excluding trans women.”¹¹⁸ The circular argument of the VRRS should not be protected from review by section 41. The purpose of human rights protection is undermined if groups that are themselves subjected to discrimination are then allowed to discriminate within the “protected” group.¹¹⁹

In her recent review of the *Nixon* case, Carissima Mathen asserts that the exclusion of Kimberly Nixon is justified, not solely on the facts of the case but

115. *Meiorin*, *supra* note 73.

116. *Nixon*, *supra* note 3 at para. 119.

117. It must be reasserted here that evidence regarding Kimberly Nixon's competence as a counsellor was not rebutted, or even challenged, by the VRRS. *Nixon*, *supra* note 3 at para. 33.

118. Egale, “Egale Supports Kimberly Nixon,” press release (25 August 2003), <<http://www.egale.ca>> .

119. This argument applies equally to the decision that provided the precedent upon which the *Nixon* court relied. *Re: Caldwell and Stuart*, [1984] 2 S.C.R. 603.

also because opening the flood gates to anyone other than women-born women will create a risk of saboteurs and will raise enormous difficulties with regard to “persons who identify as women but do not seek to transform their physicality or with persons who do not identify as women or men but nonetheless wish to become members. What principle requires Rape Relief to accept Kimberly Nixon but permits it to exclude these others?”¹²⁰ Essentially, she argues that a line has to be drawn somewhere and that the safest place to draw it is on the basis of biology/life-long socialization. Ironically, this delimitation would simply re-invoke the *Corbett* standard on the basis of visual inspection at birth instead of a chromosome test later in life. Commentators have consistently expressed concern that opening women-only space will “complicate attempts to exclude other, more challenging categories of persons, up to and including men.”¹²¹ The “slippery slope” argument has some merit, and a recent case heard by the BC Human Rights Tribunal and appealed to the Supreme Court of British Columbia confirms that such challenges are inevitable in the wake of *Nixon*. The question is whether extra-group exclusions are any more worthy of protection from review under section 41 than intra-group exclusions.¹²²

In June 2004, the BC Human Rights Tribunal heard the complaint *Johnston v. St. James Community Service Society*. The facts of the case were largely uncontested. St. James runs an emergency women’s shelter and a second-stage housing facility for women, most of whom are leaving abusive relationships. A client in the second-stage housing facility wished to hire Mr. Johnston to provide care for her two children. The society denied the client the right to make this hiring on the basis of their policy “that men are not permitted to be present in the second stage facility except when accompanied by a resident. As Mr. Johnston would have been alone with the children, the Society would not permit him to be hired in this capacity.”¹²³ The central question to be determined in this case was whether or not the society had discriminated against Johnston with respect to his employment under section 13(1)(a) or (b) of the code.¹²⁴ The tribunal held that *prima facie* discrimination on the basis of sex had been proven, since the society had admitted that the only reason why it had refused permission to hire Johnston was the fact that

120. Mathen, *supra* note 6 at 309.

121. *Ibid.* at 308.

122. From a post-modern, critical gender theory perspective, of course, this also raises the question as to whether the distinction—intra-group and extra-group—has any validity. If all men/women exist on a gendered continuum, do any absolutes apply?

123. *Johnston v. St. James Community Service Society*, [2004] B.C.H.R.T.D. No. 46 at para. 2 [*Johnston*].

124. *Ibid.* at para. 8. Although the client would have been the direct employer of Mr. Johnston, the tribunal held that the society “exercised a high degree of control over that relationship” and the ability of the society to deny access to the building was “sufficient to bring the relationship between the Society and Mr. Johnston within the scope of s.13 of the Code.” *Ibid.* at paras. 12 and 14.

he was a man.¹²⁵ The burden then shifted to the respondent to prove that there was a *bona fide* occupational requirement that justified the exclusion of Johnston. The tribunal accepted that the society had adopted the policy “in a good faith and honest belief that the standard was necessary in order to provide a safe haven for women leaving abusive relationships.”¹²⁶ However, it was determined that the society had not met the standard, which was set out in *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees Union (Meiorin Grievance)*, of establishing that it was “impossible to accommodate males without imposing undue hardship on the society.”¹²⁷ Male visitors, including “formerly abusive partner[s],” are admitted to the facility, and the exclusion of Johnston could not, in this context, be constructed as being necessary for the safety of clients.¹²⁸ Member Lyster, a member of the tribunal, asserted that multiple circumstances existed in which “a male care-giver would be an appropriate, and perhaps the most appropriate, care-giver for the children of a woman in the facility”¹²⁹ and ordered that the society “cease the contravention and refrain from committing the same or similar contravention.”¹³⁰

St. James Community Service Society appealed this decision to the Supreme Court of British Columbia. The petitioner submitted that the blanket policy of exclusion of male employees was justified under section 41 of the BC *Human Rights Code* and that, in this context, the society did not have to justify the exclusion or meet the *Meiorin* test for *bona fide* occupational requirement. Paris J. found that even though the petitioner had not raised this issue at the hearing before the tribunal, the issue should have been considered because section 41 analysis “is mandatory...if an organization comes within its terms.”¹³¹ The principle (or lack thereof) underlying exclusion was therefore rendered exempt from review. The court endorsed a policy of exclusion that has no rational connection to the objectives of the organization and that is not proven to be of benefit to the clients of St. James Community Service Society. It was explicitly argued that blanket exemption from review (with regard to the *bona fide* occupational requirement) under section 41 remains binding as long as *Nixon* “remains good authority.”¹³²

125. *Ibid.* at para. 17.

126. *Ibid.* at para. 22.

127. *Ibid.* at para. 23. *Meiorin*, *supra* note 73.

128. *Ibid.* at para. 29.

129. *St. James Community Service Society v. Johnston*, [2004] B.C.J. No. 2970 at para. 31 [*Johnston BCJ*].

130. *Ibid.* at para. 36. Lyster did not order a remedy, as evidence regarding remedy had not been advanced. In a separate hearing in July, Lyster awarded compensation of \$1,000.00 for injury to dignity and self-respect, but denied the claim for lost wages on the assertion that evidence with regard to quantum was inadequate. *Johnston*, *supra* note 123 at paras. 11 and 14.

131. *Johnston BCJ*; and *supra* note 129 at para. 24.

132. *Ibid.* at para. 25. This has implications, of course, for other groups protected under section 41. For a general discussion of the *Meiorin* decision, see Colleen Sheppard, “Of Forest Fires

Are such unprincipled exclusions to be protected under section 41? When are distinctions, among women themselves and between men and women, justified? While this case illustrates that an alternative decision in *Nixon* would “complicate attempts to exclude other, more challenging categories of persons, up to and including men,”¹³³ the question, in cases such as *Nixon* and *Johnston*, is whether or not such blanket exclusions actually serve the wider interests that feminism seeks to promote. The fear of the saboteur, of the wolf in lamb’s clothing (or the man in a dress), seems misplaced. Women too can sabotage women’s groups. And men, transgendered individuals, and women can all legitimately be excluded from (women’s) organizations when they do not share the political beliefs that motivate group action. Policing bodies is unethical and unnecessary.

Conclusions

If women-only space is to survive, “woman” must be left open to self-determination. Otherwise, we are engaging in policing and exclusion that is detrimental to the promotion of universal human rights. Moreover, our spaces should be defined and delimited not by chromosomes, genes, genitalia, gender presentation, or self-identification but, rather, by the political values we seek to advance. Perhaps it is time to admit not only that transgendered women have a place in women-only space but also that male-identified men can be feminists and can assist in much of the work of the feminist movement, that biology is not destiny for men any more than it is for women, and that male-identified men can disavow the privileges society imposes on them.¹³⁴ This kind of evolution in feminism will no doubt be painful and contested, but the parallels with regard to incorporating critical understanding of race and sexuality into feminist thought are both striking and instructive. It is a logical extension of anti-essentialism that the very fluidity of sex and gender inherent in transgender claims suggests that, like the category “woman,” “women-only” space may be an artificial, and ultimately untenable, construct. The exclusions allowed in *Nixon* and *Johnston* reflect essential thinking that is dangerous to the over-reaching goals of feminist reform and that contradicts much feminist

and Systemic Discrimination” (2001) 46 McGill Law Journal 533–59; and Tamar Witelson, “From Here to Equality: Meiorin, TD Bank and the Problems in Human Rights Law” (1999) 25 Queen’s Law Journal 347–85. For a discussion of the implications of the *bona fide* occupational requirement in religious organizations, see Hilary Paterson, “The Justifiability of Biblically Based Discrimination” (2001) 59 University of Toronto Faculty Law Review 253; and Esau, *supra* note 5.

133. Mathen, *supra* note 6 at 308.

134. This argument, of course, has significant parallels when one thinks in terms of race, sexuality, and class. White, heterosexual, economically privileged women believe that they can be allies of non-white, non-heterosexual, economically under-privileged women and accept that to be allies we must work to unlearn privilege, and that this will be a difficult, complicated, and contested process.

theory. The exclusions are unethical and unprincipled. The law, even section 41, should not allow organizations intended to ameliorate disadvantage to engage in discriminatory, exclusionary, practices. It is not my assertion that the category “woman” is irrelevant to feminist organization or legal strategies for reform. We live in a gendered world in which distinctions still have enormous impact in our day-to-day lives. It is my assertion, however, that feminists, as well as courts and tribunals, must rethink the blanket protections offered to groups enumerated under section 41 and must engage in reasoned debate regarding the conflict between group and individual rights. Our beliefs and goals, not our bodies, define us, and this fact should be reflected in law.