COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Vancouver Rape Relief Society v. Nixon,***
2004 BCCA 516

Date: 20041007
Docket: CA031546

Between:

Vancouver Rape Relief Society

Respondent
(Petitioner)

And

Kimberley Nixon

Appellant
(Respondent)

And

British Columbia Human Rights Tribunal

Respondent
(Respondent)

Before: The Honourable Mr. Justice Smith
(In Chambers)

No one appearing for the Appellant

G.C. Allison and C. Jones	Counsel for the Respondent Vancouver Rape Relieve Society
M.K. Tyshynski	Counsel for the Respondent B.C. Human Rights Tribunal
J.J. Arvay, Q.C.	Counsel for the Applicants West Coast Society of Human Rights Defenders, W.A.V.A.W. and T.A.S.
L.A. Waddell	Counsel for the Applicant Egale Canada Inc.
Place and Date of Hearing:	Vancouver, British Columbia 9 September 2004
Place and Date of Judgment:	Vancouver, British Columbia 7 October 2004

Reasons for Judgment of the Honourable Mr. Justice Smith:

[1] The applicants, Egale Canada Inc., Women Against Violence Against Women (WAVAW), the Trans Alliance Society (TAS), and the West Coast Society of Human Rights Defenders (the Defenders), seek leave to intervene in this appeal. The respondent, the Vancouver Rape Relief Society, opposes their applications. The appellant, Kimberley Nixon, did not appear on the application.

[2] The appellant is a transsexual woman. She was born physically male but, at a young age, she realized that her physical attributes did not correspond to her sense of herself as a female. She lived the first thirty years or so of her life publicly as a male and privately as a female. In November 1990 she had sex reassignment surgery. She was subsequently issued an amended birth certificate designating her sex as “F”, for female.

[3] More recently, she offered herself to the respondent as a volunteer counsellor so that she might assist women who had experienced physical and emotional abuse by males. She was initially accepted as a volunteer but, when the respondent learned of her previous life as a male, she was told that she could no longer participate in its training program because "men were not allowed in the training group". Consequently,

she filed a complaint of discrimination under ss. 3 and 8 of the ***Human Rights Act***, S.B.C. 1984, c. 22 (now ss. 8 and 13 of the ***Human Rights Code***, R.S.B.C. 1996, c. 210). The Human Rights Tribunal ultimately ruled that the respondent had discriminated against the appellant by denying her a service and employment on the basis of her sex, in contravention of ss. 8 and 13 respectively of the ***Code***, and awarded her $7,500.00 in damages. In doing so, the Tribunal concluded that the analysis of discrimination under s. 15 of the ***Charter*** set out in ***Law v. Canada (Minister of Employment and Immigration)***, [1999] 1 S.C.R. 497 was not applicable to claims of discrimination brought under the ***Code*** and that the respondent was not entitled to rely on an exemption contained in s. 41 of the ***Code***:

> **41** If a charitable, philanthropic, educational, fraternal, religious or social organization or corporation that is not operated for profit has as a primary purpose the promotion of the interests and welfare of an identifiable group or class of persons characterized by ... a common ... sex ..., that organization or corporation must not be considered to be contravening this *Code* because it is granting a preference to members of the identifiable group or class of persons.

[4] On the respondent's application for judicial review, the reviewing judge quashed the Tribunal's decision and set aside the award of damages. In his view, ***British Columbia***

Government and Service Employees' Union v. British Columbia (Public Service Employee Relations Commission), 2002 BCCA 476 required that the analysis in ***Law*** must be applied to claims of discrimination brought under s. 13 of the ***Code***. Applying that analysis, he concluded that the exclusion of the appellant from the volunteer training was not discriminatory. Further, he observed that sex is a continuum, the community of women served by the appellant is at the "far female end", and the appellant, as a transsexual, was not included in that community. He relied in part on ***R. v. Powley***, 2003 SCC 42, a case involving a claim by Métis persons to aboriginal hunting rights under s. 35 of the ***Constitution Act, 1982***, for his conclusion that the respondent was entitled to exclude the appellant by virtue of s. 41 of the ***Code***, since she was not part of the "identifiable group" of women served by the respondent.

[5] This appeal is brought from the decision on judicial review.

[6] The appellant has set out the issues and her argument fully in her factum. Briefly stated, as I understand them the issues are whether the ***Law*** test for proof of discrimination under s. 15 of the ***Charter*** is or should be applicable to claims of discrimination under the ***Code***; if so, whether the

appellant proved discrimination under that test; and whether the respondent is entitled to the exemption provided by s. 41 of the ***Code***. Three sub-issues of the latter are whether the amended birth certificate is conclusive of the appellant's status as a woman; whether the decision in ***Powley*** is relevant to the analysis of s. 41; and whether, if s. 41 operates to exclude transsexuals in this case, the section itself is contrary to s. 15 of the ***Charter***.

[7] An applicant for intervention is generally required to establish that it has a direct interest in the outcome, as opposed to a simple concern about the effect of the decision, and that its submissions may be useful and different from those of the parties to the appeal: ***Bosa Development Corp. v. British Columbia (Assessor of Area 12 – Coquitlam)*** (1996), 82 B.C.A.C. 260 at 264 Williams J.A. (In Chambers). In some cases, the absence of a direct interest by the applicant may be overcome if it represents a public interest on a public law issue and will bring a different and useful perspective to the issues: ***MacMillan Bloedel Ltd. v. Mullin*** (1985), 66 B.C.L.R. 207 at 209-210 (C.A.) Esson J.A. (In Chambers). However, as Mr. Justice Esson emphasized, it is necessary in each case "to consider the nature of the issue and the degree of likelihood that intervenors will be able to make a useful contribution to

the resolution of the issue, without injustice to the immediate parties".

[8] Egale and WAVAV each have a long history of advocacy on behalf of vulnerable minorities. Egale's focus is national and is on the rights of homosexual, bisexual, and transsexual persons. WAVAV is a local organization that provides sexual assault support services to women and teenage girls, including transgendered women, in the Greater Vancouver area. TAS is a relatively new organization active in British Columbia as a coalition of groups advocating for the rights of transgendered persons. Its membership includes WAVAV and the Defenders. The Defenders, a group estimated by the chair of its board of directors to consist of twenty-five to thirty persons, was founded in 2003 to fulfill the role formerly filled by the Office of the Deputy Chief Commissioner of the British Columbia Human Rights Commission before that institution was abolished by recent legislation: its chair, the former Chief Commissioner, deposes that the society was formed because, as a result of the legislative changes, "there is no longer an independent governmental body to advocate the public interest in human rights cases".

[9] I accept that each of the applicants has a genuine altruistic interest in this appeal and, with the exception of

the Defenders, that the interest differs from the general public interest and brings with it a unique perspective. Their interests are indirect, since the result of the appeal will affect them only indirectly. I except the Defenders because its interest coincides with the public interest.

[10] I turn to whether the applicants are likely to make a useful and different contribution to the resolution of the issues on the appeal without injustice to the parties.

[11] The applicants are unanimous in their desire to support the appellant and to argue that the appeal should be allowed and the decision of the Tribunal reinstated. All wish to be permitted to make oral submissions.

[12] Egale says that it will submit:

> - "that the jurisprudential 'test' developed under s. 15 of the *Charter* in *Law v. Canada*...is not applicable in determining whether there is discrimination under human rights legislation";
>
> - alternatively, "that the 'contextual factors' in the s. 15 test must be modified to take into account the different context of human rights legislation, which is intended to regulate the private sector"; and

> - that the respondent "failed to establish a defence under s. 41 of the *Code*" and, in particular, that it failed to meet the "*bona fide* occupational requirement" test.

In its memorandum of argument, Egale says, after explaining those proposed submissions in the context of the facts of this appeal, "Although Egale supports the within Appeal, our submissions will not be the same as those of the Appellant". However, it does not identify how its submissions will differ from those of the appellant who, as I understand it, will be advancing substantially the same points.

[13] WAVAW, TAS, and the Defenders wish to appear by the same counsel and to make the same points in argument, although, they say, from their individual perspectives. TAS applied out of time for intervention status and seeks an extension, which the respondent opposes. It adopts the submissions made on behalf of WAVAV and the Defenders, which is stated in their memorandum of argument in this way:

> The Defenders and WAVAV will support all of the submissions of the Appellant but intend to advance an argument that was it seems made quite forcefully in the Court below but is not fully made in this Court by the Appellant, and advance an argument that is made in this Court but we submit could benefit from further emphasis and elaboration. These two arguments are as follows:

> a. That s. 27 of the *Vital Statistics Act*, R.S.B.C. 1996, c. 479 (the "*VSA*") is dispositive of the application of s. 41 of the *Human Rights Code*, R.S.B.C. 1996, c. 210 (the "*Code*") in this case;
>
> b. That in the event that s. 27 of the VSA or section 41 of the Code is ambiguous then those provisions must be construed in favour of the Appellant as any other construction would render it inconsistent with the rights or values enshrined in section 15 of the *Charter*.

Thus, these groups intend to make arguments that the appellant advances in her factum.

[14] The respondent should not have to face repetitive arguments from the appellant and intervenors. Moreover, as Newbury J.A. pointed out in ***Oak Bay Marina Ltd. (c.o.b. Painter's Lodge) v. British Columbia (Human Rights Commission)***, [2001] B.C.J. No. 1136 (QL), 2001 BCCA 389 at para. 8, the Supreme Court of Canada has dealt extensively with the law affecting human rights generally and appeals from human rights tribunals in particular, and it is now for the courts to interpret and apply that law to particular cases. Further, as she observed, "there is a danger that appeals in this area will be seen as unfair if other parties ... are permitted to 'weigh in' on one side or the other – usually that of the complainant – without being directly interested and without having particular contributions to make on

particular issues". Those remarks resonate on this application.

[15] Accordingly, the Defender's application is dismissed on the bases that its arguments will be repetitive of the appellant's and that it has no interest different from that of the public interest. This Court is able to consider the public interest without its assistance.

[16] Next, TAS's application to extend time for bringing its application to intervene is dismissed. I am not persuaded that any reason has been shown for its failure to apply in a timely way that would justify granting this indulgence in the face of the respondent's opposition in the circumstances of this case.

[17] Further, WAVAV's application is dismissed on the basis that its intervention is simply for the purpose of emphasizing and elaborating some of the appellant's submissions. That should not be permitted for the reasons I have stated.

[18] Finally, it is my view that Egale may make a useful contribution on whether the ***Law*** test for proof of discrimination under s. 15 of the ***Charter*** should be applicable in the context of human rights legislation and, if so, whether it requires modification in any respect. As well, it may make

a useful contribution on the proper interpretation and the constitutionality of s. 41 of the ***Code***. These are important questions of public law concerning discrimination proscribed by provincial legislation and Egale has, through its experience, a unique perspective on the effects of discrimination on the groups and individuals for whom it advocates.

[19] Accordingly, Egale is granted leave to intervene by filing a factum limited to the issues I have identified. It will confine its factum and submissions strictly to the public interest aspects of these issues. In particular, it will not touch on the merits of the appellant's case against the respondent. The Court is able to deal with the issues *inter partes* with the assistance of counsel for the parties.

[20] Egale's factum will not exceed 20 pages in length and will be filed within 30 days of this order. Since the respondent may wish to comment on the submissions made by Egale, time will not commence to run against the respondent for filing its factum until Egale's factum has been filed and delivered. The respondent may increase the length of its factum to respond to Egale's factum, if necessary, by up to 20 pages. Egale will neither seek nor be granted costs. If the parties incur any additional disbursements as a result of the

intervention, Egale will pay them in accordance with Rule 36(3). Whether Egale will be permitted to make oral submissions at the hearing of the appeal will be up to the panel.

[21] In summary, the applications of WAVAV, TAS, and the Defenders are dismissed. Egale is granted leave to intervene on the limited basis I have described.

"The Honourable Mr. Justice Smith"