

Acting Queerly

*Ruminations
of an
Activist Lawyer*



barbara findlay, Q.C.

Thanks

I want to thank my teachers: Gloria Yamato, Ricky Sherover-Marcuse, Celeste George, Nym Hughes, Joanne Arnott, D.D. Bloom, Dorrie Brannock, Monika Chappell, Kimberly Nixon, jacquie allen, Leah Decter, Haruko Okano. None of them is a lawyer. And I want to thank my partner, Sheila Gilhooly, without whose sense of humor and shared (un)reality I could not do the work I do.

Ruminations of an Activist Queer Lawyer

barbara findlay's life and identity are affected by the racism, anti-Semitism, ageism, classism, professionalism, sexism, heterosexism, genderism, able-bodiedism, judeo-christianism, sizism, and anglophilia of Canadian society.

She is a fat, white, relatively able-bodied, middle aged, anglophone, lesbian, woman lawyer and equality rights activist who was raised working class and christian. She was locked in a mental hospital when she first realized she was queer.

Kimberly Nixon was victimized by male violence: abuse by her partner, attacks on the street. She had received counseling from Battered Women's Support Services, another all-woman feminist agency in Vancouver, and herself became a peer counsellor there. Having recovered from the trauma of her own victimization, she decided to volunteer at Rape Relief.

She had no difficulty with the screening questions; Kimberly is a feminist.

But in the middle of the first evening of the volunteer training, the facilitators told Kimberly that she had to leave, because she was not a woman. Nixon filed a human rights complaint. Rape Relief sought unsuccessfully to judicially review the decision to refer Nixon's complaint to a tribunal. Nixon was successful at the tribunal, and was awarded the highest human rights damages in B.C. Rape Relief has initiated a judicial review of that decision.

barbara findlay is Kimberly Nixon's lawyer.

To locate myself in the discussion: because we must always, I think, locate ourselves in the discussion...

It's not that my experience is the touchstone of truth. But if a proffered truth cannot explain my experience, I doubt it. And I have found that if I am not explicit about my location in relation to a question, I am less likely to find a workable truth.

I have often been at the margins of a centre. I entered the legal profession in 1977, when there were very few women practicing law. I had to get a psychiatrist to certify me as sane before I could be called to the bar, because of having been in mental hospitals.

When I realized I was a lesbian, in 1967, gay sex was still illegal under the Criminal Code and homosexuality was a mental illness under the DSM (the psychiatric bible of diagnoses). I always told my confidantes at the workplace that I was a lesbian, and I never denied it if asked. But the norms of the time dictated that the question was rarely asked.

I had gone to law school from with the not uncommon hope that I would be able to make a difference to people who needed a voice. As a feminist, I also went to law school with a healthy dread of the socialization process of a professional school.

After I got called to the bar, I worked with a union-side labour firm, then with the Legal Services Society. I taught at the Faculty of Law, and have ultimately ended up in private practice, doing a general practice for queers with an emphasis on equality and human rights cases.

What does privilege feel like?

It feels like comfort.

It feels like welcome.

It feels like safety.

It feels like respect.

It feels like self-esteem.

Privilege does not feel bad. It feels "good".

In
my

non-lawyer life, I worked as a feminist: women's bookstore, women's health collective, women's study group, women's conferences, etc etc. I had arguments with men: the basic, tiresome ones – why they should not call women 'girls', why 'he' did not include 'she', whatever the grammar books said. I taught 'women and the law', a law school seminar invented shortly after I graduated from UBC.

In the 70s, lesbians were regarded as the Problem of the women's movement, since (non-lesbian) women were afraid that if People knew there were lesbians in the group, the whole group would lose credibility since People would think everyone was a lesbian.

So although there were lesbians in every women's organization, often in leadership positions, lesbians were *sotto voce* in the women's movement.

As a lesbian, I absorbed the society's view of myself as

someone who was evil, or criminal, or crazy, or all three. As a woman, the choices I was offered were very few. A law professor on our first day of classes said, "I feel sorry for the girls in the class. You can be fluffy and incompetent, or ball breaking cigar smoking bitches like Mary Southin." (he next day, all 13 of the women in the class had a cigarillo.)

Since I have been called to the bar, I have three times watched the Supreme Court of Canada find a reason to deny equality rights to lesbians and gay men: in 1979, when they decided that a classified ad in a newspaper was not a public service, thereby avoiding the question of whether sexual orientation could be a proper basis for discrimination; in Mossop, where the Court decided that since the federal government had deliberately chosen not to include 'sexual orientation' when it amended its human rights legislation, Mossop could not claim human rights protection as a gay man, and in Egan, where the Court said that although a gay man was entitled to Charter protection from discrimination on the basis of sexual orientation, he was not entitled to relief because, in his case, the discrimination was

It may seem from my description of my experience as a lesbian in the legal profession either that it was easy – it was not; or that I was courageous or exceptional – I am not. I had to take myself in hand daily, grit my teeth, and weep later. Of course there were the predictable problems: death threats on the telephone because I was evil; homophobia in courtrooms that was impossible to name; advising my clients that if they hired me the other side would assume they were gay whether they were or not. But the hardest part was the everyday interactions, the deep silence when I said I had a "practice for the lesbian, gay, bisexual and transgendered communities", or when I had to introduce myself on a new committee.

permissible.

The experience of being a lawyer – and therefore a member of a privileged group in Canadian society – who did not herself have the same civil and human rights as everyone else in the country has been a central paradox which of my life and my lawyering. It is a backdrop for my preoccupation with understanding how someone is both privileged and oppressed at the same time.

In the early 80s, I went to an unlearning racism workshop. It changed my life in the same way that feminism had. I got a conceptual framework that helped me to understand the way that I, as a white person, contribute to the establishment and maintenance of racism in this country. I began to co-facilitate unlearning racism workshops, hundreds of them over the next 20 years. I belonged to a group called AWARE (Alliance of Women against Racism Etc., the Etc being all of the other oppressions). We had a policy that we always had a woman of colour and a white woman as co-facilitators of the workshops, because we found that everyone listened differently to someone who was affected by racism in the same ways as themselves. White people trusted a white

Here is the conundrum. Being safe, and comfortable, and welcome in the world is the goal of work against oppression. But...feeling safe, and comfortable, and welcome in the world is also the what characterizes internalized dominance.

facilitator; people of colour did not. The opposite was true for the facilitator of colour.

In AWARE, we also took as an assumption that racism, or any other oppression, was not only, or even mainly, an intellectual matter which could be changed by more or different information. We understood racism to be something which affected us – white people and people of colour – in every aspect of the way we understood ourselves, thought about ourselves, felt about ourselves, felt about others like us.

The focus for the white women in AWARE was on the ways that we had internalized a position of privilege. We called it 'internalized dominance', a term coined by Janet Sawyer. Internalized dominance is the conceptual counterpart to internalized oppression. It is the messages that we absorb, osmotically, about the features of our identities which are 'normal', 'natural', 'Canadian'. For me, those features included the colour of my skin, my education, my relative able-bodiedness, my unaccented (!) English, my christian heritage, my unambiguous gender, my professionalism, my age – a vigorous 35 at the time. I worked hard to notice the ways in which I took my privilege for granted. I assumed without thinking about it that I would never have trouble entering any room, anywhere in Canada, because of the colour of my skin. That no one would ask me the first time they met me 'where I was from' and mean 'from what country did you come'. That I did not have to call ahead to see if the meeting room was wheelchair-accessible, and, if so, whether the washrooms were too.

People who are in the dominant group with respect to an aspect of their identities feel and are treated as, normal. We feel and are treated as if they belong. We feel and are treated

as if they are entitled to be well treated. People who are in the target group for oppression with respect to an aspect of their identities feel and are treated as not part of the norm. We feel, and are treated as if, we do not automatically belong. We do not expect to be well treated; often we are not.

I remember a three day unlearning racism workshop in which we were dividing people along other axes of oppression: gender, sexual orientation. When it came time to divide the straight people from the lesbians, the question arose about where the bisexual people belonged. . We facilitators were taken by surprise since it had not occurred to us to think about this question in advance. I was adamant: bisexual people did not belong in the lesbian group, because they "participated in male privilege" and "did not share the same experience as lesbians" I am sorry to say that I 'won' the argument, and the bisexual woman was put into a caucus group by herself.

I tell that story often, because I remember the absolute moral certainty of my position.

The view I held was the commonly-accepted view among lesbians at the time. We had after all carved spaces for ourselves at great personal cost. We had had to come out in the women's groups who didn't want to acknowledge us; we had had to have confrontations and hurtful conversations with women we had thought were our friends about why it was necessary to have lesbian caucuses in women's organizations, a place for lesbian women to breathe, to be able to be authentic with each other, to sort out our feelings and our fears.

When I think about it now I do not know what it was that made me so adamant. I think it was the feeling that I had so little space, as a lesbian, that I should not have to move over for someone who wasn't "really" one of us. We lesbians did not trust bisexual women. I think somewhere we believed that they would take the stories of our lives back to their men.

We were wrong.

We were wrong because we did not understand that what united us was our common experience of heterosexism (the conviction that heterosexuality is the only natural form of human sexual expression) and homophobia (the fear and loathing of anyone not heterosexual).

Women-only groups, lesbian-only groups, women of colour groups, lesbians of colour groups, groups of women with disabilities, ...all were and are absolutely critical to our understanding of ourselves. They still are. Nothing takes the sting out of the experience of being humiliated because you are female, or because you are lesbian, than hearing other women describe the same thing happening to them. It is quite literally the only way to re-draw the boundaries of self that were violated by the sexism or the homophobia. And it is one of the most effective and efficient ways for members of a group targeted for oppression to develop an understanding of how the oppression operates, in their own lives and in the lives of other targeted people.

That is why organizations like Rape Relief and Women against Violence against Women (WAVAW) and Battered Women Support Services (BWSS) started as women-only peer support services for women who were victims of male violence: to offer a space where a woman could come to

understand that the violence she experienced was not her fault, whatever her husband/boyfriend/date/stranger said. A space outside the gaze of male eyes, safe from mocking male judgement or threat.

Though I have watched the Supreme Court of Canada deny my rights as a lesbian, I have also watched that court transform the legal situation for gay men and lesbians in the country. In *Vriend*¹ that court said that if a province was going to offer human rights protection at all, it could not protect only some marginalized groups. The court read in sexual orientation to the list of protected grounds in the Alberta Individual Rights and Protection Act. In *M v H*², the court held that it was contrary to the equality guarantees in the Charter to offer a protective regime on relationship breakdown to heterosexuals, but not to gay or lesbian partners.

And within ten years, the law has been transformed. Ten years ago there was not even protection against discrimination in the B.C. Human Rights Act; lesbian co-mothers risked losing all contact with their children if their relationships broke up; lesbians could access sperm from medical sources only by portraying themselves as straight; there were no inheritance rights on intestacy; two people of the same gender could not adopt a child together. Today there is no piece of legislation, federal or provincial, affecting gays and lesbians in this province in a discriminatory manner except for federal common law restricting the right to marry and the anachronistic criminal law 'homosexual

¹ *Vriend v Alberta* [1998] 1 SCR 493

² *M v H* [1999] SCJ No 23

panic' defence.

So I believe in the power of law to work change.

I came to transgender issues by coincidence. A trans woman phoned me in a panic the day before she was to leave for her sex reassignment surgery to see if I could speed the production of the necessary bureaucratic approval for her surgery in time for the operation to proceed.

I intervened with no clue about what I was doing, how the system worked. I was successful only because the approval had already been granted, and I was able to convey good news to my client.

Shortly after that I was approached by the High Risk Society, an organization offering emergency services to transgendered street people in the downtown east side. They wanted to write a report on transgendered people and the law. There was, at the time, exactly one piece of writing on that topic in all of Canada. It was 1994.

High Risk gathered together representatives from various parts of the gender variant communities: cross dressers, transgendered people, pre and post operative transsexuals. After examining what trans people were doing in other, primarily American, jurisdictions, the committee chose deliberately to use the word 'transgender' as the umbrella term to include all gender-variant people.

Finding Our Place, as the report was titled, concluded trans human rights complaints could be advanced for transsexuals

under the head of 'disability', since 'gender dysphoria' was recognized as an illness under the DSM. But the risk of proceeding in that manner was that only transsexuals would be entitled to human rights protection. There was also controversy among the trans community about the claim that gender dysphoria – the diagnostic term for transsexualism – was a disability. Some thought that gender variance, like homosexuality, was not a 'disability' at all, but a normal variation in the human condition. Others worried that if transsexuals described themselves as non-disabled, they would lose access to publicly-funded Gender Clinic and sex reassignment surgery.¹

In American jurisdictions, trans equality rights was being advance under 'sexual orientation' and under 'sex', pretty much equally.

The report considered whether 'sex' would be an adequate ground under which to advance human rights complaints, and concluded that it was not a sure fire outcome since protection on the grounds of 'sex' was customarily applied in situations which assumed a bi-gendered reality. Sexual orientation seemed inapt. And so the report recommended that 'gender identity' be added as a protected ground under the Human Rights Code.

Language, naming, is critical to the struggle of any marginalized group. It is critical that the group decide for itself what words come closest to describing their experience. I did not attend the committee meetings at which language

¹ The Gender Clinic at Vancouver Hospital – one of only two in the country – has been eviscerated by cuts by the Campbell government.

was considered, because as a non-trans lawyer I would have had a disproportionate impact on that discussion.

Finding Our Place became an organizing document. When the B.C. Human Rights Commission held hearings around the province to take suggestions for amendments to the Human Rights Code, there were submissions at virtually every session that 'gender identity' be added as a protected ground.

As it happened, British Columbia was the first Canadian jurisdiction to consider the question of human rights recognition. The language adopted by the community here became the language in other parts of the country.

My friend Nancy Rosenberg said it best: "We don't have a right to be comfortable.

We have a right not to be discriminated against, But we don't have a right to be comfortable."

We had been talking about transgender women in women only spaces. Women's change rooms. One of us shuddered at the idea of seeing a penis in the change room.

Meanwhile, on the legal front, there had begun to be successes. The first case, *Sheridan v Sanctuary Investments*², concerned a pre-operative transsexual woman who had been denied the use of the women's washroom in a gay bar in Victoria. Her complaint was on the ground of sex (gender) and physical or mental disability. After her complaint was filed, she made an application to amend her complaint to proceed on the ground of 'gender identity'; the tribunal held that it did not have jurisdiction to add a ground to the Code. The respondent said that he was acting on complaints of other women, lesbians,

When we political lesbians discounted women who said they were bisexual, believing them to be either cowardly lesbians afraid to come out, or thrill-seeking heterosexuals who would break our hearts and retreat to the safety of heterosexism, we failed to notice that bisexual women have no place to be: they were suspect both among heterosexuals, and among lesbians.

In the unlearning racism work that I do, some of the most anguished work is about women of colour who look white, or were raised white, or both; or olive-skinned women whose heritage was Italian or Greek, not African or South American or indigenous, but who experienced mistreatment because of the colour of their skin.

Is there something about being oppressed which makes it hard to see our own oppressiveness?

2 *Sheridan v. Sanctuary Investments Ltd.* (c.o.b. B.J.'s Lounge) January 8, 1999

patrons of the bar who objected to "a man in the washroom".

In order for transsexual people to qualify for sex reassignment surgery they must live full time for at least one year in the target gender. Sheridan was within that one year qualifying period.

She won.

Sheridan had also been refused entry to the bar on one occasion on the ground that her drivers licence photo (still male) did not look like she did (female). Though she had a letter saying that she was enrolled in the gender clinic, she was not admitted.

She lost.

There was both jubilation and consternation in the trans community when *Sheridan* was announced. From legal perspective, a victory in the women's *washroom* was a very significant victory: it was the quintessentially taboo place for a "man" to be. It was particularly significant since Ms Sheridan had not yet had her sex reassignment surgery.

The next thing that we did was to organize a conference about transgendered rights. I was the token non-trans person on the organizing committee. One hundred people showed up for the first-ever Canadian trans conference. The air was electric with the excitement of people discovering themselves.

Simultaneously with the organization of the Justice and

Equality Summit, there were meetings with representatives of the Attorney General. Hope was in the air: perhaps the Human Rights Code would be amended to include 'gender identity'. The main concern of the Attorney General was spaces where people were naked together – change rooms, that sort of thing. They proposed that the exception for 'public decency' remain in the Code.

I advocated for that solution. In meetings with trans people, and then at the Justice and Equality summit, I argued strongly for that solution as a stepping stone to full equality. I explained that there were provisions with respect to 'public decency' in the Criminal Code, that we would never succeed in having the legislature pass an amendment to include gender identity without it.

I was wrong.

I was wrong for three reasons. First, it was my own transphobia that made me certain that a solution which included the possibility of a penis in a change room would not, could not fly. Second, it was not my place, as a non-trans person, to be advocating for one position or another. Third, my voice – my experienced lawyer voice – inevitably spoke louder than it should have. I was acting out of my privilege and, without intending to, silencing trans people.

Coincident with the developments in the trans communities in B.C., some women's organizations were organizing to object to the participation in women-only space. On September 8, 1999 the B.C. Human Rights Tribunal decided *Mamela v*

*Vancouver Lesbian Centre*³, holding that the organization had improperly discontinued Mamela's membership in the organization. By the time the case got to hearing, the VLC no longer existed, and no one appeared for the respondent.

There began to be a groundswell of opposition to the participation of trans women in women-only spaces.

Reminiscent in some ways of the lines drawn during the "porn wars" in the 80s, when some feminists decried pornography as the blueprint for violence against women, and fought to have the standards of pornography reflect that harm, and others pointed to the liberatory aspects of explicit sexual materials, especially for lesbians, feminists queued on both sides of an acrimonious debate. Each side accused the other of essentialism. Each side suspected or accused the other of having abandoned their feminist principles.

The battles raged in national women's organizations – NAC (National Action Council on the Status of Women), LEAF (Women's Legal Education and Action Fund), NAWL (National Association of Women and the Law) and in national equality organizations such as the Court Challenges Program, which funds federal equality test cases.

Nixon v Rape Relief became the focus of those battles.

I can't comment on the merits of *Nixon*, because it is still before the courts. But the experience of coming to *Nixon*, of having the honour of being welcomed among trans people, in

trying to understand my own reactions, my own transphobia, and then how to advocate for trans people in a legal system that barely acknowledged their existence: that is the challenge that I am trying to articulate.

Human rights legislation invites us to think in categories. Either male/or female. Either white/or not white. Either able-bodied/or disabled.

Decoded, human rights legislation directs Us to treat Them as if they were like Us. The unarticulated Norm is a straight, white able bodied man who was raised Christian and middle class, who is neither too old nor too young, who is well-educated and has neither a criminal nor a psychiatric record. Norm, and his wife Norma.

Human rights legislation constructs those of us with spoiled identities as like Norm, but-for our race, gender, sexual orientation, religion, age, ability, etc. etc.

We are offered neither language nor paradigms to understand our lives if we happen to experience – for example – racism and sexism and homophobia because we are lesbians of colour.

Some people talk about the 'intersection' of oppressions. Intersection has even grown a suffix and become 'intersectionality'. But if you unpack 'intersection' you find a word which describes two lines crossing. Oppressions are not lines. Oppressions do not 'intersect'. I may live at an intersection but I am not an intersection. To describe oppression in terms of intersections is worse than unhelpful. It is misleading, obfuscatory. It hides much more than it

³ *Mamela v Vancouver Lesbian Centre* 1999 BCHRTD No 51

illuminates.

We are offered neither language nor paradigm to understand the most complex facts about identity: that we are all part of the mainstream, the norm; and we are all, or have been as children, part of the disadvantaged minority. We are as adults both privileged and disadvantaged.

Sometimes I think about identity as a grammar of oppression. This culture privileges some human traits and circumstances and devalues others, ignores more still. But a combination of privileges and oppression manifests differently than any privilege, any oppression on its own.

The privilege of education inflects the oppression of homophobia, so that one is seen as eccentric, not crazy. Racism manifests differently compounded with poverty than it does compounded as wealth.

And we are offered neither language nor paradigm to understand our lives if life changes parts of our identities. If we grew up being treated as white, and discover as adults that we were adopted from the reserve into a white family...what are we? If we were married and had children before we came out as lesbians, does that mean we were always lesbians, though mistaken? What is a 'disability'? If person with poor eyesight can see with the help of eyeglasses, does s/he have a disability? In Canada, where eyeglasses are relatively available? In Rwanda, where they are not?

Oppression has these characteristics.

It is relational. Oppression does not exist except between people.

Oppression exists in a country's ideology, its commonly-accepted view of itself. It is a socially sanctioned idea about who is better than whom.

That socially constructed merit/demerit system is one that we absorb as part of who we understand ourselves to be. We take in the disparaging ideas that a culture has as us as someone whose race is not white, or sexual orientation is not heterosexual, religion is not christian, language is not english.

As a lesbian in the late 60s, I understood myself to be crazy, criminal, and evil. But I understood that *I* was the problem. I had no concept of a homophobic culture. Indeed, I was *unspeakably* crazy/criminal/evil. The only information about people like me was in courses called "Deviance".

As a white person, I have been taught that I am 'normal'. A real Canadian. My ancestors, I was taught, were the pioneers, the settlers, bravely carrying the truth of christianity to the Indians. In the town where I was growing up, there were lots of aboriginal people, almost no other people of colour.

But oppression is not a one-way phenomenon. It is reflexively constructed by our individual and collective reactions to the experience of oppression, of ourselves and of others. I am not simply a passive recipient of the (mis)information of this oppressive culture. I am also a participant in that culture. Every time that I hear a racist remark and do not contradict it, I offer my agreement and support to the continuation of the racism. Every time I hear a homophobic remark and do not object, I am participating in

my own oppression.

So it is not *only* the case that I am oppressed; I am also an agent in the oppression of myself and others. I am an agent for, or an agent against, this society's oppressions. Those are the only choices, since there is no neutral place.

Oppression is discussed as if it is about one person/many people oppressing one person/many people. Perhaps discriminating against them; perhaps calling them names; perhaps simply not taking them into account.

That description is fundamentally mistaken.

Each of us who is oppressive has also been oppressed. That is not to say that at a particular moment one person is not oppressing, or harming, or assaulting, or discriminating against, or calling

I like to use smoking as an example. In the 80s, my office was always blue with smoke. Even in those cigarette-tolerant days, people complained about the haze. One colleague in particular objected, saying that my smoke was harming his health. I teased him about being over-sensitive.

Twenty years later, I have quit smoking because I would not put up with the piteousness of going outside in the rain to indulge an addiction. The social acceptability of smoking has completely changed. We have changed people's behaviour about an addiction.

names at, another. But it is to say that to understand classes of people as oppressors, and classes of people as oppressed, oversimplifies and obfuscates day to day dynamics in a dangerous way.

I think about a situation in an unlearning oppression workshop which I was co-facilitating with a white person who had a disability, and an aboriginal person who was able bodied. The able bodied aboriginal person proposed to smudge and to acknowledge that the land we were meeting on was first nations land. The disabled white person pointed out that smudging – smoke – could be harmful to anyone with compromised lungs.

A heated argument ensued. The aboriginal person said that they had never heard of anyone in their community getting sick from smoke, and in their view this was just one more way for white people to forbid aboriginal people from performing their rituals. The person with disabilities responded that disability issues were never taken seriously, that only issues of race seemed to count as true issues of oppression because no one ever thought about the physical consequences for people with disabilities of things like smoke and scents.

Who was right? Who was wrong?

I suggest that to ask that question is to fall into the trap of western either/or thinking: that there is only one right answer. To ask that question is to put the question at the wrong level.

Oppression is not simply bad treatment by one person of

another. If that were so, then all mistreatment would resolve into 'that's life', 'happens to all of us'.

A fundamental feature of oppression is that the oppressor is the person who, in relation to that feature of their identity, is in the dominant group. By definition, they start with the socially-conferred power of being part of the norm.

Conversely, a fundamental feature of being oppressed is that the person who is being oppressed is, in relation to that aspect of their identity, in the target group, the out group, the non-dominant group, in society. By definition, they start with the disadvantage of being part of the marginal in society with respect to that aspect of themselves.

Oppression is not simple. It is not the case that 'homophobia is homophobia is homophobia', nor that 'racism is racism is racism'. Straight people react differently to gay men than they do to lesbians. White people react differently to rich people of colour than they do to poor people of colour. The reactions are homophobic/racist – but the treatment is likely to be different.

Human rights legislation cannot touch those pieces of our lives.

Unless and until we develop a conceptual analysis which is both useable and responsive to the complexity of the diversity of this society, human rights legislation will continue to become less and less relevant in Canada.

Across Our Differences Press
2520 Triumph St.
Vancouver B.C. V6E 1M7
© 2002