

SEX DISCRIMINATION IN SPORT

AN UPDATE

Prepared for CAAWS by Hilary A. Findlay of Brock University with contributions by Rachel Corbett of Centre for Sport and Law.

EXECUTIVE SUMMARY

In one legal ruling, an all female fitness club was not required to provide membership to a man who had been denied it, yet in another, a hockey league was required to allow a female player onto a boys' team. Such seemingly contradictory decisions can leave sport administrators scratching their heads about what might, and might not, constitute sex discrimination in sport.

In *Sex Discrimination in Sport – An Update*, lawyer and sport management professor Hilary Findlay reviews cases since the landmark *Blainey* ruling to give an up-to-date legal snapshot of the 'lay of the land' as it applies to sex discrimination today. Her overall finding, while no case has altered the basic position confirmed by the *Blainey* decision (that females have the right to participate on male teams where there were no female teams, subject only to considerations of physical safety), there have been cases since *Blainey* that have amplified and clarified some underlying legal issues. The result has been significant legal developments in the areas of jurisdiction, justification for discrimination, reasonable accommodation and affirmative action programs in sport.

The report begins with a presentation of seven different real-life discrimination scenarios that set the stage for an explanation of the subtle issues that now enter the legal analysis of discrimination. Federal and provincial jurisdiction is described, along with some of the unique circumstances of the Canadian sport system that make a jurisdictional analysis somewhat challenging.

The author then presents the 'general rule', which is that girls will be permitted to try out for and play on boys' teams, and to do so regardless of the nature of the opportunity available to girls. In other words, where there is no opportunity, or even a comparable opportunity, girls may choose to play in an integrated setting provided they have comparable skills. Naturally, however, there are exceptions to this general rule and these are also summarized.

Although it is clear from this report that it is difficult to generalize when analyzing whether discrimination on the basis of sex has occurred, and whether such discrimination can be justified, the author does offer three guiding principles for sport organizations:

- Determine what jurisdiction governs: the *Charter of Rights and Freedoms*, provincial human rights legislation, or no legislation at all? Contrary to popular belief, the Charter has very little direct impact on Canadian sport. And while most provincial and territorial bodies and their affiliates will be subject to provincial or territorial human rights laws, local sport clubs often are not. It is also important to recognize that human rights codes vary from province to province.
- Know that females will be permitted to play on male teams unless there is some reasonable justification for not allowing them. This justification can be demonstrated through reliable and persuasive evidence, not just anecdotal or a general perception. In other words, it is no longer sufficient to justify discrimination with simplistic arguments about safety or the desire to not inhibit the growth and development of female programs by drawing away the top talent. Any justification argument must be accompanied by concrete, empirical evidence.



- Even where there is compelling justification to exclude females from male teams and programs, understand that the law may still require an organization to do everything reasonable to accommodate the female or females. Some jurisdictions will insist on accommodation to the point of 'undue hardship', even where the discrimination can be justified by empirical evidence and persuasive policy arguments.

The report also discusses affirmative action programs at some length and concludes by revisiting the seven scenarios and making more informed interpretations in each case, using the legal points set out in the report.

For a copy of the position paper, or for more information, please contact CAAWS at www.caaws.ca or caaws@caaws.ca.