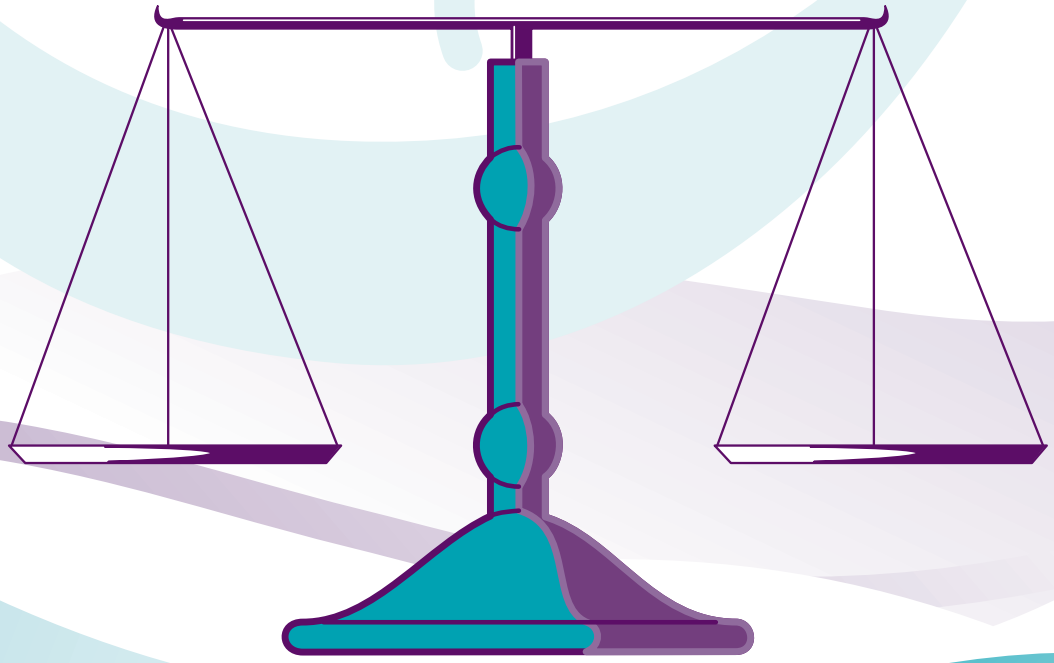
Canadian Association
for the Advancement
of Women and Sport
and Physical Activity

SEX DISCRIMINATION IN SPORT

AN UPDATE



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SEX DISCRIMINATION IN SPORT
AN UPDATE

Prepared by
Hilary A. Findlay, PhD, LLB, Brock University, Centre for Sport and Law,
with contributions by Rachel Corbett, Centre for Sport and Law

for the
Canadian Association for the Advancement of Women and Sport and Physical Activity (CAAWS)

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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 discrimina-

tion 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.

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Canadian Association for the Advancement of Women and Sport and Physical Activity (CAAWS)
N202-801 King Edward Avenue, Ottawa, Ontario, Canada K1N 6N5
Telephone: (613) 562-5667 / Fax: (613) 562-5668 / Email: *caaws@caaws.ca*

PREAMBLE

In 1993 CAAWS, in collaboration with the Government of Canada, published the first comprehensive guide to promoting gender equity in sport. That guide described the state of Canadian law following the landmark ruling *Blainey* v. *Ontario Hockey Association*. Since the time of the *Blainey* decision in the late 1980s, there have been further cases that, while not breaking entirely new legal ground, have nonetheless influenced the interpretation and application of anti-discrimination laws in more subtle ways. The purpose of this report is to provide a snapshot of the current state of sex discrimination law in Canada, by examining these more recent developments. While both CAAWS and the author acknowledge that there are important issues relating to other forms of discrimination in sport, such as race, gender and sexual orientation, they are not the focus of this report.

1. INTRODUCTION

Recently, there have been a number of sport situations that have raised questions around whether or not females can participate in all-male activities and, conversely, whether males can participate in all-female activities – and if so, under what circumstances. This paper is intended to clarify the law around these questions and, specifically around identifying and analyzing circumstances of discrimination on the basis of sex.

About fifteen years ago, when CAAWS first examined the topic of discrimination in Canadian sport, the issues were quite straightforward – where a girls team did not exist, did a girl have the right to play on a boys' team? The answer was usually yes – subject only to considerations of physical safety if the athletes were past the age of puberty. As we can see from the scenarios laid out below, the issues may not be so straightforward today. All of these are real situations that have arisen in Canada – some can be easily analyzed, while others have interesting twists or unique circumstances that make a definitive answer difficult.

Scenario One

A female university student who had played varsity basketball the previous year now wishes to play at the recreational level in the all-male league as she feels it is closer to her own skill level than the all-female league. There are co-ed leagues as well as female only and male only teams. The Athletic Department wishes to keep the gender specific teams segregated, as do the other participants.

Scenario Two

A high school female soccer player plays with the boys' team, as there is no female high school soccer league in the area. The school district has no rules against girls playing on boys' teams. All the teams in the league welcome the female player. The team makes it to the provincial play-offs. The provincial organization responsible for the provincial tournament will not allow girls on boys' teams, as there are abundant female teams and leagues available.

Scenario Three

A highly-skilled female junior squash player wishes to play in the junior boys' league. The organization agrees her level of skill is beyond that of the junior girls' league but is of the view she should play with the senior women as opposed to the junior boys. She has often played in tournaments in the senior women's category and the organization is concerned other junior girls will want to move to the junior boys category.

Scenario Four

A teenage boy wishes to try out for his local ringette team. There is no boys' team, only a girls' team. The team organizers do not want to allow the boy to play on the girls' team.

Scenario Five

A male patron wishes to join a women's fitness club. Management has refused him membership. He brings a complaint before the human rights commission alleging discrimination on the basis of his sex.

Scenario Six

A community fiscal policy results in a significant financial subsidy to the ice arena. As a result, ice rental costs can be kept lower. Other sport and recreation facilities do not receive the same subsidies. The subsidy to the arena disproportionately benefits male-dominated sports over female-dominated sports.

Scenario Seven

The college men's hockey program receives the same funding as the women's hockey team: however, the men's program has been in existence for several decades over which time is has been able to establish a strong, well-resourced program and supportive alumni. The women's program is relatively new and is seeking additional funds and resources to assist in its development.

2. WHAT IS DISCRIMINATION?

Do any of the preceding scenarios describe a circumstance of discrimination? To discriminate in the dictionary sense generally means to *make a distinction*. Some forms of discrimination are completely acceptable: for example, distinguishing between athletes on the basis of their skill level or athletic performance.[1] Other forms of discrimination, depending on the context, *might be* legally acceptable (for example, discriminating on the basis of age when selling alcohol or cigarettes) and others are absolutely unacceptable.

Most often, in the context of sport, discrimination against a person can come about as a direct result of a rule, policy, program, or action by the sport organization or league. For example, some sports or leagues have rules that do not allow girls to play on boys' teams, and vice versa. At face value such rules are discriminatory – they distinguish between groups of people on the basis of their sex. Other times a rule, policy, program, or action which, on the surface does not appear discriminatory, when applied, may have the effect of discriminating against a category of persons. This latter form of discrimination is known as adverse effect discrimination.[2]

For example, the way a city allocates financial resources to sport and recreation facilities may have the effect of discriminating between certain groups of persons. In *Morrison v. City of Coquitlam*, the allocation of direct financial subsidies by the City to sport and recreation facilities and organizations, disproportionately benefited male-dominated sports over female-dominated sports because the subsidies supported hockey arenas. On the surface, the financial policy seemed neutral but it had the effect of benefiting one category of persons over another. Based on subsequent research, the City of Coquitlam was satisfied that girls were adversely affected by the City's policies. The Parties in this case were able to reach agreement on a series of principles and initiatives that came to form the basis of a specific Gender Equity Program implemented by the City of Coquitlam as part of its sports and physical activity services. The Special Program involved appointing a Gender Equity Committee and Gender Equity Coordinator for the City of Coquitlam and establishing a Gender Equity Fund. Funding criteria for the allocation of monies and other subsidies from the Gender Equity Fund were established. The long-term goal of the Special Program is to achieve gender equity in sport in the City of Coquitlam.[3]

We can see that all the scenarios outlined in the opening section present circumstances of discrimination. Is the discrimination acceptable? To answer that, we need to look further to what law, if any, applies to each situation and whether there might be any justification for the discrimination.

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1 Not every complaint of differential treatment amounts to discrimination. It is a well-established principle that human rights legislation must be interpreted broadly and in a purposeful manner; however, not every distinction will trigger the protection of human rights laws. One must look to the facts of the situation, the context of the situation and the purposes of the legislation in order to determine if a distinction amounts to discrimination. In the case of *Stopps v. Just Ladies Fitness (Metrotown) Ltd. and D (No.3),* for example, the Complainant was not able to show that he had been adversely affected by being denied membership in a women's only fitness club where the determination of what might be an adverse effect was viewed both subjectively (from the Complainant's perspective) and objectively (whether a reasonable person, in a similar situation, would find that the differential treatment had an adverse effect). In this case, the differential treatment did not amount to discrimination under the legislation.

2 While it might appear that the distinction between direct discrimination and adverse effect discrimination is the intention to discriminate, in fact discrimination is defined by its effect or impact, not the intention.

3 Another case of indirect discrimination is *Hawkins obo Beacon Hill Little League Major Girls Softball Team v. Little League Canada*, 2006 BCHRT 606, which is scheduled to be heard in March 2008 and involves the alleged use of players' fees to differentially pay for travel expenses of girls' and boys' teams to national championships.

3. JURISDICTION

In Canada, prohibitions against discrimination stem from the Canadian Charter of Rights and Freedoms (often referred to as the *Charter*) and from human rights legislation, whether federal or provincial/territorial. If the prohibition is not found in either of these sources then the discrimination is considered legal. The *Charter* and all human rights statutes in Canada prohibit discrimination on the basis of sex. However, all of these statutes also attach various conditions to the prohibition, which have the effect of allowing discrimination on the basis of sex in certain circumstances.

Keep in mind not every sport situation is governed by the *Charter* or by human rights legislation, although some may be governed by both. The nature of the sport organization is very important in determining what, if any, legislation applies to the sport organization's activities. Sport as an activity is organized and delivered through different structures — schools (both public and private); colleges and universities; municipal recreation departments; private clubs and facilities; local non-profit teams and leagues; native sport circles; and provincial, national, and international sport governing bodies.

Charter

The *Charter* applies to matters of "government action".[4] Those legal entities that arise from government statute and are legally accountable to government are subject to the *Charter*. From this perspective public school sport programs, and municipal sport and recreation programs and facilities certainly come under the jurisdiction of the *Charter* as they have their origins in government legislation (for example, an Education Act or Municipal Government Act. At the other extreme, private schools, private clubs, and other similar sorts of privately owned businesses are not a part of "government action" and thus are not subject to *Charter* provisions. This includes national and provincial sport governing bodies, which, while they may receive considerable government subsidies, are actually private organizations. This fact often comes as a surprise to the typical sport manager, sport participant or parent of an athlete, because there is a widespread belief that the *Charter* permeates all areas of our lives and that sport participation is a basic right or privilege that ought to be subject to the *Charter*. In fact, the *Charter's* direct influence on sport in Canada is minimal.

Previous legal cases have also found that universities and colleges are not part of "government action" and are thus not subject to the jurisdiction of the *Charter*. This means that all sport activity occurring in post secondary educational institutions (facilities, intramurals and varsity teams) lies outside the jurisdiction of the *Charter*.

Human Rights Legislation

Human rights legislation exists at the federal level, as well as within each province and territory of Canada. Any organization offering services or access to programs and facilities to the "public" comes under the jurisdiction of the human rights laws of that provincial, territorial or federal jurisdiction.[5] It is well established that provincial and national sport organizations, which are recognized by government and by international sport federations as the governing bodies for sport in the particular jurisdiction, are subject to human rights legislation, as are aboriginal sport circles and universities and colleges.

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4 Financial contribution from a government does not constitute "government action" and thus is not sufficient to bring an entity within the operation of the *Charter*.

5 Application of the *Canadian Human Rights Act* (CHRA) to First Nations people is not straightforward. Section 67 of the CHRA exempts decisions or acts of band councils or the federal government that are made under the *Indian Act* from the application of the CHRA.

Some recreation and sport clubs offering sport or physical activity programs are however private clubs. They may limit their membership in ways that a "public" organization cannot under either the *Charter* or human rights legislation. A religiously-based club, a women-only fitness club[6], and certain golf, tennis, and country clubs for example, might be private and thus not subject to human rights legislation. Even a local sport club might be interpreted as private: it differs from a provincial sport organization (PSO) in that the latter has a province-wide mandate to govern the sport and offers its membership to the public at-large (although only a subset of the public may choose to participate), while the former has no such mandate and may limit membership as it chooses. These sorts of "private" organizations are not subject to human rights legislation and may, as a result, discriminate on the basis of sex.

Some Twists

There are also some additional jurisdictional "twists". The first is the situation where a private club can be private but can simultaneously offer some services or access to facilities to the public. For example, a private ice arena or racquets club may operate a retail store or restaurant/bar that is open to the public. While the entire club may be private and thus outside the jurisdiction of human rights legislation, the public part of the operation will be subject to human rights laws.[7]

In a second twist, a national sport organization may be running an event, such as a national championship, in a particular province or territory. A participant wishes to challenge one of its rules as being discriminatory. Even though the event may be that of the national organization, which is federally incorporated, the proper jurisdiction to bring a complaint of discrimination is the province or territory in which the event takes place. The same would be true of a university or college athletic conference that spans several provinces. One would look to where the event in question took place for jurisdiction.[8] Given that there are some differences in human rights legislation province-to-province and territory-to-territory, variable outcomes to a claim could arise depending on where a claim is raised, and under what jurisdiction. Where a given sport oversees inter-provincial competition (which nearly all national sports bodies do), this can present some interesting and potentially difficult issues.

A third uniquely sport-related twist arises when international sport rules conflict with the applicable human rights legislation. Typically, a national sport body must comply with the technical rules of its international counterpart and thus will incorporate such rules into its own rule structure. This has happened in several situations within the Canadian sport system. Canadian human rights laws *will always prevail* in Canada, which can create a conflict with an international body's rules as well as the national body's rules. These circumstances are typically best dealt with through a negotiated settlement as occurred in the case of *Pardeep Singh Nagra* v. *Canadian Amateur Boxing Association* (CABA). Pardeep Singh Nagra, a Sikh boxer, was initially barred from competition in Canada because he refused to shave his beard for religious reasons. The "clean-shaven" rule came from the International Amateur Boxing Association (IABA), which threatened to impose sanctions against CABA if they allowed Mr. Nagra to participate. Eventually, the IABA agreed not to impose sanctions if CABA was directed by way of a Canadian court order to allow Mr. Nagra to box.

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6 A *commercial* fitness club that offers memberships to the public would not be considered private and would be subject to human rights legislation (*Stopps v. Just Ladies Fitness (Metrotown) Ltd. and D (No.3)*).

7 *Gould* v. *Yukon Order of Pioneers* (1996), 25 C.H.R.R. D/87 (S.C.C.).

8 *Wood* v. *Canadian Soccer Association* (1984), 5 CHRR D/2024 (Can Trib.).

4. DISCRIMINATION ON THE BASIS OF SEX

The *Charter* and human rights statutes in Canada prohibit discrimination on a wide number of grounds, ranging variously from age, sex, race and religion to disability, pardoned conviction and socio-economic status. The focus of this publication is the prohibition of discrimination on the basis of sex, particularly as it affects sport participation.

Some provinces refer to sex as a prohibited ground and others refer to gender.[9] The definition of sex is broadly interpreted to include discrimination on the basis of pregnancy, as well as gender identification including transgender and transsexual identification. Sexual orientation is included as a separate and prohibited ground under both the *Charter* and human rights legislation throughout Canada but is independent of the prohibited ground of sex.

Both the Charter and the various human rights statutes are given a very broad and purposeful interpretation in order to give full effect to the goals of such legislation. As a general statement, discrimination on the basis of sex is prohibited in all jurisdictions in Canada. Facilities, organizations, leagues and teams that are subject to the jurisdiction of either the *Charter* or human rights legislation are prohibited from discriminating on the basis of sex. However, there are exceptions and modifications to this general prohibition, and this is where matters become more complicated. Nonetheless, these exceptions where applicable are construed in the most restrictive of ways.

5. THE GENERAL RULE

Consistent with the general prohibition against discrimination on the basis of sex, it has been settled law for quite some time that girls will be permitted to try out for and play on boys' teams.[10] Regardless of the nature of the opportunity available for girls – whether there is no opportunity, *or even a comparable opportunity*, girls may choose to play in an integrated setting so long as they have comparable skills.

In *Blainey v. Ontario Hockey Association (No.1)* no girls' hockey team existed. In that case the Tribunal ruled that the Complainant should be allowed to play on the boys' team. *Casselman v. Ontario Soccer Association* extended the opportunity for girls to play on boys' teams, whether or not there was a comparable experience available for girls. In this case two girls played on a mixed soccer team until they were banned at the quarterfinals stage of a competition. They were given the opportunity to play on an all-girls team, but the caliber of the team was not comparable. The Ontario Human Rights Tribunal found in favour of the girls and ordered that the soccer association be barred from stopping females from participating with males in soccer on an integrated basis.

A more recent case, *Pasternak and Pasternak v. Manitoba High School Athletic Association (MHSAA),* confirms that girls can try out for and play on boys' teams if they are at the same skill level. The Pasternak twin sisters made a complaint to the Manitoba Human Rights Commission when the MHSSA would not let them play on their high school boys' ice hockey team. A girls' team did exist at the school; however, the Pasternaks argued that this team did not play at a skill level that was appropriate for them. MHSSA argued that the high school

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9 While the terms do have different meanings ("sex" referring to the biological differences between women and men and "gender" to the socialized differences between men and women), legally and practically there is no difference in the application between the various jurisdictions.

10 See, for example: *Comm. des droits de la personne v. Fédération québécoise de hockey sur glace inc.*, unreported decision of the Quebec Superior Court, File no. 500-05-024964-775, December 20, 1977; *Forbes v. Yarmouth Minor Hockey Association*, unreported decision of the Nova Scotia Board of Inquiry, October 27, 1978.

girls' team was new and it needed the leadership and skill of the Pasternak twins to develop further. In other words, allowing the top players to play elsewhere essentially undermined the formative girls' team.

The Tribunal rejected these arguments, stating that the girls did not sign up to be leaders or pioneers, but to be players on a school team commensurate with their level of skill. Making the point that "equal opportunity must mean more than simply having a team for each gender", the Tribunal stated that the policy of the MHSSA that teams will be "equally-resourced" must be interpreted broadly and accepted the evidence of experts that "the concepts of equal opportunity and equal resources include the opportunity to participate and compete at one's own level". This decision is consistent with the earlier decisions in both *Blainey* and *Casselman*.

6. EXCEPTIONS TO THE GENERAL RULE

As expected, the general rule prohibiting discrimination on the basis of sex does not apply in all situations universally. Exceptions to the general rule include 'reasonable justification' for the discrimination. Attempts to justify the discrimination are further affected by two additional considerations – 'reasonable accommodation' and 'affirmative action'. These concepts, which are interconnected, are discussed next as well as other specific legislative provisions of a similar nature.

Reasonable Justification

Where there is no girls' team, or no comparable opportunity to participate, girls will be permitted to try out for and play on a boys' team unless there is a reasonable justification for segregating activity on the basis of sex.

The safety of participants and public decency are two generally accepted reasonable justifications to segregate activity. In addition, strength, stamina and physique have also been used to support separate programs, more so after the age of puberty, which is typically considered to be the age of 12 for girls and slightly older for boys, depending on individual rates of maturation. However, simply raising the question of safety or decency or differences in strength in the absence of further effort by the party seeking to justify a distinction is not sufficient. The party seeking to justify the discriminatory practice must prove, with reliable and persuasive evidence, that the justification is reasonable in all the circumstances.

SAFETY – The nature of the sport will directly affect the assessment of any safety issue; however, a number of other factors will interact with this consideration. Size of players, speed and the degree of physical contact in the activity are all considerations. This is not new and such considerations have always been part of the assessment of risk to participants based not only on their sex but also on age, physical capacity and level of skill. Some courts have suggested that in contact sports safety becomes a particular issue at the time participants reach puberty; however, each situation needs to be assessed on its individual circumstances. The mere suggestion of some safety risk will not be sufficient. It is necessary to demonstrate on a "preponderance of objective evidence" the nature of the risks, the severity of such risks and the probability of the risks occurring (that is, that they are real and impossible to avoid).[11]

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11 A number of sport organizations, in particular soccer clubs, have banned the wearing of the hijab during games on the basis it poses a safety hazard to the individual player. The hijab is a headscarf worn by Muslim women and girls. The international soccer federation's rule states, "a player must not use equipment or wear anything that is dangerous to himself or any other player (including any kind of jewellery)". It does not make mention of headscarves or other religious headgear. These cases are thus not specifically ones where there is a conflict between the international body's playing rules and that of a local organization. Further, while the issue of safety has been refuted by some individuals and players have been allowed to wear the hijab by various officials, in no case to date involving religious headgear in sport has there been a complaint lodged with a human rights commission.

PUBLIC DECENCY – Public decency is an expressed exception to discrimination in a number of jurisdictions and is implied in virtually all the others. The definition of public decency from a human rights perspective is not clear.[12] What constitutes public decency depends on the circumstances and community morals. One must look to what is generally acceptable in the circumstances while keeping in mind that community values change over time. At one point in time it was not considered appropriate, from a public decency perspective, for boys and girls to wrestle together. Now many school and club-based wrestling programs allow males and females to participate together.

There may be other factors that may constitute a reasonable justification for maintaining a rule, policy or procedure that directly or indirectly results in discrimination on the basis of sex. For example, women's-only fitness clubs have been successfully justified using a privacy (as opposed to public decency) argument.[13]

It is important to consider that the argument for any justification must be supported by concrete evidence. It will not be enough to rely on impressionistic evidence or anecdotal; scientific expert evidence is usually needed but can be difficult to obtain. For example, if a long-term practice is challenged as being discriminatory on a prohibited ground, such as sex, there may be some concern that removing or altering the discriminatory practice may cause untoward consequences – levels of participation may drop, injuries may occur, etc. Simply stating a concern or stating possible consequences will not be sufficient. Some direct evidence that the concerns will occur and the actual impact of such occurrence must be offered to justify the discrimination

Reasonable Accommodation

Regardless of the explanation put forward that a particular justification for a discriminatory practice is reasonable, it is necessary to attempt to make reasonable accommodation for the particular needs of the individual or group discriminated against if those needs are based on a prohibited ground (in this case, the sex of the individual). The process of accommodation is an individualized one – what might be a reasonable accommodation for one person may not be appropriate for another. For example, some flexibility in how a rule, policy or procedure is applied may be possible and appropriate, while still meeting the objective or purpose behind implementation of the rule, policy or procedure.

What constitutes reasonable accommodation? Some jurisdictions do not actually refer to 'reasonable accommodation' but rather to accommodation to the point of 'undue hardship'. There is little practical difference between the two descriptions. Both the Ontario Human Rights Code and the federal Human Rights Act limit the evaluation of undo hardship to three considerations: the cost of the accommodation, the availability of other funding sources, and health and safety requirements. Other jurisdictions do not limit what may be considered.

Most issues with accommodation relate to funding. The test for undue hardship on this factor is whether the cost associated with the proposed accommodation would affect the solvency or viability of the organization. The Supreme Court of Canada has said that the use of the word 'undue' in the term "undue hardship" suggests some hardship is acceptable. In looking at the financial consequences of the accommodation to the organization, the availability of outside resources will be taken into consideration. For example, are there grants or other special funding sources available to the organization?

Safety issues, discussed above from the perspective of reasonable justification, also enter into a discussion of reasonable accommodation. While there is typically an element of risk for anyone participating in sport, contact sports may constitute an unreasonable risk for some. There may be measures that mitigate the

12 Indecency, indecent exposure, or obscenity as defined in the *Criminal Code* would undoubtedly constitute a violation of public decency.

13 *Stopps v. Just Ladies Fitness (Metrotown) Ltd. and D (No.3)* 2006 BCHRT 557.

safety risk such as limiting female participation to certain positions. For example, some females have assumed kicking responsibilities on all-male football teams, or goalie duties on all-male hockey teams.

Female pregnancy presents additional challenges. An important concern in sport is the safety of both the female athlete and the fetus during pregnancy, particularly at the elite level. The issue of whether a pregnant athlete should be permitted to continue playing has arisen in a number of sports, including softball, soccer and basketball.[14] The safety analysis can be difficult in those sports that do not involve full contact but where accidental forceful contact is a real possibility. If an organization receives a request to accommodate in such circumstances, it is reasonable for the sport organization to ask for a note from the individual's physician or other health professional confirming the request. The note should set out accommodation needs and any medical restrictions and, if possible, set out possible accommodation measures.[15]

Other factors may also be argued in cases of accommodation, depending on the jurisdiction. The Tribunal in *Stopps v. Just Ladies Fitness (Metrotown) Ltd. and D* accepted that a women only fitness club could not accommodate a male member without incurring undue hardship in the form of undermining the unique privacy of the women-only environment.

In sport an accommodation often has to be made around washroom and change-room facilities. For example, teams often use the change-room as a team meeting-room because of a lack of other meeting facilities. In the case of one twelve-year-old girl playing hockey with a boys' hockey team, who was required to change in the women's washroom separate from the rest of her team, this had the effect of precluding her from pre- and post-game meetings and team-building sessions. The governing sport organization had a rule precluding girls and boys from being in the same change room for safety and decency reasons. The club could not ignore the rule (even though all players had on some basic clothing) without penalty from the governing organization. Eventually, the club, sport governing body and the player and her parents worked out an accommodation whereby she could be part of the team meetings and camaraderie.[16]

These two concepts of 'reasonable justification' and 'accommodation' have been combined into a three-pronged test that can used to determine whether a rule, policy or practice exists, or is introduced, and that discriminates on a prohibited ground, it is justifiable in the circumstances. The party wishing to maintain the discriminatory rule, policy or practice must show, on a balance of probabilities, that:

- The rule, policy or practice was adopted for a purpose or goal that is rationally connected to the function being performed[17],
- The rule, policy or practice was adopted in good faith, in the belief that it is necessary for the fulfillment of the purpose or goal, and
- The rule, policy or practice is reasonably necessary to accomplish its purpose or goal, in the sense that the organization cannot accommodate persons with the characteristics of the claimant without incurring undue hardship.[18]

The first two parts of the test speak to the reasonable justification for the discriminatory rule, policy or practice. The third part of the test speaks to the need to take every measure possible, short of undue hardship, to accommodate the individual.

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14 In all jurisdictions, discrimination on the basis of a woman's pregnancy is prohibited.

15 Such measures are also important to other players who may be concerned their own actions on the field could cause a risk to the pregnant player. While there may still be a risk notwithstanding the accommodation, the pregnant player has knowingly and voluntarily assumed such risk.

16 The settlement was worked out privately between the parties and not shared with the public.

17 In *Pasternak v. Manitoba High School Athletic Association*, at both the Tribunal and the appeal levels, the adjudicators looked to the mission statements and objectives of the MHSAA in reaching their conclusion that segregated teams were not necessary and, in the particular circumstances of the Claimants in this case, inconsistent with the goals of the organization.

18 *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 (also known as "Grismer").

Affirmative Action Programs

Most jurisdictions in Canada make provision for "special programs," also known as affirmative action programs. These programs are intended to prevent or break historic or systemic patterns that have worked to disadvantage certain groups of people. In all cases, these special programs are not considered to contravene anti-discrimination statutes – rather, they are meant to improve opportunities for certain disadvantaged groups by eliminating or reducing the negative effects or impact of the past.

Section 15(2) of the *Charter* makes provision for an affirmative action program and says:

> *(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.*

Most jurisdictions have similar provisions in their human rights legislation although they vary somewhat jurisdiction to jurisdiction. Alberta and New Brunswick, however, do not make explicit provision for affirmative action programs on the basis of sex.

In some jurisdictions, it is necessary to apply for a special or affirmative action program before initiating one. British Columbia, Saskatchewan, Prince Edward Island and Newfoundland and Labrador all require that an application be made in advance to the respective Human Rights Commission. In this application, it is necessary to show historic or systemic patterns that have had the effect of disadvantaging certain groups of people on the basis of their sex, and that a special or affirmative action program is necessary to break that pattern and enable further opportunity. Similar evidence would likely be necessary to maintain an existing affirmative action program if it were challenged.

In *Blainey v. Ontario Hockey Association (No. 1),* the Ontario Women's Hockey Association (OWHA) was found to be operating a "special program" as defined in section 14(1) of the *Ontario Human Rights Code.* After reviewing the relative positions of the men's and women's hockey programs in Ontario in terms of number of participants, scope of program, and skill level, among other factors, the Tribunal accepted that the OWHA needed to exclude men from its programs in order for it to survive. In that case, heard in 1986, the Tribunal wrote:

> *The evidence clearly establishes that as a group females in this province do not have the same opportunity to play organized competitive hockey. Female hockey must continually struggle for access to ice time. Because of these handicaps, the program offered by the OWHA does not have the same level of participation as does male hockey … Although prepubescent girls can compete equally with prepubescent boys, to allow young boys to play on girls' teams would lead to serious difficulties for female hockey. Many parents are opposed to their daughters playing hockey, even on all-female teams. This opposition would likely intensify if males were permitted to play on female teams. Most females desire to play on all-female teams. To allow males to play female hockey would likely result in a large number of female players deciding to leave the sport.*

It has been argued in a number of cases that it is necessary to prevent girls from playing on boys' teams in order to build the girls' program. The essence of the argument is that if the most skillful players on a girls' team are siphoned off to the boys' team, the girls' teams could never develop a level of skill beyond that point where the players left: in other words, teams could never reach a level of excellence where the most skillful female players could compete.

The Tribunal in *Blainey v. Ontario Hockey Association (No. 2)* found there was no evidence that any such influx of female players to boys' teams would occur. In the result, while the Tribunal did recognize the girls' team as a "special program" under the Ontario Code, it struck down the rule preventing girls playing on boys' teams stating that such a rule was not necessary to the development of a "special program." In *Pasternak*, the Tribunal followed *Blainey*, again finding no evidence that any such influx of female players to boys' teams has occurred since *Blainey* or would occur in the future and thereby dilute the development of girls' teams.

Other Legislative Provisions

As noted earlier, while the legislation across jurisdictions is generally very similar, there are some differences in wording. Such differences can have a dramatic effect on how a particular circumstance might be interpreted. One unique clause is found in the *Ontario Human Rights Code.* Section 20(3) of the *Code* reads:

> *The right under section 1[of the Code] to equal treatment with respect to services and facilities is not infringed where a recreational club restricts or qualifies access to its services or facilities or gives preferences with respect to membership dues and other fees because of age, sex, marital status or family status.*

There are few interpretive guidelines for this section. What constitutes a "recreational club"? Should there be a rational connection between the interests of the particular group and the limitation on the services or facilities that may be offered to the group? Can a recreational club 'selectively' discriminate? The breadth of the exception, being based only on certain limited characteristics, is an anomaly and could in fact promote the very discrimination the Code is intended to eradicate.

7. CONCLUSION

Can all of this analysis be distilled down to a few instructive principles? The subtleties of the issue cannot – but, in broad strokes, here is the lay of the land in 2008:

1. The jurisdiction within which the alleged discrimination is taking place is critical. Such jurisdiction dictates which rules, if any, will apply. The *Charter* may apply, provincial/territorial human rights legislation may apply, both statutes may apply or neither statute may apply, in which case there are no limits on discriminatory behaviour.

2. As a general rule, girls will be permitted to try out for boys' teams, regardless of the nature of the opportunity available for girls. Where there is no opportunity *or, even where there is a comparable opportunity*, girls may choose to play in an integrated setting provided they have comparable skills.

3. Girls will be permitted to play on a boys' team unless there is a reasonable justification for segregating activity on the basis of their sex. The party seeking to restrict female participation has the onus to prove, using reliable and persuasive evidence, that the discriminatory restriction can be reasonably justified. Using the first two prongs of the three-prong test discussed previously, it would be necessary to show that the rule precluding girls from playing on boys' teams is rationally connected to the function being performed and that it is absolutely necessary for the fulfillment of the function or goal. Issues of safety, public decency or significant physiological differences that preclude competition depending upon the facts and circumstances, may enter into this analysis.

There are also other rules, policies and practices that can also lead to discrimination (e.g., finance policies, subsidies, facility access rules, time schedules, etc.). Again, the party seeking to maintain the discriminatory practice has the onus to prove that it can be reasonably justified using the first two prongs of the test.

4. A reasonable justification to maintain a discriminatory rule, policy or procedure, if proven, will only be accepted if, using the third prong of the test, it can be shown it is not possible to reasonably accommodate the individual or group who is adversely affected by the discrimination. In other words, the possibility of a reasonable accommodation will trump an otherwise reasonable justification for the discrimination.

5. A program that prevents or breaks historic or systemic patterns that have worked to disadvantage certain groups of people is not considered to contravene anti-discrimination statutes. Such programs would, for example, operate to prevent boys from playing on girls' teams. In some jurisdictions such programs, known as affirmative action or special programs, must receive the consent of the applicable human rights commission before being instituted.

8. POSTSCRIPT – REVISITING THE SCENARIOS

Circling back to the scenarios presented in the opening paragraph, the following section provides a brief analysis of each scenario. It must be remembered that these scenarios were presented in a very general fashion. Other facts, or slight changes in the facts, could completely change the analysis. As with most legal cases and interpretations, the correct analysis will depend on the particular facts and circumstances of each case.

Scenario One

A university is not subject to the Charter but it is subject to human rights legislation (see Sahyoun v. Canadian Colleges Athletic Association and McKinney v. University of Guelph). The general rule, that females will be permitted to try out for male teams, regardless of the nature of the opportunity available for females, would initially apply. If the Athletic Department wishes to keep the gender-specific teams segregated, it will have to argue such a course of action is reasonably justifiable. The argument for any justification must be supported by concrete evidence. It will not be enough to rely on impressionistic evidence or anecdotal; scientific or expert evidence is usually needed. In showing justification, the Department may attempt to raise an issue such as safety.

Scenario Two

The provincial school sport organization is a distinct entity from the schools themselves and the education system, although individual schools may be members of the organization (see Pasternak v. Manitoba High School Athletic Association). It therefore does not come within the jurisdiction of the Charter. The organization offers services to the 'public', where 'public is defined as the schools and their student bodies (see Sahyoun v. Canadian Colleges Athletic Association) and is thus within the jurisdiction of the provincial human rights legislation. Even though there are abundant female teams and leagues available, the players are entitled to try out for, and play on the boys' team if successful (see Pasternak v. Manitoba High School Athletic Association and Blainey v. Ontario Minor Hockey Association).

Scenario Three

The provincial sport organization is a private organization and thus not subject to the jurisdiction of the Charter but, as the governing body for sport within the province/territory, it has a mandate to offer services to the 'public'. It is therefore subject to human rights legislation. The general rule that females will be permitted to try out for male teams, regardless of the nature of the opportunity available for females, would thus apply initially (see Pasternak v. Manitoba High School Athletic Association and Blainey v. Ontario Minor Hockey Association).

In this scenario, the organization is concerned that other junior girls will want to move to the junior boys category and thus does not want to permit the girl to play with the junior boys. The organization will have to argue a reasonable justification to move away from the general rule. Simply stating a concern or stating possible consequences will not be sufficient. Some direct evidence that the concerns will materialize and the actual impact of that occurrence must be offered to justify limiting the player's choices.

If this scenario occurred in Ontario, and if the organization could bring itself within the constraints of Section 23 of the Ontario Human Rights Code, it might be able to limit the player's choices.

If the situation occurred in New Brunswick, there is an absolute prohibition against discrimination on the basis of sex with no opportunity to argue any reasonable justification (see section 5(2) of the New Brunswick Human Rights Act).

Scenario Four

The local ringette team would not originate from any 'government action' and thus would not be subject to the Charter. It also would likely not be subject to any human rights legislation as it does not offer services to the 'public' at large, as opposed to a provincial team, for example, that must offer an opportunity to any player who meets the legitimate eligibility requirements and has particular skills. The team would likely be a 'private' entity not subject to either the Charter or human rights legislation. It may limit its membership in any way it wishes, even if that amounts to discrimination on a prohibited ground.

Scenario Five

If the fitness centre is a commercial venture offering services to the 'public' then it is likely subject to human rights legislation. The onus to prove a prima facie case of discrimination (i.e., a bare case of discrimination) is always on the person making the claim. The male patron would thus have to demonstrate that he had been adversely affected by the fitness centre's policy (see Stopps v. Just Ladies Fitness (Metrotown) Ltd. and D (No.3)). If he is able to do this, the Centre must argue that there is some reasonable justification permitting the discriminatory policy to persist. In the Stopps case, the male patron was not able to show a prima facie case of discrimination but, as well, the human rights tribunal accepted that the fitness centre was reasonably justified in maintaining its women-only policy on the basis of the unique privacy it offered its female patrons.

Scenario Six

A community, or municipality, derives its origins from statute and is thus subject to the Charter. It also provides services to its residents (the 'public') and thus is also subject to human rights legislation. The policy, while neutral on its surface, disproportionately benefits male-dominated sports over female-dominated sports (this would be a case of adverse effect discrimination) (see Morrison v. City of Coquitlam). In order to persist in its policy the municipality would have to argue it is reasonably justifiable.

Scenario Seven

This scenario raises issues of gender equity and gender equality. 'Gender equity' has been defined as the process of achieving fairness among women and men while the term 'gender equality' speaks to equality in status and equal enjoyment of fundamental rights. The Canadian judicial approach to discrimination accepts that equality is more than just equal treatment – it is a matter of looking at the underlying sources of the inequality and addressing those from a broader group-based perspective. What that means will vary from case to case.

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CANADIAN ASSOCIATION FOR THE ADVANCEMENT OF WOMEN AND SPORT AND PHYSICAL ACTIVITY

N202-801 King Edward Avenue, Ottawa, Ontario, Canada K1N 6N5
Tel: (613) 562-5667 Fax: (613) 562-5668

www.caaws.ca