

From Blainey to Pasternak: Are We Making Progress?

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Speaking Notes for a Presentation at a Research Conference,
To Remember is to Resist: 40 Years of Sport and Social Change, 1968-2008
University of Toronto, May 20-22, 2008

What is the legal status in Canada of gender discrimination in sport today? Today, as a general rule, girls will be permitted to play on boys' teams unless there is a reasonable justification for segregating activity on the basis of their sex. The answer appears fairly simple – however, the implementation and the consequences are not always that simple.

The question at the root of this presentation is whether the judicial consideration of gender discrimination cases in sport has affected opportunities for girls and women to participate in sport in this country. It is ironic that we have two cases, very similar factually, occurring some two decades apart that can act as bookends for us. One involves Justine Blainey, a 12-year old wanting to play hockey on the boy's traveling team in Ontario (1984) and the other involves the 17-year old Pasternak twins, Amy and Jesse, in Manitoba, who wanted to play with the boy's school hockey team (2005). We start with Blainey not just because it was first but, more importantly it was a case heralded to have opened the doors of sport for girls and women across Canada.

First a comment on jurisdiction. In Canada, prohibitions against discrimination stem from the Canadian Charter of Rights and Freedoms (or 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. Of course sex, or gender, is a prohibited ground in them both.

Charter

The *Charter* applies to matters of “government action”.¹ Those legal entities that arise from government statute and are legally accountable to government, or who perform a quintessential government function, are subject to the *Charter*. From this perspective individual 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 (such as 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, provincial/territorial and aboriginal

¹ 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*.

sport governing bodies, as well as universities and colleges, which, while they may receive considerable government subsidies, are actually private organizations. In fact, the *Charter's* direct influence on sport in Canada is very minimal.

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 jurisdiction.² It is well established that provincial and national sport organizations are subject to human rights legislation, as are aboriginal sport circles and universities and colleges.

Some recreation and sport clubs offer their services and facilities to a limited audience. Such organizations are deemed "private" and are not subject to human rights legislation. A religiously based club, a non-commercial women-only fitness club³, and certain golf, tennis, and country clubs for example, are not subject to either human rights legislation or the *Charter* and may, as a result, discriminate on the basis of sex, or some other prohibited ground. 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.

Most decisions involving sport have come through the human rights route. Even school sports are organized and managed by an outside organization so, while the school itself might be subject to *Charter* oversight, the sport organization is subject only to human rights legislation.

Returning to the Blainey case, the decision of the Ontario Human Rights Tribunal was heralded as a watershed decision opening the doors for greater, more equitable opportunities for girls to participate in sport activity. In 1984 Justine Blainey tried out for and was selected to a local boy's traveling hockey team. The rules of the Ontario Hockey Association did not let girls play on boy's teams and thus Justine was denied membership. Although the matter involved a provincial sport organization, Blainey first had to use the new section 15(1) of the *Charter of Rights and Freedoms*⁴ to force changes to the Ontario Human Rights Code so that her exclusion from the boy's team could be recognized as a prohibited discrimination under the Ontario Code.

Section 19(2) of the Ontario Human Rights Code as it was written in 1985 read:

² 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. This could, for example, indirectly affect access for some to various sport or recreation programs.

³ 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)*).

⁴ The *Charter of Rights and Freedoms*, which came into force in 1982.

The right under Section 1 [of the Code] to equal treatment with respect to services, goods and facilities is not infringed where membership in an athletic organization or participation in an athletic activity is restricted to persons of the same sex.

Ironically and as an aside, the current Section 20(3) of the *Code* is very similar to the 1985 version:

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

Blainey was then able to use the Ontario Code to successfully challenge her exclusion from the boy's team. The challenge was straightforward. As noted by one commentator⁵, "the only difference between [Justine] and the other (male) members of the team as far as playing hockey was concerned was her sex which, at least in this context, was simply an "accident of birth". Justine was much more the "same" than she was "different" – all one had to do was 'degenderize' her and make her sex irrelevant to the team selection process.

The Blainey case reflects the narrow approach to equality jurisprudence known as the *formal equality approach*. The focus of formal equality is on the individual's situation and on the relevance of some personal characteristic to the objectives of the challenged rule or policy. This approach requires that people who are similarly situated be treated alike, to the extent that they are alike. Blainey was sufficiently like the boys on the team on which she wished to play to have the right to play with them.

Although formal equality continues to highlight inequalities in various situations, its focus is on the individual and her treatment. The adverse effects on the broader group are ignored.⁶ In other words, rights are seen to protect the individual from discriminatory and prohibited action, not to address the underlying disparities between groups, which led to the individual's claim in the first place. Thus, deprived of the group context, the real issues of inequality are often ignored and left unaddressed (Day & Bodsky, 1998).

The 1989 the Supreme Court of Canada decision in *Andrews v. The Law Society of B.C.*⁷ established that equality was more than just treating likes alike. In *Andrews*, Mr. Justice McIntyre, rejected the 'similarly situated' test of formal equality as a fixed rule or formula for resolving equality claims arising under the *Charter*, holding that:

⁵ Margot Young (1997), 4 Review of Constitutional Studies, p. 150-166 at 151.

⁶ Affirmative action programs presumably aim to ameliorate such adverse effects.

⁷ [1989] 1 S.C.R. 143

Consideration must be given to the content of the law, to its purpose, and its impact upon those to whom it applies, and also upon those whom it excludes from its application. The issues which will arise from case to case are such that it would be wrong to attempt to confine these considerations within such a fixed and limited formula (Andrews 1989, p. 168).

With the *Andrews* decision the court signaled that its preferred approach was one a *substantive equality analysis*. Substantive equality does not involve the comparisons of the formal equality approach. It is contextual and multi-faceted in its approach. A substantive equality approach is concerned with ensuring that laws and policies do not impose subordinating treatment on groups that already suffer social, political or economic disadvantage. It also seeks to redress the existing inequality of such groups. As described by Melina Buckley⁸, “substantive equality requires a focus on systemic and group-based inequities and it encompasses the right to have one’s differences acknowledged and accommodated both by the law and by relevant social and institutional policies and practices”.

The decision in *Andrews* did not completely reject the formal equality approach – both understandings of equality continue to permeate our jurisprudence.

However, in many respects this formal equality approach to judicial analysis is built into the very wording of most of our (Canadian) human rights legislation. By and large codes are written as formal equity documents – they focus on individual rights, as opposed to group rights, and are based on the presumption that remedying the differential treatment of individuals is sufficient to create equality.

This is significant, as we must remember this is the main forum for formal human rights cases in sport. Four troubling issues have been identified and associated with a formal equality approach to jurisprudence. First, the difficulties of trying to adapt such an individually based rights complaint model to claims of systemic or group-based discrimination are well documented (Black, 1994; Duclos 1993; Young 1992). Claimants must prove the impugned policy or law has a disproportionately adverse effect on the group and then show that this generally adverse impact was specifically operative in her own case. This is quite a different and much more complex requirement than a showing of “direct discrimination” where the discrimination is typically ‘self-evident’.

Second, a formal equality analyses requires that a claimant show she has been treated differently. In other words, some comparator group against which “difference” is judged is required. The comparator becomes the norm against which the claim of discrimination is judged. The reference group acts as a norm and the focus is on the difference between the individual and the norm. The norm is typically male mainstream sport. There is often an inference that anything that deviates from the norm is sub-normal. Further, such differences are often based on historically and socially constructed

⁸ Buckley, Melina (Ed.), *Transforming Women’s Futures: A Guide to Equality Rights Action and Theory* (Vancouver: West Coast Women’s Legal Education and Action Fund, 2001, p. 42

stereotypes. By simply focusing on the differences the courts miss what Minow⁹ asserts should be the primary preoccupation of equality law – “the practices and institutions that construct and utilize differences to justify and enforce exclusions” not the difference itself.

The third issue relating to a formal equality analysis is the restrictive way in which claims have traditionally been viewed. The focus has been on single categories leaving ignored the more complex and nuanced reality of many girls and women. Nitya Iyer, for example, has made the case repeatedly that in defining the identity of complainants in sex discrimination cases solely on the basis of their gender, human rights law ignores the unique forms of discrimination experienced by female members of visible minorities.

We see this in sport as race, culture, religion and gender intersect. Vickie Paraschuk, from the University of Windsor, among others, has written extensively of the myopic view we take when we ignore the cultural heritage and customs of our Inuit and other native groups and try to impose on them one standard and one view based upon a completely different experience. Giles (1999), for example, writes of attempts to create a Sport Nunavut Gender Equity Policy premised on, what she described as “prescribed whitestream, Western notions of feminism and gender roles” (p. 95).

The case of Asmahan Mansour, the 11-year-old soccer player who refused to remove her hijab while playing in a soccer tournament in Laval Quebec this past summer, powerfully highlights how sport rules and policies differentially affect girls and women. The situation is notable not only because it highlights the multi-faceted nature of girls and women’s experiences but also for the way it was handled. There was no human rights complaint filed (and one might wonder why). While the rules of FIFA, the world governing body for soccer, did not explicitly forbid the wearing of the hijab, only the wearing of headgear that could be a danger to the athletes, many countries, including the USA and Britain allow the wearing of the hijab, as do several Canadian provinces (including Ontario and British Columbia). Indeed, at the time of the incident the FIFA home page on its website had a picture of a female player wearing a hijab. The Quebec Soccer Association supported the decision of the referee to ban the headwear (even though a previous referee in the same tournament had allowed it).

Two aspects of this matter are particularly notable. First, shortly after the matter died down one provincial soccer association passed a rule forbidding its use in an attempt to clarify the rule. Secondly, and of particular note for this presentation, the head of the Quebec Soccer Association¹⁰ commented during the course of the matter that “a comparable decision would be made for Jews and Sikhs”. In other words, as long as all people in a similar situation are treated similarly, it is not discrimination. This is the classic formal equality approach. The matter seems to have faded from everyone’s view – this, in itself, seems to speak volumes.

⁹ Martha Minow, “Making All the Difference: Inclusion, Exclusion, and American Law (Ithaca: Cornell University Press, 1990) at 86

¹⁰ Valmie Ouellet

The fourth issue, somewhat related to the previous issue, is the sometimes narrow interpretation of prohibited categories by officials. Human rights claims not falling four square within the wording of the prohibited categories are often more likely to be dismissed. For example, claims based around gender identity do not necessarily fit well within the prohibited category of sex. Indeed, two provinces/territories do include gender identity either directly or indirectly, as a prohibited ground in their human rights legislation. One might assume gender identity is subsumed under the ground of sex; however, only Ontario seems to have a policy that explicitly does this.

Both approaches to equality analysis (i.e., formal equality and substantive equality) remain a fundamental part of our equality jurisprudence. Even Mr. Justice MacLntyre acknowledged this when he wrote in the *Andrews* decision (p. 174-5): “[d]istinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination while those based on an individual’s merits and capacities will rarely be so classed.” An interesting and important caution identified by Bruce Ryder and his colleagues in their 2004 paper, is how one determines when a personal characteristic actually reflects merit and capacity as opposed to the stereotypical application of a group characteristic. This, I think, is particularly tricky issue reflected in both *Blainey* and *Pasternak*. The *Pasternaks* were successful in their claim but were not successful in making the team. *Blainey* played with the boy’s team but was soon outpaced in skill and speed by the boys and ended play with them.

In any event, taking these two approaches together, it is fair to say the *Charter* and human rights legislation have two purposes: ensuring that laws avoid treating individuals according to irrelevant personal characteristics, and ensuring that laws avoid further subordination of already disadvantaged groups. Problems arise when these goals clash, as illustrated in the diagram on the next page. This diagram show the intersection of two scenarios for each of the two approaches: ‘okay’ refers to the situation that does not offend anti-discrimination laws, while ‘violates’ refers to the situation that does offend anti-discrimination laws.

In the upper left and lower right quadrants there is no conflict. In the upper right, a situation arises where there is discrimination under the formal equality analysis, but clear ameliorative objectives under the substantive equality analysis, the substantive equality analysis will prevail typically with the recognition of an affirmative action program. The lower left hand quadrant shows another conflicting situation: under the formal equality analysis there is no discrimination but under the substantive equality analysis, discrimination is found. In this situation, given the prevailing doctrinal leaning of the courts, the substantive equality analysis should prevail, but does not always. (It is here that the analysis of Ryding and his colleagues (2004) has shown that, at least with *Charter* equality claims, a trend away from the substantive equality approach.)

Formal Equality Approach

		Formal Equality Approach	
		Okay	Violates
Substantive Equality Approach	Okay	Okay/ Okay	Okay/ Violates (Affirmative Action)
	Violates	Violates/ Okay (Substantive trumps)	Violates/ Violates

We have had scarce few cases to fit into this chart. Blainey came before *Andrews* and the introduction of the substantial equality analysis. Thus, Blainey was decided on a purely formal equality analysis approach (top left quadrant). In 1994, David Morrison¹¹ filed a complaint on behalf of his youngest daughter and other girls living in the British Columbia City of Coquitlam who participated in gymnastics. Mr. Morrison alleged that the City's allocation of sport subsidies discriminated on the basis of sex, specifically; that sports typically dominated by males (such as hockey) received more subsidy than those typically dominated by females (e.g., gymnastics). This particular case never made it to a hearing, having been settled between the parties. The settlement included both budgetary and policy initiatives aimed at some of the underlying problems of girls' and women's sport. However, it has all the earmarks of fitting into the bottom right quadrant – a situation that, under either a formal equality analysis of adverse discrimination or a substantive equality analysis, would potentially have rendered a successful result for the Claimants (assuming the evidence put forward supported the analysis).

In the 2006 case of *Stopps v. Just Ladies Fitness (Metrotown) Ltd. and D*, the Complainant, Mr. Stopps, was not able to show that he had been adversely affected by being denied membership in a women's only fitness club. In this case, the British Columbia Human Rights Tribunal found that the differential treatment did not amount to discrimination under the legislation. They then went on to recognize the unique privacy of the women-only environment. This case the Tribunal found on a formal equality analysis, no discrimination but went on to find discrimination from a substantive equality perspective. This case fits the lower left quadrant.

¹¹ *Morrison v. City of Coquitlam*

Since the 1990s the number of sport related cases coming before Tribunals has declined to a trickle. Two broad categories of cases have always been recognized – the individual rights cases and the group rights or systemic discrimination cases. There may now be a pattern to the outcome of the individual rights cases based on past experiences. As to the latter, as previously recognized, these are difficult cases to bring forward. Nonetheless, although individuals experience the effects of inequality and, in this sense such claims are individually based, discrimination is fundamentally rooted in the underlying disadvantages of the group. These are the more difficult and less clear cases to mount, but the more necessary. This is once again highlighted in the Pasternak case.

Fast-forward two decades – twenty years. In 2005 the Pasternak twins from Manitoba wanted to play on their high school boys' ice hockey team. Even though they had been playing through the ranks of boys' teams for a number of years, the local high school sport authority enforced a rule prohibiting girls from playing on boy's teams where a girl's team existed. In this case the girl's team had been in existence for one year and the Pasternak twins level of skill far exceeded the level of the girl's team. As in the case of Ms. Blainey, using the Manitoba Human Rights Code, the Pasternak twins were successful in challenging the exclusionary rule. The adjudicator ruled that the twins should be permitted to try out for the team on the merit of their own abilities. As in the Blainey case, the adjudicator found the twins to be more akin to the boys than to the girls in their hockey skill (i.e., more alike than different). Ironically, and sadly, they did not make it through the selection process and thus did not play on the team they fought to play on.

The decision was appealed by the Respondent, Manitoba High Schools Athletic Association, Inc. (MHSAA). Interestingly, the Court found that the Tribunal Adjudicator had applied a *substantive equality approach*. In the words of Justice McKelvy of the Manitoba Court of Appeal, "...being treated on the basis of an individual's personal merit, as opposed to personal characteristics such as gender, is the essence of substantive equality" (p. 34). Interestingly, these words actually echo Mr. Justice MacIntyre's description of formal equality in the *Andrews* decision. It seems even more evident that the decision rested on a formal equality analysis as one reviews the decision.¹² By way of elaboration, Justice McKelvy wrote:

She [the Human Rights Tribunal Adjudicator] determined that the men's team played a more challenging and competitive level of hockey. The women's team at WKCI was competing in its first season and its level of competitiveness was in no way comparable to that offered by the men's team. Further, I have accepted the finding of fact that the men's and women's "game" remains substantially different. The Pasternaks were denied the opportunity to try out or to complete the try-out process for the men's team and, consequently, were denied the chance to be judged on the basis of their personal merit.

¹² It would appear that the two witnesses affiliated with CAAWS were actually each arguing one of the two jurisprudential approaches to decision-making – the formal equality approach and the substantive equality approach.

Without question the female team at WKCI operated with the same funding, ice time and other accommodations as existed for the men's team. However, the Adjudicator correctly evaluated that this matter was not one related to reasonable accommodation. The Pasternaks sought to be afforded the opportunity to compete for placement on the male team, which represented a higher level of hockey in terms of competitiveness and skill. The men's team has competed in the "B" division of high school hockey. This level was considered to be in keeping with the experiences and possible skill set of the Pasternaks. The same could not be said with respect to the female team which was in its initial year of operation with many of its players never previously having participated in organized hockey. The opportunity to be evaluated on the basis of merit was wrongly denied by the MHSAA because of gender.

In the end, the Pasternaks did not make the boy's team. And one wonders how the women's team will ever reach the competitive level the Pasternaks desired when the top players – the players with experience, are allowed to be siphoned off. On the one hand and, as noted by the Tribunal Adjudicator, the Pasternaks did not 'sign up' to be role models or pioneers, only to play the game at a skillful level. On the other hand, ameliorization of the systemic marginalization of female athletes and the development of more highly skilled opportunities in sport might require that highly skilled athletes, such as the Pasternaks, remain with the girls' teams bringing their skill and expertise to the institution of girl's sport – whatever sport that might be, and that girls' and women's sport be recognized as different from boys' and men's sport.¹³ This is not a novel thought. After the *Blainey* case, Margot Young wrote: "[t]he wicking away of top girl athletes into boys leagues simply ensures that female leagues retain secondary and subordinate status". It was also the argument initially presented in *Blainey* and again in *Pasternak*. The Tribunal in *Blainey* found there was no evidence that there would be an exodus of female players to boys' teams. In *Pasternak*, the Tribunal followed *Blainey*, finding that no evidence had been presented showing that since *Blainey* there had been a flow of females players to boys' teams and thereby causing a dilution the development of girls' teams, nor that it would occur in the future.

From a formal equality perspective, the Pasternaks were treated differently on the basis of a personal characteristic, which, in the view of both the adjudicator and the judge did not correlate with merit or capacity. However, the organization was unable to rally evidence to the effect that striking down the rule prohibiting girls from playing on boys teams would further subordinate the position of girls' sport. In *Pasternak*, as in *Blainey*, the matter remained in the top left hand quadrant of our chart.

Has anything changed between *Blainey* and *Pasternak* or is *Pasternak* is a bit like *deja vu* all over again? As skillful and exceptionally motivated athletes challenged the lack of opportunity available to them to play and further develop in their chosen sports played out judicially through out the 1970's and 1980's in particular, what was really happened, at least from a judicial perspective, was that the immediate interests of the athlete were pitted against longer term systemic change -- and those immediate interests were short

¹³ This is the familiar dichotomy of individual rights pitted against group rights.

term at best. In one sense, legal recourse, particularly through the human rights process has not served the state of girl's and women's sport particularly well. Both Blainey and Pasternak, occurring some twenty years apart, remind us of the underlying marginalizing factors really at issue. At the end of the day, both individual athletes, while legally successful, claimed a hollow victory in their pursuit of playing opportunities and, arguably, little attention was paid to the girl's teams from they wished to disassociate themselves. Opportunity is inextricably linked to proper support – economic, cultural, structural. The right of the individual to proper sport opportunity simply cannot be understood separate from other equality considerations – including issues of budget allocation, facilities, scheduling, safety, child care, among others. These become particularly potent when issues of rural and urban geography are put into the mix. If the evidence to feed the substantive equality argument is there, it needs to be marshaled.

As a footnote, it is important to consider that any such argument must be supported by concrete evidence. It will not be enough to rely on impressionistic evidence or anecdote; 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.

Post Script

In 1995 the federal government adopted a policy requiring federal departments and agencies to conduct gender-based analysis of future policies, projects and legislation, where appropriate. The initiative was part of the Canadian federal plan as part of the Federal Plan¹⁴ arising out of the 4th World Conference on Women held in Beijing in 1995. The objective is to ensure that a gender perspective is reflected in all policies and programs at the national, provincial and local levels. While a gender-based analysis approach may be evident at the governmental level and in some national initiatives (e.g., the 2002 CAAWS conference), its trickle down effect has not been felt at the operational level of sport organizations (nationally, provincially and locally). A good example of this is the gender equity policies of most (though perhaps not all) sport organizations. More often than not they are drafted as a necessary evil and then shelved. They do not reflect the diverse and multi-faceted experiences of the women they serve. Yet they hold great potential to help sport organizations become substantive equality advocates.

¹⁴ The Federal Plan was formally titled “Setting the Stage for the Next Century: The Federal Plan for Gender Equality - 1995-2000”

