

Appeal No. 630/85

SUPREME COURT OF ONTARIO

(COURT OF APPEAL)

B E T W E E N :

JUSTINE ELIZABETH BLAINEY by her
litigation guardian Caroline Blainey

Applicant
(Appellant)

- and -

THE ONTARIO HOCKEY ASSOCIATION and
THE ONTARIO HUMAN RIGHTS COMMISSION

Respondents
(Respondents in Appeal)

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STATEMENT OF FACT AND LAW OF THE APPELLANT

PART I - THE APPEAL

1. This is an appeal on behalf of Justine Elizabeth Blainey ("Justine Blainey") from the Order of the Honourable Mr. Justice Steele in the Supreme Court of Ontario made the 25th day of September, 1985 dismissing the application of the Appellant.

PART II - THE FACTS

THE PARTIES AND THE STRUCTURE OF THE O.H.A.

2. The Appellant, Justine Blainey, is a female, born January 11, 1973.

Affidavit of Litigation Guardian, paragraph (c)
Appeal Book p 46, (TAB 4)

3. The Respondent Ontario Hockey Association ("O.H.A.") is a non-profit incorporated association with approximately 175,000 male and 3500 female registered hockey players. It offers a structured program for the promotion of amateur hockey. There are a number of divisions within the O.H.A., including the Metropolitan Toronto Hockey League ("M.T.H.L.") and the Ontario Women's Hockey Association ("O.W.H.A."). Since in or about 1975, the O.W.H.A. has operated a system of hockey teams for females in parts of Ontario.

Affidavit of Brent Ladds paragraph 2, 3, 4, 8,
Appeal Book p 272-4, (TAB 12)

Affidavit of Frances Rider, paragraph 2, 4 7,
Appeal Book p 296, 298 (TAB 13)

4. The Canadian Amateur Hockey Association ("C.A.H.A.") is the sole official national sports governing body for amateur hockey in Canada. It has branches in each province, of which the O.H.A. is one.

Affidavit of Murray Costello paragraph 2, 3,
Appeal Book p 361 (TAB 16)

Transcript of Evidence of Abigail Hoffman,
paragraph 23-24, Appeal Book p. 415-417 (TAB 20)

DENIAL OF OPPORTUNITY TO PLAY

5. In or about May, 1985, Justine Blainey competed successfully with 63 others for one of the 14 places on the "Olympics", an "A" level hockey team in the Minor Peeewe Division of the M.T.H.L. She practised with the Olympics and played in exhibition games against other M.T.H.L. teams from May, 1985 until the hearing of the application before Mr. Justice Steele in September, 1985. Mr. Justice Steele in his decision (the "Decision") found that Justine Blainey "... is physically able to compete as a full member of that team, although all other members are boys."

Affidavit of Daniel Damario paragraph 1-10, 13,
Appeal Book pp. 66-69, 72 (TAB 6)

Decision p 3, Appeal Book p 13 (TAB 2)

6. Although the O.H.A. operates hockey teams for females through the O.W.H.A., Regulation 250 of the O.H.A. ("Regulation 250") restricts eligibility for membership in O.H.A. teams to male persons.

Affidavit of Daniel Damario paragraph 10, Appeal
Book p 69, Exhibit "D" Appeal Book p 112 (TAB 6)

7. Any team, club or team official who allows a player who is not a member of an O.H.A. team to play may be suspended for a period of up to one year.

Affidavit of Daniel Damario paragraph 9-10,
Appeal Book p 69, Exhibit "D", Appeal Book p 110
(TAB 6)

Transcript of Examination of Lois Kalchman
paragraph 15-17, Appeal Book p 435-6 (TAB 21)

Transcript of the Cross Examination of Brent
Ladds paragraph 32-35, Appeal Book p 488-9
(TAB 24)

8. The O.H.A. through the M.T.H.L. refuses to accept Justine Blainey as a member of the Olympics because she is female. Mr. Justice Steele found as a fact that "Justine Blainey is effectively prohibited from playing on the team of her choice solely because of her sex."

Decision page 3, Appeal Book p 13 (TAB 2)

9. Regulation 250 is sanctioned by Section 19(2) of the Ontario Human Rights Code, 1981 ("Code"). The Attorney General of Ontario who is also the Minister Responsible for Women's issues in Ontario has announced the government's intention to repeal this section of the Code.

The Ontario Human Rights Code, 1981, S.O. 1981,
c. 53, Section 19(2)

Affidavit of Peter A. Milligan paragraph 1,
Appeal Book p 225, Exhibit 1, Appeal Book p 227-
230 (TAB 7)

THE OPPORTUNITIES FOR JUSTINE BLAINNEY TO DEVELOP AS
A HOCKEY PLAYER ARE SUPERIOR ON AN M.T.H.L. TEAM

10. Commencing in 1983, Justine Blainey played on an O.W.H.A. girls team for two seasons. It had fewer practices, less training, fewer games, and overall, fewer competitive opportunities than did M.T.H.L. boys' teams for the same age bracket. The coach of her girls team

acknowledges that for her to continue with that team or indeed, in the women's hockey system would not offer the challenge that Justine Blainey's skill and determination merit. This coach also states, as do others, that girls' and womens' hockey is more for fun and less competitive than boys and mens' hockey.

Affidavit of Caroline Blainey paragraph 3-13, 19-20, Appeal Book p 50-9 (TAB 5)

Affidavit of Betty Ann Armstrong paragraph 1, 4-11, Appeal Book p 232-3 (TAB 8)

Transcript of Evidence of Lois Kalchman paragraph 48, Appeal Book p 444 (TAB 21)

11. The Olympics' coach, Mr. Damario, anticipates that for the 1985-86 season, the team will play as many as 89 games and in addition, practice 4 hours a week.

Affidavit of Daniel Damario paragraph 13, 16, 17, Appeal Book p 72-5 (TAB 6)

12. Despite having taken the position on cross-examination that it will be some time in the future before a girl is capable of playing on an M.T.H.L. team, the President of the O.W.H.A. contended that Justine Blainey would have opportunities available to her as a member of an O.W.H.A. girls' team that would be at least equal to those available to her as a member of the Olympics. However, even leaving aside the less challenging level of play, in each case where she provided concrete information, none of the girls' teams she proposed could equal the Olympics in

number of practices, number or length of competitive games or length of regular season. Further, a large part of the playing opportunities available to her in the organizations proposed would be house league play, which is essentially non-competitive.

Supplementary Affidavit of Frances Rider
paragraph 2(a)-(e), Appeal Book p 343-9 (TAB 14)

Transcript of the Cross Examination of Frances Rider, paragraph 8-14, 18,19,25-28 Appeal Book p 509-513, 518, 527 (TAB 25)

Affidavit of Caroline Blainey paragraph 4(a), 14-16 Appeal Book p 50, 59-60 (TAB 5)

Transcript of the Examination of Abigail Hoffman paragraph 13-14, 22-23, Appeal Book p 402-406 415-6 (TAB 20)

The Report of the Task Force on Equal Opportunity in Athletics (Volume 1) John Sopinka Q.C. (the "Sopinka Report") at 13 Appeal Book p 555(TAB 27)

Transcript of the Cross Examination of Caroline Blainey, paragraph 22 Appeal Book p 470-2(TAB 23)

13. Overall, the opportunities in womens' hockey are not as extensive or as challenging as the opportunities in organized hockey for boys and men.

Transcript of the Examination of Abigail Hoffman, paragraph 13, 32-33, Appeal Book p 402, 404, 424-5, (TAB 20)

Transcript of the Examination of Lois Kalchman, paragraph 37-48, Appeal Book p 441-4 (TAB 21)
Transcript of the Cross Examination of Caroline Blainey, paragraph 44 Appeal Book p 477-8(TAB 23)

LOSS OF OPPORTUNITY TO PLAY WILL CAUSE SERIOUS HARM

14. Being on the Olympics in the 1985-86 season is very important to Justine Blainey's future as an athlete. To lose an entire year of competitive play at this level would be a permanent setback.

Affidavit of Caroline Blainey, paragraph 20-23, Appeal Book p 62-3, (TAB 5)

Affidavit of Daniel Damario, paragraph 11, Appeal Book p 70-1 (TAB 6)

Transcript of the Examination of Abigail Hoffman, paragraph 10-12, Appeal Book p 398-402 (TAB 20)

15. Losing Justine Blainey would harm the morale and playing capacity of the Olympics. She is a valued and important member of the team, and cannot be replaced with a player of comparable ability at this time of year.

Affidavit of Daniel Damario, paragraph 3, 11, 14-15 Appeal Book p 67, 70-1, 73 (TAB 6)

NO DETRIMENTAL EFFECTS ON TEAMS OR VOLUNTEERS

16. It is undisputed that Justine Blainey has been well accepted as a full member of the team by her teammates. She competed in 4 exhibition games this summer as an Olympic member. She played well and was accepted by all - coaches, officials, and members of other teams. The Olympics' coach, who has had extensive experience coaching in the O.H.A., observed no adverse effects when she played and is of the opinion that permitting her to play would not adversely affect the M.T.H.L., the O.H.A., or any team therein.

**Affidavit of Daniel Damario, paragraph 13-14,
Appeal Book p 72-3 (TAB 6)**

**Affidavit of Caroline Blainey, paragraph 21,
Appeal Book p 62 (TAB 5)**

17. Arrangements for Justine Blainey to change in private and travel with the Olympics present no problem.

**Affidavit of Daniel Damario, paragraph 19 and 20,
Appeal Book p 76-7 (TAB 6)**

18. The Appellant has adduced evidence of examples where having girls on boys' teams, whether in hockey or other sports, has been a positive experience with no adverse effects. Some local authorities and teams in Ontario permit or advocate integration of females into boys' hockey teams.

**Affidavit of Daniel Damario, paragraph 21 Appeal
Book p 77, (TAB 6)**

**Affidavit of Bruce Kidd, paragraph 9, Appeal Book
p 6-7 (TAB 10)**

**Transcript of the Examination of Abigail Hoffman,
paragraph 7-9, Appeal Book p 396-8 (TAB 20)**

**Transcript of the the Examination of Lois
Kalchman, paragraph 18-36, Appeal Book p 436-441,
(TAB 21)**

**Transcript of the Examination of Thomas Riley,
paragraph 21-30, Appeal Book p 450-452 (TAB 22)**

**Transcript of the Cross Examination of Bruce
Kidd, paragraph 3-7, Appeal Book p 523-6 (TAB 26)**

Sopinka Report Appeal Book p 608 (TAB 27)

19. The Respondent has adduced no such specific evidence, relying rather on conjecture as to the ill

effects that might follow if girls win places on boys' teams. Despite having experience with, and indeed a policy allowing girls 12 and under to play on boys' teams where, in the O.W.H.A.'s opinion, no "equal opportunity" exists in girls' hockey, the O.H.A. adduced no evidence that the presence of girls on boys teams had harmfully affected any aspect of amateur hockey. Indeed, the O.H.A. and the O.W.H.A. support integration at 12 years and under, but entirely exclude girls over 12 from this opportunity.

Affidavit of Brent Ladds, paragraph 13, Appeal Book p 278 (TAB 12)

Affidavit of Frances Rider, paragraph 16, 19, Exhibit H, Appeal Book p 302-307, 327 (TAB 13)

Affidavit of Hazel McCallion, paragraph 2, 6, Appeal Book p 354, 355, (TAB 15)

Affidavit of Angela James, paragraph 7, 9, Appeal Book p 372-3 (TAB 17)

AN ATHLETE SHOULD BE JUDGED ON INDIVIDUAL ABILITY

20. The experts relied on by the Appellant and the O.H.A. agree that, prior to puberty, girls and boys are comparable in strength, speed, endurance and athletic skill. Even after puberty, not all males will outperform all females in sports. A minority of females will still outperform most males. Further, the research does not establish that females are at any greater risk than male athletes.

Affidavit of Helen Lenskyj paragraph 10, 12.1 Appeal Book pp 242-243 (TAB 9)

Affidavit of Dr. Charles Bull, paragraph 2-8,
Appeal Book p 378-382 (TAB 18)
Sopinka Report 33-35, 91, 101, Appeal Book p 575-
7, 633, 642 (TAB 27)

Sopinka Report at 33-35, 91, 101, Appeal Book
575-7, 633, 642 (TAB 27)

21. In order to develop to the fullest as an athlete, competitive play is required at the highest level of which an individual is capable. Developing opportunities for women and girls in sports need not and should not be restricted to sex-segregated opportunities alone.

Affidavit of Bruce Kidd, paragraph 8, Appeal Book
p 254 (TAB 10)

Affidavit of Helen Lenskyj, paragraph 7-8, 12.1,
Appeal Book p 241, 243 (TAB 9)

Transcript of Evidence of Abigail Hoffman,
paragraph 10, Appeal Book p 398-400 (TAB 20)

22. Mr. Justice Steele found that Justine Blainey "...is physically able to compete as a full member of the team [the Olympics], although all other members are boys."

Decision p 3, Appeal Book p 13 (TAB 2)

THE O.H.A. HAS A PUBLIC DIMENSION

23. The C.A.H.A. is recognized by the federal government as the official sport governing body for amateur hockey in Canada. No other organization can purport to regulate the Canadian amateur hockey program.

**Transcript of the Examination of Abigail Hoffman,
paragraph 23-26, Appeal Book p 415-8 (TAB 20)**

24. As a sport governing body, the C.A.H.A. receives significant funding from government sources. For instance, in 1984 it received \$950,000 from the federal government through Sport Canada, (the federal government agency responsible for the development of sport at the national and international level) for its administration, development of coaching and other activities, from which the O.H.A. receives a benefit. Additionally, in Ontario the 72 recognized sports, including hockey, receive substantial public funding from provincial sources.

**Transcript of the Examination of Abigail Hoffman,
paragraph 1, 15-17, 30-31, Appeal Book p 394.
445-8, 423-424 (TAB 20)**

Sopinka Report p. 17, Appeal Book p 559 (TAB 27)

**Transcript of the Cross Examination of Brent
Ladds, paragraph 23-29, Appeal Book p 486-488
Exhibit 1, Appeal Book p 504a (TAB 24)**

25. The O.H.A.'s programs are further subsidized by the municipalities. For example, 17 of North York's 19 municipal arenas are used primarily for organized minor hockey (i.e. O.H.A. division teams). These 17 arenas are valued at \$44,050,000.00 for replacement of buildings alone. The 6 indoor arenas in Etobicoke used by O.H.A. teams are valued at approximately \$9,500,000.00. These figures show a substantial input of public capital to the O.H.A. In addition, in the 1984-85 hockey season the

contribution from public operating funds to the O.H.A. divisions' teams for subsidized ice time on municipal arenas was \$424,445.00 in North York and \$115,000.00 in Etobicoke.

**Affidavit of Barbara Greene, paragraph 4-7,
Appeal Book p 262-265, (TAB 11)**

**Transcript of the Examination of J. Thomas Riley,
paragraph 7-19, Appeal Book p 448-9 (TAB 22)**

NO OTHER EFFECTIVE RECOURSE AVAILABLE

27. Other than by way of this application and appeal, Justine Blainey has no effective means available to her to challenge her exclusion from the Olympics. When Caroline Blainey approached the president of the M.T.H.L. on her daughter's behalf regarding the possibility of playing on an M.T.H.L. team, he refused to forward her request to the O.W.H.A. Caroline Blainey then directly approached the O.W.H.A. on an informal basis, but without success. The O.W.H.A. president in her evidence took the position that the O.W.H.A. provides ample opportunities for the Appellant to play in the Toronto area.

**Transcript of the Cross Examination of Frances Rider, paragraphs 20-21, Appeal Book p 575-6
(TAB 25)**

**Supplementary Affidavit of Frances Rider,
paragraph 1-4, Appeal Book p 343-350 (TAB 14)**

27. Further, the Ontario Human Rights Commission (the "Commission"), in response to Caroline Blainey's request for assistance, informed her that due to the provisions of

Section 19(2) of the Code, it had no jurisdiction to receive her complaint.

Affidavit of Caroline Blainey, paragraph 25,
Exhibit "A", Appeal Book p 63-5 (TAB 5)

PART III - The Issues and the Law Applicable Thereto

A. SECTION 19(2) OF THE CODE CONTRAVENES SECTION 15(1) OF THE CHARTER

28. The learned Judge held (correctly, it is submitted) that:

"On the plain reading of Section 19(2) [of the Code] it is an infringement of Section 15(1) [of the Charter] because it purports to permit athletic organizations to be restricted to persons of the same sex. Both the purpose and effect of Section 19(2) are in violation of Section 15(1) of the Charter, whether they be tested on a strict scrutiny basis or any other basis."

Decision p. 18, Appeal Book p 28 (TAB 2)

The Canadian Charter of Rights and Freedoms (the "Charter") Section 15(1)

29. It is submitted that a legislative purpose that violates the Charter's guarantees is *ultra vires* and unconstitutional, and that a statutory provision underpinned by such a purpose, such as Section 19(2) of the Code, cannot be supported under the Charter.

R. v. Big M. Drug Mart (1985) 58 N.R. 81 at 106, 116-117 per Dickson, J. (S.C.C.)

Association of Quebec Protestant School Boards et al. v. Attorney General of Quebec et al. (1984) 54 N.R. 196 at 220-222 per curiam (S.C.C.)

B. SECTION 19(2) OF THE CODE IS NOT SAVED BY SECTION 1 OF THE CHARTER

30. The effect of Section 19(2) of the Code is to permit the absolute and arbitrary exclusion of females from participating in any athletic activity or organization in this province. This is a complete denial of the rights guaranteed under Section 15 of the Charter. There are, therefore, no limits prescribed by law, reasonable or otherwise, with which to trigger the saving provisions of Section 1 of the Charter.

Re Ontario Film and Video Appreciation Society and Ontario Board of Censors (1984) 45 O.R. (2d) 80 at 82 per Mackinnon A.C.J.O. (C.A.)

Hunter v. Southam (1984) 11 D.L.R. 4th 641 at 658-659 per Dickson, J. (S.C.C.)

31. For the purposes of applying Section 1 of the Charter, there must be a government interest or objective underlying the impugned statutory provision. It is submitted that the learned Judge erred in identifying the interest of the O.H.A. in upholding its Regulation 250 with a state interest in the objective of Section 19(2) of the Code. Indeed, the only evidence respecting the interest of the state in this instance is to the contrary.

32. The statement by the Honourable Ian Scott, Q.C., Attorney General of Ontario and Minister Responsible for Women's Issues that the government intends to repeal Section 19(2) of the Code is a convincing indication of

the public policy of the province. There is, therefore, no longer any state interest in upholding Section 19(2) of the Code.

Affidavit of Peter A. Milligan and Exhibit 1
Appeal Book pp 226-30 (TAB 7)

33. In the alternative, such government interest or policy as may exist is not entitled to protection under Section 1 of the Charter. It is submitted that the learned Judge erred, therefore, in holding that there was a "significant state interest" in Section 19(2) of the Code.

Decision, p 23, Appeal Book p. 33 (TAB 2)

R. v. Big M. Drug Mart, supra at 116

34. Relative to the Charter, there is no presumption of constitutionality in favour of legislation. It is submitted that the learned Judge erred in the significance he attached to the inclusion of Section 19(2) in provincial human rights legislation, and in holding that such legislation can contravene the Charter.

Decision pp. at 7-9 Appeal Book p 17-19 (TAB 2)

Ontario Film and Video Appreciation Society supra at 82

R. v. Videoflicks (1984) 48 O.R. (2d) 395 at 424 per Tarnopolsky, J.A. (C.A.)

35. It is submitted that the learned Judge erred in analyzing and applying Section 1 of the Charter as "the

only protection of society as a whole from the individual rights granted in Section 15(1)". In determining the applicability of Section 1 of the Charter to the statutory provision in issue, it is submitted the court must focus on the impact of the impugned legislation on the individual whose rights have been or may be infringed, rather than simply on the rationality of a particular statutory provision in furthering a government objective, even when that objective is valid.

Decision, p. 18

Hunter v. Southam supra per Dickson J. at 650

36. Relative to Section 1 of the Charter, the combined effect of (i) the reference to sex as one of the specific grounds in respect of which equality is guaranteed under Section 15; (ii) the purpose of Section 15, which at a minimum is to ensure that persons in similar situations are treated similarly, and (iii) Section 28 of the Charter, is to impose the highest standard of judicial scrutiny where there has been a denial of equality on the basis of sex.

R. v. MacDonald (unreported) June 1985 (Ont. C.A.) per Morden, J.A. at p. 35

Charter Sections 15(1), 28

37. It is submitted that, having applied a "strict scrutiny" test to breaches of Section 15(1) of the Charter,

the learned Judge erred in holding that only a "significant" government interest must be shown in the subject matter of Section 19(2) of the Code for it to be validated by Section 1 of the Charter, when he should have required a higher, more exacting standard to be met.

Darrin et al. v. Gould, 540 P. 2d 882 (LWash. S.C., 1975 at 893

Brenden et al. v. Independent School District 477 F. 2d 1292 (U.S.C.A., 8th Cir. 1292) at 1299-1300

38. It is submitted that the learned Judge erred in holding that the O.H.A. had adduced evidence sufficient to satisfy the significant burden of proof it bears under Section 1 of the Charter to establish that Section 19(2) of the Code constitutes a reasonable limit on the rights and freedoms guaranteed by the Charter, demonstrably justifiable in a free and democratic society.

39. The learned Judge based his conclusion that the O.H.A. had established the existence of a significant state interest in Section 19(2) of the Code on a combination of three findings:

(i) with a few exceptions of brief duration, females generally cannot compete successfully with men in hockey because of physiological differences;

(ii) the only reason hockey facilities for women in the greater Toronto area are not as extensive as those for men is lack of demand (expressly rejecting any need for equality in separate facilities provided for men and women);

(iii) allowing the Appellant to play hockey on the Olympics might jeopardize the existence of private organizations that voluntarily develop sports.

The learned Judge also considered that in international Olympic competition, contact sports are sex segregated.

Decision pp. 21-23, Appeal Book p 31-33, (TAB 2)

40. These three factors do not constitute evidence that can satisfy the burden of proof on the O.H.A. to support Section 19(2) of the Code. Section 19(2) extends in its application beyond hockey, and is impeachable by reason of its scope. The evidence relied on by the learned Judge related only to Regulation 250. Even if his findings are accurate, (which is not admitted), a finding that Regulation 250 may be justified does not translate into a finding that Section 19(2) is *intra vires*.

41. In any event, it is submitted that the learned Judge's findings as outlined in paragraph 39 above are not well founded. Relative to the first of these, it is submitted that the use of a gender-based classification in athletics cannot be justified, as it ascribes a particular quality or trait to one sex that is not shared by all members of that sex, relegating the entire class to an inferior status. It is further submitted that such a system of classification in athletics is inherently unfair and tends to perpetuate stereotypes.

La Commission des Droits de la Personne c. La
Federation Quebecoise de Hockey sur Glace Inc. et
autres [1978] C.S. 1076 at 1082-1083

Brenden supra at 1297-1302

Darrin supra at 887, 891-892

42. Further, there is no evidence that, prior to puberty, the majority of females are physically unable to compete successfully with the majority of males in hockey or other sports. In fact, the evidence, as referenced in paragraph 20 hereof is to the contrary. Additionally, there is no evidence that this Appellant will only be able to compete successfully with males in hockey for a short number of years.

43. Relative to the second factor relied on by the learned Judge, it is submitted that he erred in refusing to take into consideration the inequality demonstrated by the evidence between the hockey facilities available to males and those available to females. "Limited demand" for women's hockey facilities cannot in law constitute an acceptable rationale for consigning qualified female athletes, including the Appellant, to opportunities in hockey or other sports that are inferior to those available to their male peers. The possibility that womens' hockey facilities may be expanded at some time in the future is no answer to a current denial of the Appellant's rights under Section 15(1) of the Charter.

Decision, at 21-22, Appeal Book p 31-32 (TAB 2)

La Commission des Droits supra p 1082

Brenden supra at 1302

44. Relative to the last of the learned Judge's findings, it is submitted that he erred in relying on the O.H.A.'s and O.W.H.A.'s conjecture and speculation to found his conclusion that, if the Appellant were permitted to play hockey for the Olympics, the voluntary development of sports by private organizations would be jeopardized. The Respondent's own evidence, as well as that of the Appellant, as referenced above in paragraphs 18 and 19, shows that girls are accepted on boy's teams in Ontario and that their participation is supported by volunteers.

Decision, pp. 22-23, Appeal Book p 32-33 (TAB 2)

Retail Wholesale and Department Store Union v. Government of Saskatchewan [1985] 5 W.W.R. 97 at 118-119 (Sask. C.A.) per Bayda, C.J.S.

45. It is submitted that, in evaluating the O.H.A.'s and O.W.H.A.'s expressed fear that, if this application were granted, women's hockey would be taken over by men, the learned Judge erred in failing to take into account Section 15(2) of the **Charter** and Section 13 of the **Code**, which authorize affirmative action programs where appropriate.

Charter, Section 15(2)

Code, Section 13

46. It is submitted that the learned Judge erred in failing to consider that, even if there is a government interest in Section 19(2) of the Code of sufficient importance to override a right guaranteed by the Charter, the means chosen to achieve this interest must impair as little as possible the right or freedom in question. The rigour of Section 19(2) is unacceptably disproportionate to any legitimate government objective.

R. v. Big M. Drug Mart supra at p. 116

Retail Wholesale Union v. Gov't. of Sask. supra
at pp. 117-118

Hunter v. Southam supra p. 656-659

47. It is submitted that the learned Judge erred in failing to consider that there is no equivalent to Section 19(2) of the Code in any other human rights code in a Canadian jurisdiction. Human rights legislation in Quebec has been held to require the Quebec Ice Hockey Federation Inc. to permit the participation of females on teams formerly reserved for males.

La Commission des Droits supra

48. American courts have frequently dealt with the exclusion of females from amateur athletic activities, ranging from tackle football to golf. It is well established that the exclusion of a qualified female from the opportunity to try for and, if successful, join a

boys' team is a denial of equality wrongful under both the Fourteenth Amendment to the American Constitution and under the Equal Rights Amendment to State Constitutions. All of the arguments and fears raised by the O.H.A. in this case have been rejected by American courts.

Reed et al. v. Nebraska School Activities Association et al. 341 F. Supp. 258 (U.S. dist. Ct., Neb., 1972)

Haas v. South Bend Community School Corporation 289 N.E. 2d 495 (Indiana S.C. 1972)

Brenden supra

Commonwealth of Pennsylvania v. Pennsylvania Interscholastic Athletic Association Pa Cmwltth., 334 A. 2d 839 (1975)

Darrin v. Gould supra

Force et al. v. Pierce City R-VI School District et al. 570 F. Supp. 1020 (U.S. Dist. Ct.)

49. It is submitted that the American authorities' rejection of gender-based classifications in athletics should apply *a fortiori* in Canada, given the inclusion of sex as one of the enumerated grounds under Section 15(1) of the **Charter** and the explicit authorization in the **Charter** and the **Code** of affirmative action programs.

Charter, Section 15

The Code, Section 13

C. **SECTION 19(2) OF THE CODE CONTRAVENES SECTION 28 OF THE CHARTER**

50. It is submitted that the learned Judge erred in his interpretation of the meaning and effect of Section 28 of the Charter and in failing to apply it in the circumstances of this case.

51. The learned Judge held that Section 28 of the Charter merely emphasizes that men and women are to be treated equally in the Charter, but that it does not affect or cannot override Section 1 of the Charter. This is tantamount to giving no effect to Section 28 at all.

Decision, pp. 23-24, Appeal Book 33-34 (TAB 2)

52. The plain words of Section 28 require that it be given overriding importance such that the rights entrenched therein cannot be contravened by legislation, as Section 19(2) of the Code purports to do, and such that the equality of males and females as guaranteed by Section 15 of the Charter may not be limited.

The Charter, Sections 1, 15 and 28

Hunter v. Southam, supra, at 649-650

53. Accordingly, it is submitted that the learned Judge erred in failing to find that Section 19(2) of the Code contravenes the Charter and is of no force or effect.

Constitution Act, 1982, Section 52(1)

Charter, Sections 1, 15, 24(1), 28

D. SECTION 19(2) IS SEVERABLE FROM THE BALANCE OF THE CODE

54. It is submitted that the learned Judge erred in holding that "under normal circumstances" Section 19(2) is not severable from the Code and that it is not an intended exemption from, inter alia, Section 1 of the Code.

Decision, pp. 15,16, Appeal Book p. 26, (TAB 2)
Code, Sections 1, 8, 19(2)

55. It is submitted that the learned Judge erred in applying an incorrect test to determine the question of severability. On a plain reading of the Code, it and in particular Section 1, were intended to and can independently survive absent Section 19(2). There is no evidence of any contrary legislative intention.

Decision p. 15, Appeal Book p 25, (TAB 2)

Re: Alberta Bill of Rights Act, Attorney General of Alberta v. Attorney General of Canada et al. (1947) 4 D.L.R. 1 at 11 (Privy Council)

Toronto v. York Tp. et al. (1938) 1 D.L.R. 593 at 596 (Privy Council)

Interpretation Act R.S.O. 1980, c. 219, s. 4

E. ABSENT SECTION 19(2), THE O.H.A. IS IN CONTRAVENTION OF THE CODE

56. Regulation 250 and the exclusion of the Appellant from the Olympics are a denial of services or facilities that is contrary to Sections 1 and 8 of the Code.

Code, Sections 1, 8

Re Ontario Softball Association and Bannerman
(1979) 26 O.R. (2d) 134 at 142-143 per Wilson
J.A. in dissent (Ont. C.A.)

F. AN EFFECTIVE REMEDY SHOULD BE ORDERED

57. Pursuant to Rule 14.05(3)(d) of the Rules of Practice, this Honourable Court has jurisdiction to adjudicate upon relevant issues of law relating to the provisions of the Code, which jurisdiction does not interfere with the Commission's responsibilities. In the circumstances of this case, it is submitted that it would be appropriate and just for the Court to rule on the question of whether Regulation 250 constitutes a denial of services or facilities contrary to Section 1 of the Code. It is particularly appropriate where to require the Appellant to resort to the machinery of the Code would in effect deny her her rights because of the length of time required to complete Commission proceedings, a fact of which it is submitted this Honourable Court can take judicial notice.

Rules of Practice, Rule 14.05(3)(d)

London Life Insurance Company v. O.H.R.C.(1985)
50 O.R. 2d 749 (H.C.) at pp. 752

58. In the alternative, it is submitted that if this Honourable Court declines to exercise its jurisdiction to apply the provisions of Section 1 of the Code to the O.H.A., then this Honourable Court should grant an interim Order permitting the Appellant to play on the Olympics for

the 1985-86 hockey season, and any subsequent season in which she is chosen in competitive tryouts by an M.T.H.L. or other O.H.A. team, pending the resolution of her complaint to the Commission.

Charter, Section 24(1)

59. Section 24(1) of the Charter empowers the Court to order such remedy as it considers just and appropriate where Charter rights have been infringed. It is submitted that, in the circumstances of this case justice requires that an immediate remedy be provided to the Appellant to enable her to play hockey as a member of the Olympics or any other O.H.A. team for which her skill and strength qualify her.

Charter, Section 24(1)

G. REGULATION 250 CONTRAVENES THE CHARTER

60. It is submitted that the learned Judge erred in failing to find that the Charter applies directly to the O.H.A.

Decision, pp. 7-9, Appeal Book p 17-19 (TAB 2)

61. It is submitted that the O.H.A.'s relationship and contacts with the state as outlined in paragraphs 23-25 hereof are sufficiently pervasive to make its regulations and practices directly subject to the Charter by virtue of Section 32 thereof, pursuant to which the Charter applies to the legislature and government of each province.

The Charter, Section 32

Burton v. Wilmington Parking Authority (1961) 365 U.S. 715 (U.S.S.C.)

Evans v. Newton (1966) 382 U.S. 292 (U.S.S.C.)

62. Thus, Regulation 250 is itself a contravention of Sections 15 and 28 of the Charter, as it denies a female the right to membership in a team for which she is otherwise qualified, solely on the basis of her sex. Further the denial of equality on the basis of sex inherent in this Regulation is not a reasonable limit demonstrably justifiable in a free and democratic society.

Charter, Sections 1, 15(1), 28

63. In any event, it is submitted that Section 32 is not an exhaustive statement of the applicability of the Charter. Even if the O.H.A. is not within the ambit of Section 32 of the Charter, it is submitted that as so-called "private action", the actions of the O.H.A. barring females constitute an unjustifiable denial of equality under the law and of the equal protection and benefit of the law contrary to the Charter, for the reasons outlined in the preceding paragraph.

add reference to opinion De v. L. R. (see)
R. v. Lerke (1984) 11 D.L.R. 4th 185 (Alta. Q.B.)
 per Rowbotham, J. at pp. 188-190
Slattery, B. "Charter of Rights and Freedoms - Does it bind private persons?" Canadian Bar Review, Volume 63, 148

Dale Gibson, "The Charter of Rights and the Private Sector" (1982) 12 Man. L.R. 213

64. Accordingly, the learned Judge erred in failing to hold that the O.H.A. is directly subject to the Charter and that the gender requirement in Regulation 250 is not a proper bar to the Appellant's acceptance for registration to play in the M.T.H.L and is of no force and effect.

Charter, Sections 1, 15(1), 24(1), 28

Constitution Act, 1982, Section 52(1)

H. THE COURT HAD JURISDICTION TO DETERMINE DISPUTED QUESTIONS OF FACT

65. It is submitted that the learned Judge erred in holding that he was unable to decide disputed questions of fact on this application.

Decision P.5
Rules of Practice, Rule 14.05(2)

Re Johnson and the Queen in Right of Ontario
(1985) 50 O.R. ³⁰ at 34 (H.C.)
(2d)

Re Danson and Attorney General of Ontario (1985)
51 O.R. (2d) 405 at 408-409 per McRae, J. (H.C.)

I. THE COURT HAD JURISDICTION TO GRANT AN INTERIM INJUNCTION

66. It is submitted that the learned Judge erred in holding that he had no jurisdiction to grant an interim injunction in the circumstances of this case.

Decision pp 10-11
Courts of Justice Act, 1984 S.O. 1984, c. 11 s.
114

Yule Inc. v. Atlantic Pizza Delight Franchise
(1968) Ltd. et al. (1977) 17 OR (2d) 505
(Divisional Court)

Herbert v. Shawinigan Cataractes Hockey Club et
al. (1978) 22 OR (2d) 654 (H.C.)

Issac Wilfred Stoffman et al. v. Vancouver
General Hospital et al. (unreported) July 4, 1985
Supreme Court of British Columbia

Hammerstein v. B.C. Coast Vegetable Marketing
Board et al. (1962) 37 DLR (2d) 153 (B.C.C.A)

PART IV - RELIEF REQUESTED

67. The Appellant asks that the Order of Mr. Justice Steele made September 25, 1985 be reversed and that an Order or Orders be entered:

a) declaring Section 19(2) of the Code to be contrary to Sections 15 and 28 of the Charter and thus void and of no force and effect pursuant to Section 52 of the Constitution Act, 1982; declaring that, Section 19(2) of the Code being void, it does not bar application of Section 1 of the Code to the Regulations of the O.H.A. and declaring that Regulation 250 is contrary to Section 1 of the Code and thus cannot constitute a bar to the acceptance of Justine Blainey for registration as a player in the M.T.H.L., a division of the O.H.A.; and

b) declaring that Regulation 250 is contrary to Sections 15 and 28 of the Charter, and thus cannot constitute a bar to the acceptance of Justine Blainey for registration as a player in the M.T.H.L. division of the O.H.A.; and

c) requiring the O.H.A. through the M.T.H.L. to accept the standard C.A.H.A. registration card for Justine Blainey although she is a female; and

d) permitting Justine Blainey to play on the team in the M.T.H.L. which has selected her in a competitive process, pending the final disposition of this appeal pursuant to Section 144(2) of the Courts of Justice Act, S.O. 1984, c. 11; and

e) such further and other relief as Counsel may advise and this Court deem just; and

f) the costs of the Appellant in this proceeding.

All of which is respectfully submitted.

Richard E. Shibley *Joan M. Gilmour* *J. Anna Fraser*
RICHARD E. SHIBLEY JOAN M. GILMOUR J. ANNA FRASER

SHIBLEY, RIGHTON & McCUTCHEON WALKER, POOLE, MILLIGAN

OF COUNSEL TO THE APPELLANT

SCHEDULE "A"

1. **R. v. Big M. Drug Mart** (1985) 58 N.R. 81 per Dickson, J. (S.C.C.)
2. **Association of Quebec Protestant School Boards et al. v. Attorney General of Quebec et al.** (1984) 54 N.R. 196 (S.C.C.)
3. **Re Ontario Film and Video Appreciation Society and Ontario Board of Censors** (1984) 45 O.R. (2d) 80 per Mackinnon A.C.J.0 (O.C.A.)
4. **Hunter v. Southam** (1984) 11 D.L.R. 4th 641 at 658-659 (S.C.C.) per Dickson, J. (S.C.C.)
5. **Decision of the Honourable Mr. Justice Steele in the Supreme Court of Ontario** made the 25th day of September 1985 dismissing the Application of the Appellant herein
6. **R. v. Videoflicks** (1984) 48 O.R. (2d) 395 per Tanapolsky, J.A. (O.C.A.)
7. **R. v. MacDonald** (unreported) June 1985 (O.C.A.) per Morden, J.A.
8. **Darrin et al. v. Gould**, 540 P. 2d 882 (Wash. S.C., 1975)
9. **Brenden et al. v. Independent School District 477** F. 2d 1292 (U.S.C.A., 8th Cir. 1292)
10. **La Commission des Droits de la Personne v. La Federation Quebecoise de Hockey sur Glace Inc. et autres** [1978] C.S. 1076
11. **Retail Wholesale and Department Store Union v. Government of Saskatchewan** (1985) 5 W.W.R. 97 (Sask. C.A.) per Bayda, J.
12. **Reed et al. v. Nebraska School Activities Association et al.** 341 F. Supp. 258 (U.S. Dist. Ct., Neb., 1972)
13. **Haas v. South Bend Community Corporation** 289 N.E. 2d 495 (Indiana S.C. 1972)
14. **Commonwealth of Pennsylvania v. Pennsylvania Interscholastic Athletic Association Pa Cmwltth.**, 334 A. 2d 839 (1975)
15. **Force et al. v. Pierce City R-VI School District et. al.** 570 F. Supp. 1020 (U.S. Dist. Ct. Missouri, 1983)

16. **Burton v. Wilmington Parking Authority** (1961) 365 U.S. 715 (U.S.S.C.)
17. **Evans v. Newton** (1966) 382 292 (U.S.S.C.)
18. **R. v. Lerke** (1984) 11 D.L.R. 4th 185 (Alta. Q.B.) per Rowbotham, J.
19. Slattery, B. "Charter of Rights and Freedoms - Does it bind private persons?" Canadian Bar Review, Volume 63, 148
20. Dale Gibson, "The Charter of Rights and the Private Sector" (1982) 12 Man. L.R. 213
21. **Re: Alberta Bill of Rights Act, Attorney General of Alberta v. Attorney General of Canada et al.** (1947) 4 D.L.R. (Privy Council)
22. **Toronto v. York Tp. et al.** (1938) 1 D.L.R. 593 at 596 (Privy Council)
23. **Re Ontario Softball Association and Bannerman** (1979) 26 O.R. (2d) 134 at 142-143 per Wilson J.A. in dissent (O.C.A.)
24. **London Life Insurance Company v. O.H.R.C.** (1985) 50 O.R. 2d 749 (H.C.)
25. **Yule Inc. v. Atlantic Pizza Delight Franchise (1968) Ltd. et al.** (1977) 17 O.R. (2d) 505 (Divisional Court)
26. **Herbert v. Shawinigan Cataractes Hockey Club et al.** (1978) 22 O.R. (2d) 654 (High Court)
27. **Issac Wilfred Stoffman et al. v. Vancouver General Hospital et al.** (unreported) July 4, 1985 Supreme Court of British Columbia
28. **Hammerstein v. B.C. Coast Vegetable Marketing Board et al.** (1962) 37 D.L.R. (2d) 153 (B.C.C.A.)

SCHEDULE "B"

I. Ontario Human Rights Code, 1981, S.O. 1981, c. 53

S. 1 1. Every person has a right to equal treatment with respect to ^{Services} services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, age, marital status, family status or handicap.

S. 8 8. No person shall infringe or do, directly or indirectly, any- ^{Infringe-} thing that infringes a right under this Part. ^{ment} ^{prohibited}

S. 13 - 24 13.—(1) A right under Part I is not infringed by the ^{Special} implementation of a special program designed to relieve hardship ^{programs} or economic disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity or that is likely to contribute to the elimination of the infringement of rights under Part I.

(2) The Commission may, ^{Review by} ^{Commission}

(a) upon its own initiative;

(b) upon application by a person seeking to implement a special program under the protection of subsection (1); or

(c) upon a complaint in respect of which the protection of subsection (1) is claimed,

inquire into the special program and, in the discretion of the Commission, may by order declare,

(d) that the special program, as defined in the order, does not satisfy the requirements of subsection (1); or

(e) that the special program as defined in the order, with such modifications, if any, as the Commission considers advisable, satisfies the requirements of subsection (1).

(3) A person aggrieved by the making of an order under sub- ^{Reconsidera-} section (2) may request the Commission to reconsider its order ^{tion} and section 36, with necessary modifications, applies.

(4) Subsection (1) does not apply to a special program where ^{Effect of} an order is made under clause (2) (d) or where an order is made ^{order} under clause (2) (e) with modifications of the special program that are not implemented.

(5) Subsection (2) does not apply to a special program ^{Subs. (2) does} implemented by the Crown or an agency of the Crown. ^{not apply} ^{to Crown}

Age
sixty-five
or over

14. A right under Part I to non-discrimination because of age is not infringed where an age of sixty-five years or over is a requirement, qualification or consideration for preferential treatment.

Canadian
Citizen-
ship

15.—(1) A right under Part I to non-discrimination because of citizenship is not infringed where Canadian citizenship is a requirement, qualification or consideration imposed or authorized by law.

Idem

(2) A right under Part I to non-discrimination because of citizenship is not infringed where Canadian citizenship or lawful admission to Canada for permanent residence is a requirement, qualification or consideration adopted for the purpose of fostering and developing participation in cultural, educational, trade union or athletic activities by Canadian citizens or persons lawfully admitted to Canada for permanent residence.

Idem

(3) A right under Part I to non-discrimination because of citizenship is not infringed where Canadian citizenship or domicile in Canada with the intention to obtain Canadian citizenship is a requirement, qualification or consideration adopted by an organization or enterprise for the holder of chief or senior executive positions.

Handicap

16.—(1) A right of a person under this Act is not infringed for the reason only,

(a) that the person does not have access to premises, services, goods, facilities or accommodation because of handicap, or that the premises, services, goods, facilities or accommodation lack the amenities that are appropriate for the person because of handicap; or

(b) that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of handicap.

Powers of
Commission

(2) Where, after the investigation of a complaint, the Commission determines that the evidence does not warrant the appointment of a board of inquiry because of the application of subsection (1), the Commission may nevertheless use its best endeavours to effect a settlement as to the provision of access or amenities or as to the duties or requirements.

Social
interest
organ-
izations

17. The rights under Part I to equal treatment with respect to services and facilities, with or without accommodation, is not infringed where membership or participation in a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by a prohibited ground of discrimination is restricted to persons who are similarly identified.

18.—(1) This Act shall not be construed to adversely affect any right or privilege respecting separate schools enjoyed by separate school boards or their supporters under *The British North America Act, 1867* and the *Education Act*.

Separate school rights preserved 1867, c. 3
R.S.O. 1980, c. 129

(2) This Act does not apply to affect the application of the *Education Act* with respect to the duties of teachers.

Duties of teachers

19.—(1) The right under section 1 to equal treatment with respect to services and facilities without discrimination because of sex is not infringed where the use of the services or facilities is restricted to persons of the same sex on the ground of public decency.

Restriction of facilities by sex

(2) The right under section 1 to equal treatment with respect to services 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.

Athletic activities

(3) The right under section 1 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.

Recreational clubs

20.—(1) The right under section 2 to equal treatment with respect to the occupancy of residential accommodation without discrimination is not infringed by discrimination where the residential accommodation is in a dwelling in which the owner or his or her family reside if the occupant or occupants of the residential accommodation are required to share a bathroom or kitchen facility with the owner or family of the owner.

Shared accommodation

(2) The right under section 2 to equal treatment with respect to the occupancy of residential accommodation without discrimination because of sex is not infringed by discrimination on that ground where the occupancy of all the residential accommodation in the building, other than the accommodation, if any, of the owner or family of the owner, is restricted to persons who are of the same sex.

Restrictions on accommodation, sex

(3) The right under section 2 to equal treatment with respect to the occupancy of residential accommodation without discrimination because of marital status is not infringed by discrimination on that ground where the occupancy is in a building that contains not more than four dwelling units, one of which is occupied by the owner or family of the owner.

Idem: marital status

(4) The right under section 2 to equal treatment with respect to the occupancy of residential accommodation without discrimination because of family status is not infringed by discrimination on that ground where the residential accommodation is in

Idem: family status

a building, or designated part of the building, that contains more than one dwelling unit served by a common entrance and the occupancy of all the residential accommodation in the building or in the designated part of the building is restricted because of family status.

Restrictions
for insurance
contracts, etc.

21. The right under sections 1 and 3 to equal treatment with respect to services and to contract on equal terms, without discrimination because of age, sex, marital status, family status or handicap, is not infringed where a contract of automobile, life, accident or sickness or disability insurance or a contract of group insurance between an insurer and an association or person other than an employer, or a life annuity, differentiates or makes a distinction, exclusion or preference on reasonable and *bona fide* grounds because of age, sex, marital status, family status or handicap.

Discriminatory
employment
advertising

22.—(1) The right under section 4 to equal treatment with respect to employment is infringed where an invitation to apply for employment or an advertisement in connection with employment is published or displayed that directly or indirectly classifies or indicates qualifications by a prohibited ground of discrimination.

Application
for
employment

(2) The right under section 4 to equal treatment with respect to employment is infringed where a form of application for employment is used or a written or oral inquiry is made of an applicant that directly or indirectly classifies or indicates qualifications by a prohibited ground of discrimination.

Questions at
interview

(3) Nothing in subsection (2) precludes the asking of questions at a personal employment interview concerning a prohibited ground of discrimination where discrimination on such ground is permitted under this Act.

Employment
agencies

(4) The right under section 4 to equal treatment with respect to employment is infringed where an employment agency discriminates against a person because of a prohibited ground of discrimination in receiving, classifying, disposing of or otherwise acting upon applications for its services or in referring an applicant or applicants to an employer or agent of an employer.

Special
employment

23. The right under section 4 to equal treatment with respect to employment is not infringed where,

- (a) a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by their race, ancestry, place of origin, colour, ethnic origin, creed, sex, age, marital status or handicap employs only, or gives preference in employment to, persons similarly identified if the qualification is a

reasonable and *bona fide* qualification because of the nature of the employment:

- (b) the discrimination in employment is for reasons of age, sex, record of offences or marital status if the age, sex, record of offences or marital status of the applicant is a reasonable and *bona fide* qualification because of the nature of the employment;
- (c) an individual person refuses to employ another for reasons of any prohibited ground of discrimination in section 4, where the primary duty of the employment is attending to the medical or personal needs of the person or of an ill child or an aged, infirm or ill spouse or other relative of the person: or
- (d) an employer grants or withholds employment or advancement in employment to a person who is the spouse, child or parent of the employer or an employee.

24.—(1) The right under section 4 to equal treatment with respect to employment is infringed where employment is denied or made conditional because a term or condition of employment requires enrolment in an employee benefit, pension or superannuation plan or fund or a contract of group insurance between an insurer and an employer, that makes a distinction, preference or exclusion on a prohibited ground of discrimination.

Employment conditional on membership in pension plan

(2) The right under section 4 to equal treatment with respect to employment without discrimination because of age, sex, marital status or family status is not infringed by an employee superannuation or pension plan or fund or a contract of group insurance between an insurer and an employer that complies with the *Employment Standards Act* and the regulations thereunder.

Pension or disability plan under R.S.O. 1980, c. 137

(3) The right under section 4 to equal treatment with respect to employment without discrimination because of handicap is not infringed,

Employee disability and pension plans: handicap

- (a) where a reasonable and *bona fide* distinction, exclusion or preference is made in an employee disability or life insurance plan or benefit because of a pre-existing handicap that substantially increases the risk;
- (b) where a reasonable and *bona fide* distinction, exclusion or preference is made on the ground of a pre-existing handicap in respect of an employee-pay-all or participant-pay-all benefit in an employee benefit, pension or superannuation plan or fund or a contract of group insurance between an insurer and an employer or in respect of a plan, fund or policy that is offered by an

II. Constitution Act, 1982

Guarantee of Rights and Freedoms

ss. 1

Rights and freedoms in Canada

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Equality Rights

ss. 15(1) + (2)

Equality before and under law and equal protection and benefit of law

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Affirmative action programs

(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.

ss. 24

Enforcement

Enforcement of guaranteed rights and freedoms

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Exclusion of evidence bringing administration of justice into disrepute

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

ss. 28

Rights
guaranteed
equally to both
sexes

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

Application of Charter

ss. 32(1) + (2)

Application of
Charter

32. (1) This Charter applies
(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Exception

(2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this section comes into force.

ss. 52(1)

Primacy of
Constitution of
Canada

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

INTERLOCUTORY ORDERS

s. 114(1) + (2)

Section 114

Injunctions and receivers

114.—(1) In the Supreme Court, the District Court or the Unified Family Court, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

Terms

(2) An order under subsection (1) may include such terms as are considered just. R.S.O. 1980, c. 223, s. 19(1).

s. 144 - (1)
to (7)

Section 144

Powers on appeal

144.—(1) Unless otherwise provided, a court to which an appeal is taken may,

- (a) make any order or decision that ought to or could have been made by the court or tribunal appealed from;
- (b) order a new trial;
- (c) make any other order or decision that is considered just. R.S.O. 1980, c. 223, s. 29(1).

Interim orders

(2) On motion, a court to which an appeal is taken may make any interim order that is considered just to prevent prejudice to a party pending the appeal. *New.*

Power to quash

(3) On motion, a court to which an appeal is taken may, in a proper case, quash the appeal. R.S.O. 1980, c. 223, s. 13(1).

Determination of fact

(4) Unless otherwise provided, a court to which an appeal is taken may, in a proper case,

- (a) draw inferences of fact from the evidence, except that no inference shall be drawn that is inconsistent with a finding that has not been set aside;
 - (b) receive further evidence by affidavit, transcript of oral examination, oral examination before the court or in such other manner as the court directs; and
 - (c) direct a reference or the trial of an issue,
- to enable the court to determine the appeal.

Scope of decisions

(5) The powers conferred by this section may be exercised notwithstanding that the appeal is as to part only of an order or decision, and may be exercised in favour of a party even though the party did not appeal. R.S.O. 1980, c. 223, s. 29(2, 3).

New trial

(6) A court to which an appeal is taken shall not direct a new trial unless some substantial wrong or miscarriage of justice has occurred.

Idem

(7) Where some substantial wrong or miscarriage of justice has occurred but it affects only part of an order or decision or some of the parties, a new trial may be ordered in respect of only that part or those parties. R.S.O. 1980, c. 223, ss. 30, 31.

APPLICATIONS — BY NOTICE OF APPLICATION

Rule 14.05

Notice of Application

14.05(1) The originating process for the commencement of an application is a notice of application (Form 14E or 68A).

Application under Statute to Supreme Court or District Court

(2) Where a statute authorizes the commencement of a proceeding by an application to the Supreme Court or District Court or a judge thereof, the proceeding may be brought by application.

Application under Rules to Supreme Court

(3) A proceeding may be brought in the Supreme Court by application where these rules authorize the commencement of a proceeding by application or where the relief claimed is,

- (a) the opinion, advice or direction of the court on a question affecting the rights of a person in respect of the administration of the estate of a deceased person or the execution of a trust;
- (b) an order directing executors, administrators or trustees to do or abstain from doing any particular act in respect of an estate or trust for which they are responsible;
- (c) the removal or replacement of one or more executors, administrators or trustees, or the fixing of their compensation;
- (d) the determination of rights that depend on the interpretation of a

deed, will, contract or other instrument, or on the interpretation of a statute, order in council, regulation or municipal by-law or resolution;

- (e) the declaration of an interest in or charge on land, including the nature and extent of the interest or charge or the boundaries of the land, or the settling of the priority of interests or charges;
- (f) the approval of an arrangement or compromise or the approval of a purchase, sale, mortgage, lease or variation of trust;
- (g) an injunction, mandatory order or declaration or the appointment of a receiver or other consequential relief when ancillary to relief claimed in a proceeding properly commenced by a notice of application; or
- (h) in respect of any matter where it is unlikely that there will be any material facts in dispute.

Applications — Generally

Re Forestell and Niagara College of Applied Arts and Technology (1981), 33 O.R. (2d) 282 (H.C.).

Where the form of the notice of application did not follow the correct form, the court dismissed the application.

Collins v. Collins (1981), 32 O.R. (2d) 358, 21 C.P.C. 148, 122 D.L.R. (3d) 141 (H.C.).

Declaratory relief cannot be sought by way of originating application. [But see rule 14.05(3)(h) — Authors.]

Stafford v. Can. Motor Cycle Assn. (1978), 22 O.R. (2d) 58 (H.C.).

Where a proceeding does not fall within an enumerated class of cases in which an originating application is appropriate and does not depend upon undisputed facts, an originating application should not be brought.

Re Northview Const. Co. and Jonbar Const. Co., [1971] 1 O.R. 369, 15 D.L.R. (3d) 399 (Co. Ct.).

The court refused to determine a question brought by notice of application where there was a substantial dispute of fact; an action was said to be appropriate.

R. v. York Twp.: Ex parte 125 Varsity Rd. Ltd., [1960] O.R. 238, 23 D.L.R. (2d) 465 (C.A.).
The court refused to grant substantive relief of a nature normally available by action to parties to an originating application who were joined so that they would be bound by the decision of the court on another point.

Inc. Synod of Diocese of Huron v. Ferguson (1924), 56 O.L.R. 161 (H.C.).

A successful plaintiff was deprived of costs where a matter which could have been disposed of by originating application was asserted by action.

All Acts
remedial

s. 10

10. Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of any thing that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit. R.S.O. 1970, c. 225, s. 10.

PLAYERS
Qualifications

250 "Every male person who is an amateur in accordance with the Association's definition thereof who is not under suspension by the C.A.H.A. or any of its branches, by any other member of the I.I.H.F., or any professional organizations, and is not a member of any club or team under the jurisdiction of any other member of the International Ice Hockey Federation shall be eligible for membership in a club in the Association. A player derives no benefit from any suspension."

THE CONSTITUTION OF THE UNITED STATES

PREAMBLE

U.S. Constitution,
Amendment XIV

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

AMENDMENT XIV [1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.