

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)

FACTUM OF THE INTERVENOR, THE CANADIAN
ASSOCIATION FOR THE ADVANCEMENT OF WOMEN AND SPORT

PART I

1. By Order of the Associate Chief Justice made the 19th day of December, 1985, The Canadian Association for the Advancement of Women and Sport was given leave, as a friend of the Court, to intervene in the within Appeal.

PART II - The Facts

2. The Intervenor adopts the statement of facts set out in the Appellant's Statement of Fact and Law, but would

add the following as to the relationship between Sport Canada, the Canadian Amateur Hockey Association ("C.A.H.A."), and the Ontario Hockey Association ("O.H.A.").

Sport Canada

3. Sport Canada is the federal agency created by the Federal Government to implement its policies in relation to amateur sport in Canada.

Transcript of Evidence of Abigail Hoffman,
Appeal Book, p. 394

4. The policy of the Federal Government is to have Sport Canada designate certain national sports organizations as the vehicles for providing leadership and training for the betterment of the amateur sport within Canada.

Transcript of Evidence of Abigail Hoffman,
Appeal Book, p.407

5. The national sports organizations (or national governing bodies) achieve that status by meeting certain criteria established by the Federal Government. The organization must be incorporated under Canadian law and meet certain conditions established by the Federal Government, which conditions include recognition in a minimum of eight provinces, demonstrated capacity to do such things as to enforce and develop the rules of the sport, train technical leaders, stage national and international competitions, as

well as other conditions and criteria.

Transcript of Evidence of Abigail Hoffman,
Appeal Book, pp. 416-417

6. Sport Canada gives each such organization a monopoly status and does not recognize a second governing body in any one sport.

Transcript of Evidence of Abigail Hoffman,
Appeal Book, p. 417

7. The national governing bodies for each sport provide services in the nature of public services and carry out Sport Canada policy.

Transcript of Evidence of Abigail Hoffman,
Appeal Book, p. 417

8. As a quid pro quo, Sport Canada provides substantial funding to such organizations. As one of its main responsibilities, Sport Canada is to ensure that the national governing bodies receiving funds from the Federal Government do carry out programs which serve the public interest in sport.

Transcript of Evidence of Abigail Hoffman,
Appeal Book, p. 394, 445-8, 423-4

The C.A.H.A.

9. The C.A.H.A. is the national governing body for hockey in Canada, so recognized and designated by Sport

Canada.

Transcript of Evidence of Abigail Hoffman,
Appeal Book, p. 406

10. Accordingly, it receives substantial funds, almost \$1,000,000 for the year 1986/86, from the Federal Government through Sport Canada to enable it to carry out its role as the national governing body for amateur hockey in Canada.

Transcript of Evidence of Abigail Hoffman,
Appeal Book, pp. 406-407

The O.H.A.

11. The C.A.H.A. has 12 branches, one of which is the Ontario Hockey Association, which itself is a federation of local and district branches, "the whole comprising a large pyramidal organization".

Affidavit of Murray Costello,
Appeal Book, p. 361

Affidavit of Brent Ladds,
Appeal Book, p. 272

12. The O.H.A., as a branch of the C.A.H.A., carries out the responsibility for amateur hockey within its particular jurisdiction in correspondence with the rules and regulations of the C.A.H.A., and it has responsibility for delivery of programs established on a national basis.

Transcript of Evidence of Abigail Hoffman,
Appeal Book, p. 407

13. As to the question of the application of the Canadian Charter of Rights and Freedoms (the "Charter") to the C.A.H.A. and the O.H.A., the learned trial Judge held as follows:

"It was submitted that the C.A.H.A. and the O.H.A. exercise a governmental or state function, and are therefore subject to the Charter. In support of that proposition, various United States cases were cited, including Brenden et al. v. Independent School District et al., 477 F. 2d 1292. All of these American cases related to athletic endeavours operated by school boards. Also, the American Constitution differs from the Charter. In my opinion, all these cases are distinguishable and are of little assistance. The C.A.H.A. and the O.H.A. are not school boards or affiliated with any governmental organization. They do not exercise a governmental function.

It was also suggested that, because the C.A.H.A. and the O.H.A. receive substantial grants from the federal government under the Fitness and Amateur Sport Act, R.S.C. 1970, c.F-25, and from various municipalities, they are exercising a governmental function. The Fitness and Amateur Sport Act does not authorize the government to provide athletic services. It merely authorizes grants to assist them. Similarly, municipalities merely make grants to assist the Association. This does not make the C.A.H.A. or the O.H.A. governmental agencies. To hold otherwise would mean that all industries, charities and other organizations that receive government grants are performing government functions and are always subject to the Charter. This is not the intent of s. 32 of the Charter.

For these reasons, s. 14 of the Charter does not apply to the C.A.H.A. or the O.H.A. because they are private organizations."

Reasons for Judgment of the Honourable
Mr. Justice Steele
Appeal Book, pp. 19 - 20

PART III - The Issues and the Law Applicable Thereto

14. It is respectfully submitted that the learned trial Judge erred in concluding that the Charter did not apply to the C.A.H.A. and the O.H.A.

15. It is respectfully submitted that "government", as that word is used in Section 32 of the Charter, is intended to embrace both the creation of and execution of government policy, and is not limited simply to the actions of the Parliament of Canada or of a provincial Legislature, either in the form of a statute, regulation or governmental order.

Constitution Act, 1982, Part 1, The Canadian Charter of Rights and Freedoms, s. 32 and 52

Re: Klein and Law Society of Upper Canada (1985), 16 D.L.R. (4th) 489 (Ont. Div. Ct.)

Black et al v. Law Society of Alberta (1983), 144 D.L.R. (3d) 439 (Alberta Q.B.)

Re McCutcheon and City of Toronto et al. (1983) 147 D.L.R. (3d) (Ont. S.C.)

Stoffman et al. v. Vancouver General Hospital et al., June 27 and 28, 1985, Vancouver Registry No. A851497 (B.C.S.C.)

Attorney General of Quebec v. Blaikie et al. (No. 2), [1981] 1 S.C.R. 312, 123 D.L.R. (3d) 15

Operation Dismantle Inc. v. Canada (1985) 59 N.R. 1 (S.C.C.)

16. It is respectfully submitted that the exercise of legislative power in the carrying out of a policy objective

can be done by the expenditure of money.

Reference re Agricultural Products Marketing Act
and Two Other Acts (1978) 84 D.L.R. (3d) 257 (S.C.C.)

17. In these circumstances, where the whole scheme developed by the Federal Government is to establish an agency, Sport Canada, for implementing its objectives in relation to amateur sport in Canada and to have it use funds to achieve those objectives, the actions taken by Sport Canada in the circumstances are "government" within the meaning of Section 32 of the Charter.

18. The further technique of recognizing national governing bodies for a sport, giving them a monopoly position and have them assume responsibility for implementation of policies of the Government across Canada through the medium of provincial branches and affiliates, is the manner in which "government" is conducted in these respects.

19. The transfer of funds to the C.A.H.A. subject to the conditions attached, including that the funds be used to implement Government policy, and the fact that this is carried out by the C.A.H.A. through its affiliate, the O.H.A., cause the whole system of amateur hockey organization in Canada to be a part of the government of Canada within the meaning of the Charter.

20. Furthermore, the extent to which the O.H.A. and its affiliates are funded with public monies emanating from the Province of Ontario and various municipalities, render the operations of the O.H.A. part of the "government" of the Province of Ontario.

21. Accordingly, it is respectfully submitted that the learned trial Judge erred in holding that simply because the O.H.A. and C.A.H.A. are "private organizations" they are not part of the system of government either within Canada or a province. Rather, when viewed as a comprehensive scheme, the C.A.H.A. and the O.H.A. perform a "public function" and accordingly become part of "government" as that word is used in the Charter and accordingly, both are bound to conduct themselves in accordance with the Charter.

PART IV

22. The Intervenor supports the relief requested by the Appellant.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Donald J. M. Brown
of Counsel for the Intervenor,
The Canadian Association for
the Advancement of Women and
Sport

SCHEDULE A

LIST OF AUTHORITIES

Re: Klein and Law Society of Upper Canada
(1985), 16 D.L.R. (4th) 489 (Ont. Div. Ct.)

Black et al v. Law Society of Alberta (1983),
144 D.L.R. (3d) 439 (Alberta Q.B.)

Re McCutcheon and City of Toronto et al.
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(No. 2), [1981] 1 S.C.R. 312, 123 D.L.R. (3d) 15

Operation Dismantle Inc. v. Canada (1985)
59 N.R. 1 (S.C.C.)

Yves de Montigny, Section 32 and Equality
Rights, Chapter 13, pp. 565-597

Equality Rights and The Canadian Charter
of Rights and Freedoms, Bayefsky and Eberts
eds., 1985, The Carswell Company Limited

Tribe, Constitutional Choices, Chapter 16,
pp. 246-267, "Refocusing the 'State Action'
Inquiry: Separating State Acts from State Actors",
1985, Harvard University Press

Jaffe, "Law Making by Private Groups"
(1937-38) 51 Harvard Law Review 201

Horan, "Contemporary Constitutions and
Legal Relationships Between Individuals",
(1976) Vol. 25, International and Comparative
Law Quarterly, p. 848

SCHEDULE B

STATUTES AND REGULATIONS

Constitution Act, 1982, Part 1, The Canadian
Charter of Rights and Freedoms, s. 32 and 52

- "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.
- (2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this section comes into force."
- "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.
- (2) The Constitution of Canada includes
- (a) the Canada Act, including this Act;
 - (b) the Acts and orders referred to in Schedule 1; and
 - (c) any amendment to any Act or order referred to in paragraph (a) or (b).
- (3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada."