File Nos. 04 EN 433 and 04 EN 434

IN THE MATTER OF: *The Human Rights Code*, C.C.S.M. c. H175

AND IN THE MATTER OF: Complaints by Amy Pasternak and Jesse Pasternak alleging a breach of section 13 of *The Human Rights Code*

BETWEEN:

AMY PASTERNAK,

Complainant,

- and -

MANITOBA HIGH SCHOOLS ATHLETIC ASSOCIATION INC.,

Respondent,

AND BETWEEN:

JESSE PASTERNAK,

Complainant,

- and -

MANITOBA HIGH SCHOOLS ATHLETIC ASSOCIATION INC.,

Respondent.

Adjudicator: M. Lynne Harrison

Appearances

Counsel for the Manitoba Human Rights Commission: Sarah Lugtig

Counsel for the Respondent: Victor Bargen and Richard Stefanyshyn

INTERIM DECISION

On December 8, 2005, in accordance with subsections 32(1) and (2) of *The Human Rights Code*, I was designated by the Minister of Justice as a Board of Adjudication, to hear and decide the within Complaints.

In the Complaints, dated October 22, 2004, it is alleged that the Respondent Manitoba High Schools Athletic Association Inc. (the "MHSAA") contravened section 13 of *The Human Rights Code* by subjecting the Complainants to differential treatment based on their sex (female).

Prior to the hearing, counsel for the MHSAA advised that he intended to raise a preliminary issue relating to jurisdiction. Counsel for the MHSAA and the Manitoba Human Rights Commission (the "Commission") both expressed their preference to have this issue dealt with separately, on a preliminary basis.

Hearings were therefore held in Winnipeg on May 4 and 5, 2006, with respect to this preliminary issue as to jurisdiction.

At the outset of the hearings, Commission counsel sought an order amending the style of cause to correct the name of the Respondent, as well as an order that the Complaints be heard together. Counsel for the MHSAA indicated his consent to both of these requests, and the orders were made.

In his preliminary remarks, counsel for the MHSAA indicated that there were three grounds on which he would be arguing that this Board does not have

jurisdiction to hear these Complaints, namely: that the Complaints are directed at the wrong party; that the MHSAA's internal appeal process has not been completed; and that the matters at issue are of a private nature, and therefore beyond the scope of subsection 13(1) of the *Code*.

Evidence was adduced at the hearings in the form of a number of Exhibits, including an Agreed Statement of Facts (plus attachments), which was filed as Exhibit 7. Three witnesses were called to testify: Morris Glimcher, who was and is the Executive Director of the MHSAA; Rick Kraychuk, a guidance counsellor at West Kildonan Collegiate Institute ("WKCI") and manager of the WKCI Wolverines Hockey Team at the relevant times; and Mark Miles, a member of the Board of Directors of the MHSAA, who was called by the MHSAA as a rebuttal witness. Counsel reserved the right to recall each of these witnesses in the event that the hearing of the Complaints is to proceed on the merits.

The Facts

In each of the Complaints, the Complainant states:

> "1. My sister . . . and I have played hockey for the last 11 years, regular hockey and contact hockey for the last 4 years. I do not wish to play in the Girls High School Hockey League.
>
> 2. I played on a lower level A1 team last year to meet the minimum requirement of playing one year of Bantam to qualify for the High School Men's Hockey League. I have only played Boys and Mens hockey all my life and I am not prepared to play a lower caliber sport of Girls hockey.
>
> 3. In the spring I participated in the Men's High School Rookie Tournament and I have attended the tryouts this fall at my school for the Men's High School Team at West Kildonan

> Collegiate (WKCI Wolverines) and made the team. I was told due to the Manitoba High School Athletic Association (MHSAA) that I was not allowed to play and that I would have to go to the girl's team.
>
> 4. My mother, Coaches, Manager, Administrator and the school division superintendent asked the MHSAA to reconsider their decision of not allowing me to play in the men's league. I received a reply that it would create anarchy within our high school system."

The MHSAA is a "not for profit", registered charitable athletic association, which was incorporated under *The Corporations Act* of Manitoba on June 14, 1978, having operated as an unincorporated association for several years prior to that date. Its main type of business, as set out in its Annual Returns, is "education and related services".

The MHSAA regulates high school athletic programs in the Province of Manitoba. It is a "multi sport organization" which governs eligibility rules and regulations, playing and competition rules for such sports as golf, soccer, cross-country running, basketball, volleyball, curling, hockey, badminton, track and field, fastball and baseball. Its "Mission" and "Vision" are described as follows:

> "**Vision**
> The Manitoba High Schools Athletic Association believes in the goals of education and that participation in sport plays an integral role in the total education of the student. The Association encourages the high school student to participate in activities that will assist in the realization of physical, social, and emotional values.
>
> **Mission**
> To promote the benefits of participation in high school sport by providing athletic and educational opportunities that will allow the athlete to reach her/his full potential."

The preamble to the section on eligibility in the MHSAA Rules & Regulations states that:

> "Provincial competition for school athletes is administered by the MHSAA. The athletes participating represent the highest competitive level of school competition in their sport."

Membership in the MHSAA is voluntary and is open to any high school in the Province of Manitoba, whether public or private. In this regard, the MHSAA's Rules and Regulations, which were filed as an attachment to the Agreed Statement of Facts, state as follows:

> "**MEMBERSHIP**
> Membership in the Association shall be open to Manitoba schools conducting classes at the senior high school level. It must be emphasized that schools are members - not specific sports."

In order to compete under the auspices of the MHSAA, students must be enrolled at a school which is a member in good standing of that Association. The students themselves are not members of the MHSAA, only the schools. According to the Agreed Statement of Facts:

> "Almost all public schools in Manitoba belong to the MHSAA and participate in inter-school sport programs. Schools are not precluded from participating in sporting events outside the Province of Manitoba or outside the MHSAA membership."

With respect to the sport of hockey and the facilities used by high school hockey teams, the Agreed Statement of Facts states that "the arena for training is not on the school 'premises' and is a facility generally used by the community." Mr. Glimcher testified that the MHSAA is not involved with arranging for ice time at all, that it

is the schools which negotiate and sign contracts with the arena owners, that this is a purely private arrangement between the schools and the arenas, some of which are privately owned, that the schools are responsible for security, behaviour and crowd control at the arenas, and that the arenas are generally not open to the public during practice time.

The MHSAA is funded through membership fees, revenue from provincial championships, corporate partnerships, grants from Sport Manitoba, various local fundraising initiatives (such as Bingo) and other revenue generating opportunities at a local and provincial level. Paragraph 6 of the Agreed Statement of Facts states that "while the MHSAA receives its funding from the Province of Manitoba and the other separate fundraising sources, it is autonomous and independent from the Province of Manitoba Department of Education or any other Provincial or Federal Government."

The MHSAA is governed by a sixteen person Board of Directors which manages all affairs related to the Association. That Board consists of urban and rural representatives, and typically includes physical education teachers, coaches, school administrators, school division superintendents, student representatives, and representatives from the Manitoba Association of School Trustees and the Department of Education.

By-Law No. 1 of the MHSAA provides that the Directors shall set rules and regulations as may be required. The Rules and Regulations which have been set

include a number of requirements which schools must meet in order to be eligible for MHSAA competition. One of those requirements is stated as follows:

> "p) The MHSAA endeavors to provide equal opportunities for athletes. If a school does not have a girls team, then the girl may try out for the boys team. If a school has both a boys and a girls team, then the students would play for their respective gender."
> (Emphasis added)

The Rules and Regulations further state that:

> "k) Schools in exceptional circumstances may apply to the Board of Directors for special eligibility consideration for any student/athlete."

In September, 2004, WKCI appealed to the MHSAA on behalf of the Complainants, who wished to try out for the WKCI Men's Hockey Team. In his letter dated September 15, 2004, Mr. Kraychuk wrote as follows:

> "There is a rule that does not allow females to play male high school hockey if there is a female high school hockey team at the same school. We support Jessie [sic] and Amy Pasternak with their endeavours for trying out for the WKCI Wolverine Men's Hockey Team by launching this appealing [sic] on their behalf.
>
> It is our belief, at West Kildonan Collegiate, that we should not discriminate, for whatever reason, in any way. All players should have the right to try out for any team and play for it, if they are successful. We would rather not have to tell someone that they couldn't play on any team due to gender rather than ability.
>
> Included, as requested, are letters from the Principal of WKCI, the KPAC Zone President, and the WHSHL President. I have not yet received a letter from the WKCI Women's Hockey Coach but hopefully I will be able to forward it before the September 20th board meeting."

On September 21, 2004 Mr. Glimcher responded to Mr. Kraychuk by e-mail as follows:

> "The Board discussed your appeal and it was denied. They felt that as your school has a boys and a girls team, there is equal opportunity for the students. I will forward a letter to your school administration this week." (Emphasis added)

A considerable amount of evidence was adduced with respect to whether or not the School Division and/or WKCI, and specifically Mr. Kraychuk, knew that they could appeal the September 21 decision of the MSHAA Board, and whether any attempt was made to appeal that decision or have it reconsidered. A copy of one page from an MHSAA handbook entitled "Eligibility Appeals" was filed as Exhibit 8. Mr. Glimcher testified that the handbook is sent out every year to all member schools and provides the guidelines for the organization. Toward the bottom of the page, it is stated as follows:

> **"Final Appeal:** If a school is unsatisfied with the results of an appeal, a final appeal could be considered by another committee appointed by the Executive Director. Cost for this would be $150.00 (non-refundable)."

Mr. Glimcher testified that such a final appeal would be to a committee which is independent of the Board of Directors and made up of individuals from the community at large. He indicated that there had been two or three such appeals in the past five years, but provided no further information with respect to those appeals.

There was no evidence that any "final appeal" as referred to in the above excerpt from the handbook was ever filed. It is not disputed that the $150.00 cost for any such appeal was not paid.

The Legislation

Subsection 13(1) of *The Human Rights Code* provides as follows:

> **"Discrimination in service, accommodation, etc.**
> 13(1) No person shall discriminate with respect to any service, accommodation, facility, good, right, licence, benefit, program or privilege available or accessible to the public or to a section of the public, unless bona fide and reasonable cause exists for the discrimination."

"Discrimination" is defined in subsection 9(1) of the *Code* to mean, inter alia, "differential treatment of an individual or group on the basis of any characteristic referred to in subsection (2) . . . ." One of the characteristics referred to in subsection 9(2) is sex.

Positions of the Parties

As indicated above, the MHSAA's position on this preliminary Motion is that this Board does not have jurisdiction to hear these Complaints for three reasons. In the first place, counsel for the MHSAA argued that the Complaints are directed at the wrong party. It was submitted that the Complainants do not have standing to bring a complaint against the MHSAA: only members of the MHSAA can bring a proper complaint, and the Complainants are not, and cannot be, members. There is no relationship between the Complainants and the MHSAA.

Secondly, counsel for the MHSAA argued that there was a bona fide appeal process available, which process was not exhausted. As a result, this Board has no jurisdiction, or at least has no jurisdiction until the appeal process has been

completed. Even though that final appeal process was not open to the Complainants, it was open to WKCI and the School Division, and they did not pursue it. While everyone wants to feel that the Complainants have some redress, this can only be accomplished in accordance with the rules. To proceed otherwise would be to open a Pandora's box and enable anyone to circumvent the rules and the process by bringing an application for a remedy under the *Code*.

It was further argued that that final appeal was important, and that it was "colossally unfair" to the Complainants for those who were charged with the responsibility of bringing such an appeal not to have done so. If there is any cause of action, it may be against WKCI and the School Division, who had a duty to see that the appeals were brought forward, but did not do so.

The third argument advanced by counsel for the MHSAA is that the matters which are the subject of the Complaints are of a private (as opposed to a public) nature, and therefore do not fall within the scope of subsection 13(1) of the *Code*. Counsel pointed to evidence that the MHSAA is an autonomous and independent private corporation, that virtually all of the activity in question takes place in private arenas outside the school, that what is involved is private arrangements between schools and private arenas, and that practices in particular are closed to the public. All of these were said to be indicia of the private nature of this matter. Counsel did not dispute that human rights legislation must be interpreted broadly, but stated that even with a broad reading there has to be some limit.

In response to the MHSAA's first argument, counsel for the Commission submitted that the Complaints are appropriately directed at the author of the rule in question. The services at issue in this case are the overarching program and facility for high school athletics, and the opportunity to try out for, and compete in, inter-school sports and championships. These programs and services are provided by the MHSAA and no one else.

With respect to the MHSAA's second argument, counsel submitted that the Board's jurisdiction must be found within *The Human Rights Code*. Section 43 of the *Code* requires the adjudicator to decide whether the *Code* has been contravened and sets out various remedial orders which may be made. While certain other statutes such as Manitoba's *Ombudsman Act* and Ontario's *Human Rights Code* require or authorize a tribunal "to not deal" with a complaint in certain circumstances, nowhere in Manitoba's *Human Rights Code* does it say that an adjudicator must or may dismiss or defer a complaint on grounds that external or other routes of appeal have not been exhausted. For the Board to refuse to exercise its jurisdiction to hear and determine the Complaints would be a direct violation of the *Code*.

The Commission further submitted that even if the Board could refuse to hear the Complaints, the internal appeal mechanism relied upon by the MHSAA is not within the Complainants' control. No such appeal route was or is available to the Complainants. The issue here is not one of fairness, but of discrimination.

With respect to the final ground advanced by the MHSAA, Commission counsel submitted that it is a cardinal rule that human rights legislation must be given a broad and purposive interpretation. With reference to the wording of section 13, the history and intent of the legislation, and of that section in particular, and the caselaw, counsel argued that it is not necessary for the general public to have access to the services for the section to apply; it is sufficient that the services are available or accessible to a section of the public.

Counsel went on to submit that the relational approach adopted by the Supreme Court of Canada in *Berg* v. *University of British Columbia*, [1993] 2 S.C.R. 353 must be applied to determine whether the activities or services in this case are covered by the *Code*. Based on that approach, it was argued that the service provided by the MHSAA is a provincial system or program for high school athletics and competition. That service has its own public, which is made up of students who are brought together only by the fact that they are high school students interested in participating and competing in athletics, and is closely tied to the provincial education system. None of the indicia of a private relationship are present.

Decision

As indicated previously, the only issue which is before me at this time is whether I have jurisdiction to hear these Complaints.

The Supreme Court of Canada has repeatedly emphasized that human rights legislation should be given a broad, liberal and purposive approach which

recognizes the special nature of such legislation and advances the broad policy considerations underlying it. The Court has also cautioned that this interpretive approach does not permit rewriting the legislation. The legislation must be interpreted generously, but without reading the limiting words out of the statute or circumventing the intention of the legislature.

With respect to the MHSAA's first argument, namely that these Complaints have been brought against the wrong party, subsection 13(1) of the *Code* states that no person shall discriminate "with respect to" any service, etc. "available or accessible to the public or a section of the public." The wording of that provision is very broad. There is nothing in subsection 13(1) which suggests that the prohibition against discrimination only applies to the services provided by an organization to its own members, and that only its members can complain that the services it provides are discriminatory. To interpret that provision so narrowly would surely be contrary to the spirit and intent of the *Code*, and inconsistent with the caselaw.

While the MHSAA provides services to its member schools, it also offers and provides services to and for high school students. This is clear from its own Vision and Mission statements, which say that the MHSAA "encourages the high school student to participate . . ." and "provid[es] athletic and educational opportunities that will allow the athlete to reach her/his full potential". As stated in the MHSAA Rules and Regulations, the MHSAA administers provincial competition "for school athletes".

Pursuant to the MHSAA By-Law, the Directors have set Rules and Regulations regarding eligibility. These Rules and Regulations state that schools are responsible for placing only MHSAA eligible athletes into competition, and set the criteria which are to be applied in determining who is eligible. It is one of the MHSAA's Rules relating to eligibility which stipulates that "[i]f a school has both a boys and a girls team, then the students would play for their respective gender."

Individual schools cannot change or disregard the MHSAA Rules. On the contrary, the Rules state that schools may be subject to penalties for violations of eligibility rules, including expulsion of the team, forfeiture of all previous results and loss of performance bond.

It is undoubtedly true, as the MHSAA argued, that member schools, including WKCI, provide services in connection with the inter-school and provincial competition. This does not change the fact that the MHSAA provides and administers a system which is intended to and does benefit high school athletes in the Province.

In summary, the MHSAA makes provincial athletic competition available to high school students; it is the author of the Rules which govern that competition, and the body which was responsible for the decision that the Complainants would not be allowed to play hockey for the WKCI Men's Team. In my view, the MHSAA is properly named as a Respondent in these proceedings.

With respect to the second ground put forward by the MHSAA, no authority was cited by the MHSAA in support of its argument that this Board has no jurisdiction to hear the Complaints unless or until all internal appeals have been exhausted. Counsel did not refer to any provision in the *Code* which would suggest that the Board must or even could decline to hear, or defer hearing, these Complaints on this basis. On the contrary, subsection 32(1) provides that the Minister shall designate an adjudicator "to hold a hearing and decide the validity of the complaint", and subsection 39(1) requires that the adjudicator "convene and complete the hearing without undue delay". (Emphasis added).

There was conflicting evidence at the hearing as to whether WKCI and/or the School Division were aware that they could bring a further appeal from the decision of the Board of Directors and/or apply to have it reconsidered. It was acknowledged that the original appeal by WKCI was properly brought and was denied. In the e-mail advising that the appeal had been denied, there is no indication of any possibility of a further appeal or reconsideration. While a "final appeal" is briefly referred to in the page from the handbook entitled "Eligibility Appeals", there is no reference at all to any "final appeal" in the MHSAA Rules and Regulations filed at the hearings.

The handbook states that "a final appeal could be considered by another committee appointed by the Executive Director." I note that the original appeal was denied by the Board of Directors, not simply a committee, and that the basis for the denial follows the wording of the eligibility rule, stating that, as WKCI "has a boys and a

girls team, there is equal opportunity for the students". In these circumstances, it was suggested that there would be little point in bringing any further appeal, whether to an internal or an external committee.

The focus on the internal appeal process, and whether an exception to the rule might have been granted if that process had been pursued, ignores the more fundamental question of whether the MHSAA rule itself is discriminatory and violates subsection 13(1) of the *Code*. In other words, one of the issues in these proceedings must surely be whether requiring the Complainants, or more accurately WKCI or the School Division on behalf of the Complainants, to seek special permission or an exemption in order for them to be able to try out for and/or play for the Men's Hockey Team, particularly where such consideration would apparently only be available "in exceptional circumstances", constitutes discrimination or differential treatment on the basis of sex. This issue has nothing to do with whether any appeal or appeal process was pursued.

It is the responsibility of the MHSAA to ensure that its rules and policies, and the application of those rules and policies, are non-discriminatory. I agree with Commission counsel that the issue here is not one of fairness, in terms of whether WKCI could or should have appealed the MHSAA Board decision, but of discrimination. The MHSAA cannot insulate itself by arguing that any blame or responsibility must lie with WKCI or the School Division in these circumstances.

Finally, the MHSAA has acknowledged that the Complainants could not have applied to the Association for an exemption from the Rules to enable them to play hockey on the WKCI Men's Team or filed any appeal from the Board's decision to deny the original appeal by WKCI. It is not clear what course of action the MHSAA is suggesting that the Complainants ought to have pursued or to be pursuing at this point. However, to hold that they cannot bring a claim of discrimination until a process over which they have no control has been completed, would surely frustrate the purpose of the *Code*.

To paraphrase the submission of the MHSAA, to conclude that any and all internal appeal processes must be exhausted before a complaint of discrimination may be brought under *The Human Rights Code*, would be to enable anyone to circumvent the fundamental rights and protections guaranteed to Manitobans under the *Code*.

I conclude, therefore, that the Complainants were entitled to file and pursue complaints under the *Code*, irrespective of whether the MHSAA's internal appeal process has been exhausted.

I turn now to the third ground raised by counsel for the MHSAA, namely that the matters in question are of a private nature and do not fall within the scope of subsection 13(1) of the *Code*.

In support of this argument, counsel relied on the decision in *Winnipeg School Division No. 1* v. *MacArthur* (1982), 14 Man. R. (2d) 386 (Q.B.). In that case, the

Court found (at p. 400) that the right to attend a public school did not extend, and never had extended, to every member of the public. The Court then went on to conclude and declare, inter alia, that a public school was not a service or facility "customarily available to the public" within the meaning of section 3 of *The Human Rights Act* (as it then was).

As noted by counsel for the Commission, section 3 of *The Human Rights Act* was amended shortly after the *MacArthur* decision. The amended provision specified that discrimination was prohibited with respect to any accommodation, service, etc. "available to the public or to a section of the public. . . ." (emphasis added) That latter phrase has been carried forward into subsection 13(1) of the current *Human Rights Code*.

Subsequently, in *Berg* v. *University of British Columbia*, *supra*, the majority of the Supreme Court of Canada, also expressly and conclusively "reject[ed] any definition of 'public' which refuses to recognize that any accommodation, service or facility will only ever be available to a subset of the public." (at p. 383) I note that reference was made in that decision (at p. 372) to the wording of the Manitoba legislation as amended ("which prohibits discrimination in the provision of a list of service 'available or accessible to the public or to a section of the public" (original emphasis)), and it was observed that the Manitoba Legislature had already addressed this issue directly.

In *Berg*, the Supreme Court held that students "admitted to a university or school within the university . . . become the 'public' for that service" (at p. 383). The

Court concluded that the services and facilities at issue (a rating sheet and a key which facilitated after-hours building access) were incidents of the public educational relationship between the university and the complainant, that they fell within the scope of the applicable human rights legislation, and that the human rights tribunal in that case had been correct in assuming jurisdiction.

In this case, I have previously concluded that the MHSAA offers and provides services and programs for and to high school students. Are these services available to the public within the meaning of the *Code*?

The MHSAA's own statements confirm that its services are intended to play "an integral role" in the students' "total education" and "to assist in the realization of physical, social and emotional values". The MHSAA is publicly funded. The services and programs that it provides are available and accessible to students attending the majority of the high schools in the Province. The relationship between the MHSAA and the students is not based on any private selection process. Its services and programs are a necessary and important adjunct to the educational and recreational process.

In the circumstances, even if it could be said that some of the arrangements or services (such as ice time for practices) are "private", it cannot be said that the games and competitions and the overall system of services and programs provided by the MHSAA are not available and accessible to the public or a section of the public.

I therefore find that the matters in question fall within the scope of subsection 13(1) of the *Code*.

Conclusion

Based on the foregoing, I conclude that I do have jurisdiction to hear these Complaints.

Both parties have requested that I issue this interim decision at this time. The hearing is scheduled to resume on June 19, 2006 and to continue for two weeks, to June 30, 2006, and will proceed on those dates.

Dated at Winnipeg, Manitoba, this 12th day of June, 2006.

M. Lynne Harrison

M. Lynne Harrison