

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

Complainants

against

MANITOBA HIGH SCHOOLS ATHLETIC ASSOCIATION INC.

Respondent

REASONS FOR DECISION

Introduction

These proceedings arise out of Complaints filed by Amy and Jesse Pasternak against the Manitoba High Schools Athletic Association Inc. ("MHSAA") in October 2004, in which it is alleged that the MHSAA contravened section 13 of *The Human Rights Code* by subjecting the Complainants to differential treatment based on their gender (female).

The Complaints first came before me on May 4 and 5, 2006 with respect to a preliminary issue as to jurisdiction. On June 12, 2006, at the request of the parties, I delivered an interim decision in which I concluded that I had jurisdiction to hear these matters.

Hearings therefore continued in Winnipeg on June 19 to 23 and June 26 to 29, 2006 with respect to the merits of the Complaints.

At issue in these proceedings is whether the MHSAA's refusal to allow Amy and Jesse Pasternak to try out for, and if they were successful, play for their high school men's hockey team constituted discrimination in contravention of *The Human Rights Code* of Manitoba.

## The MHSAA

The MHSAA is an independent, "not for profit" corporation which regulates athletic programs in the Province of Manitoba, including regulation of policy and management of funding received from the Province of Manitoba. It is the primary organization in Manitoba for coordinating and organizing interschool competition at the high school level.

The MHSAA is governed by a sixteen or seventeen person volunteer Board of Directors. According to the MHSAA By-Law, the Board is to consist of four urban and four rural representatives (typically physical education teachers, coaches and school administrators), one female physical education representative, appointed representatives from various bodies including the Manitoba Association of School Trustees, Manitoba Association of School Superintendents and Department of Education, and two student representatives.

Membership in the MHSAA is voluntary and is open to any school or school division in the Province of Manitoba, with narrow exceptions. Just under 200 high schools, including almost all public high schools in Manitoba, belong to the MHSAA and participate in interschool sport programs. This includes West Kildonan Collegiate Institute ("WKCI").

In its "Vision and Mission Statement" the MHSAA describes its Mission as being 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." That document goes on to describe the goals of the MHSAA, the first of which is said to be to "encourage participation and excellence in high school sport". The Statement refers to one of the MHSAA's objectives as being to "consider the welfare of the participants as the primary criteria upon which all policies of the association are based."

The MHSAA has set Rules and Regulations which include a number of requirements which schools must meet in order to be eligible for MHSAA competition. One of those eligibility Rules states as follows:

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.

There was no evidence as to when this rule was first enacted. However, Morris Glimcher, the Executive Director of the MHSAA, testified that the rule requiring boys to play on boys' teams and girls to play on girls' teams was in place when he started with the MHSAA in 1974.

The Rules and Regulations further state that:

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

Mr. Glimcher testified that the only time the MHSAA has made an exception to its rule about boys' participation on girls' teams and girls' participation on boys' teams has been when the school does not have a girls' team and the MHSAA has therefore allowed girls to try out for the boys' team.

The MHSAA also has a Gender Equity Policy. It is unclear precisely when that policy came into being, although the evidence indicated that it was much later than the above eligibility rule and likely in the early 1990's. The Policy refers to MHSAA's Vision as being that:

Women and girls will enjoy a full and equitable range of opportunities for participation, officiating, competition and leadership in school sport activities.

It goes on to set out strategies or procedures for implementing this policy, under various headings, including championship opportunities, board and committee structure, student-athlete participation, sponsorship, equity partnership, education, and research, evaluation and monitoring. In terms of student-athlete participation, it states:

**Statement:** MHSAA will continue to provide equitable opportunities for students in co-curricular activities.

**Action:** MHSAA encourages student-athletes to participate on same-sex teams where both the boys program and the girls program

are equitable in terms of coaching, funding, practice time, facility access etc.

The MHSAA is described as a "multi-sport organization", in that it governs eligibility rules and regulations, playing and competition rules for a number of sports, namely golf, soccer, cross-country running, basketball, volleyball, curling, hockey, badminton, track and field, fastball and baseball.

In hockey, there is both a boys' and a girls' program. Girls' high school hockey has different rules with respect to body contact and checking than boys' high school hockey. While there is incidental body contact in the girls' program, body checking is not allowed. In the boys' program, there is full body contact.

In the event that a girls' hockey team does not have enough players, the MHSAA will make a special exception to allow the school to use a player from another school in order to ice a team. This special arrangement is also available for boys' hockey, but is generally not required, as there tends to be greater participation in boys' high school hockey than in girls' high school hockey.

### The Complaints

The Complainants, Amy and Jesse Pasternak, are 17 year old twin sisters. They have lived in Winnipeg all their lives and have attended WKCI for the past 3 years (Grades 9-11). They are currently starting Grade 12.

The Pasternak girls began skating when they were very young and were playing hockey by the time they were 4 or 5. They come from a hockey family. While they were growing up, the twins spent a lot of time at the rinks watching their three brothers and older sister play hockey. Their father played and still plays hockey. Their mother played hockey in the women's league when it first started. She has also coached hockey.

By 2004, the twins had been playing hockey through community clubs and the minor hockey league for 11 years, including contact hockey for the last four of those

years. They had always played together on the same team, Amy in goal and Jesse on defence. Their teams were always boys' teams. Neither of the twins has ever played on a girls-only hockey team.

There are a number of different levels in minor hockey. Up until age 11, A1 is the highest level, followed by A2 then A3. At age 11, AA hockey is introduced and becomes the highest level, and at age 13 AAA hockey is introduced and becomes the highest level.

Up until age 13, the Pasternak twins played at the highest level of hockey available, A1 until age 11 and AA until age 13. In AA hockey, they were each named to the All-Star Team, Jesse in 2000-2001 and Amy in 2001-2002.

In the 2003-2004 season, the twins played on an A1 team. While they were then eligible to play AAA hockey, they testified that it was too expensive, approximately twice as much as AA. For several reasons, including that AA hockey in their area was going downhill and that the girls had some difficulty with the coaching on the AA team, they chose to play on the lower level A1 team. As Grade 9 students, they were required to play on a minor hockey team if they wished to be eligible to play for their high school men's team the following season.

At the end of the 2003-2004 season, the twins played for WKCI in the high school rookie tournament. Students are not eligible to play for a high school hockey team until Grade 10. However, Grade 9 students can play in the rookie tournament, a weekend long tournament near the end of the school year, in which both Grades 9 and 10 students have a chance to experience what high school hockey is about, by playing for their school under the high school rules. The teams play boys' or contact hockey, and are not restricted in terms of gender; both males and females play. There is no girls' rookie tournament.

In September 2004, when they were beginning Grade 10, the twins signed up to try out for the WKCI men's hockey team. They participated in the first two weeks of

general practice for that team. There is no question that they were competitive in terms of skill, conditioning, and general hockey knowledge.

That year, for the first time, WKCI also officially had a women's hockey team.

On September 15, 2004, Rick Kraychuk, then manager of the WKCI men's hockey team, wrote to Mr. Glimcher 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.

That letter also made reference to letters from the Principal of WKCI, the President of the KPAC Zone (the MHSAA zone to which WKCI belongs) and the Winnipeg High School Hockey League President, which were said to be enclosed.

WKCI's appeal came before the Board of the MHSAA at its meeting on September 20, 2004. On September 21, 2004, Mr. Glimcher sent an e-mail to Mr. Kraychuk advising that the Board had discussed and denied the appeal, because "they felt that as your school has a boys and a girls team, there is equal opportunity for the students."

It was stated, as an agreed fact, that the coach for the WKCI mens' hockey team, Jayson Henrich, cannot say definitively whether or not Amy or Jesse would have made the men's team in 2004. Mr. Henrich testified at the hearing that he did not believe that there were any cuts in 2004-2005, that the roster size has varied in the five years in which he has been involved with the team, and that there have been no more than one, or possibly two, cuts each year.

On September 22, 2004, Cindy Pasternak, the twins' mother wrote to Mr. Glimcher to provide further information with respect to her daughters' requests, and to appeal to the MHSAA on an individual basis. Mr. Kraychuk sent a further letter to Mr. Glimcher and the MHSAA Board in support of the twins and "any challenge of [the]

MHSAA boards decision". Although Mrs. Pasternak repeatedly asked the MHSAA for a timely response, she did not receive a reply to her letter.

The twins continued to participate in the try-outs for the men's hockey team. On the last day of try-outs, having received no further response from the MHSAA, they were told that they could not play. Both girls were visibly upset as they left the ice. Mrs. Pasternak testified that when they were told, Jesse got a little bit angry and upset and Amy just broke down in tears.

The girls were asked about the impact this had on their lives. Amy indicated that it was very hard to go to arenas and watch games where their friends were playing, to run into people who would ask them where they were playing, and to have to answer "nowhere". Jesse indicated that it was hard not playing and that she felt like she was missing out, but tried to fill the gap with other sports. Both girls indicated that their skills had likely suffered from not playing hockey.

Mrs. Pasternak was also asked how this had affected her daughters. She responded that hockey had always been a very large part of her daughters' lives, and described them as being "despondent" for some period of time after they were told that they could not play.

The twins did not play minor hockey that year. Although they were invited and encouraged to play for the WKCI women's team, they did not wish to do so. Jesse did come out and play in one exhibition game with the women's team. She testified, however, that the skill level and level of hockey were far below what she was used to, and that she did not enjoy the game. There was no body contact and it was a really slow pace. Even though she was playing defence, Jesse scored five goals during the game.

At the end of the 2004-2005 hockey season, the twins again participated in the high school rookie tournament.

On October 22, 2004, the twins filed their Complaints with the Manitoba Human Rights Commission.

The MHSAA filed a response to those Complaints, in which it expanded on its previous advice, stating that the Board had felt that:

... as West Kildonan has both a boys team and a girls team, the girls should participate on the team of same gender. It would not be right for a girl to possibly take the place of a boy when, there is already a place for them to play. There would be no alternative team for the boy, as it would not be appropriate for a boy to play on a girls' team.

The MHSAA went on to detail the reasons for its decision as follows:

Reasons for this decision

The Manitoba High Schools Athletic Association feels that they are indeed just in this ruling. The association has long strived for equal participation and recognition of both boys and girls athletics. Women's hockey is becoming stronger and gaining more interest and participation.

1. West Kildonan just began to have a girls team. It is ironic that the girls' team at West Kildonan almost folded due to a shortage of players. The MHSAA had to make a special exception to allow them to use a player from another school in order to ice a team.
2. It is felt that it would be unfair to allow a girl to tryout for the boys team when they have a team of their own. The West Kildonan Boys team currently has 18 players registered.
3. There is ample opportunity, through the community hockey system, for these girls' to play on a boys team.
4. The Pasternak girls could have played girls high school hockey for their school and played community hockey on a boys team if that was their wish. They chose not to play on the girls school team, which was their option.

On July 21, 2005, having investigated the Complaints, a Human Rights Officer completed reports for presentation to the Human Rights Board of Commissioners. His recommendation was that prohibiting the girls from playing on the boys' hockey team was discriminatory based on sex, and that the MHSAA had failed to establish that the rule was reasonably necessary.

In September 2005, the twins again signed up and attended the try-outs for the WKCI men's hockey team.



On September 14, 2005, Mr. Kraychuk received an e-mail from Mr. Glimcher stating that the case would be proceeding to the next level, and expressing the hope that the Pasternaks were not at the try-out camp as this could cause insurance problems. In a subsequent e-mail, Mr. Glimcher indicated that the Pasternaks would not be covered by insurance because they were not eligible to play, and that if ineligible players were on the team, all of the insurance would be null and void for the team.

The twins continued to participate in the 2005 try-outs for the WKCI men's hockey team while the school and the team attempted to pursue various avenues, including arranging private insurance. However, these attempts were unsuccessful, and by the end of the try-outs, the twins were again advised that they could not play for the men's team.

The twins did not play minor hockey that year either. There was evidence that there was, in fact, no AA or A1 boys' minor hockey team in their area that year. This was not refuted by the MHSAA. The twins did not play for the WKCI women's hockey team in 2005-2006.

Academically, the Pasternak twins are both honour students. Chris Carman, the current manager of the WKCI men's hockey team and a teacher at WKCI who has taught the twins, described them as conscientious, hard-working, competitive and a pleasure to have in class.

The evidence indicates that the twins are also talented athletes. They participate in various other sports at WKCI, both individual and team sports. Some of these sports, such as badminton and lacrosse, are mixed. Others, such as volleyball, track and field, soccer and cross-country running, are restricted by gender.

When asked why she was okay playing on women only teams for some sports but not for hockey, Amy responded that she hadn't grown up playing those sports; she was at the same skill level as the other women in those sports and it was therefore a challenge. With hockey, she had grown up playing with boys and that was where her skill

level was. Similarly, on cross-examination, when asked whether she thought it a good idea for her to be playing on the girls' team with just girls in volleyball, Jesse responded that for volleyball it was, because she hadn't grown up playing that sport.

Outside the school system, the twins have also played lacrosse for 11 years. Lacrosse is a full contact sport, which the girls described as being rougher than hockey. For the last two summers both girls have played lacrosse with men at national levels, on Team Manitoba, in the under 16 age group. They currently play on a men's lacrosse team for ages 17 to 21. The twins are the youngest players on that team, and they and their older sister are the only females now playing in their lacrosse league.

#### The WKCI Hockey Teams

As indicated previously, 2004 was the first year in which the WKCI women's hockey team officially participated in the high school league. There was a wide range of experience and ability on that team. On the one hand, eight of the 16 players had never played hockey before. Of those eight, it was said that some could skate, but had just not played hockey. On the other hand, the team's captain and top player scored 50 goals and had 5 assists that year, and was selected to play on the All Star Team. There appears to be no doubt that the twins would have been two of the best players on the women's team, and as Kim MacDonald, the head coach of the women's team, stated, an excellent addition to the team in terms of leadership, skill and general knowledge of the game.

Both the WKCI women's team and the women's high school hockey league were described at various times as "developmental". In the 2004-2005 and 2005-2006 seasons, the WKCI women's team finished in the bottom of the standings. In 2005-2006, they won one game and tied one game.

The Agreed Statement of Facts indicates that in terms of resources, the girls' and boys' hockey programs are the same. Hockey games are refereed by certified officials, ice time is available to both the boys' and girls' teams for practice, schedules are established to ensure both boys' and girls' teams play approximately the same number of

"league games" and both programs train in the same facility.

The witnesses at the hearing confirmed that the men's and women's hockey teams at WKCI are accorded approximately the same amount of ice time, with the same number of practices and the same number of league games. In the 2005-2006 season, the girls' team arranged to have extra outdoor ice time for additional practices.

In terms of coaching, there was no dispute that the head coaches for both teams are well-qualified. They both have experience in hockey, enthusiasm and the required level of certification. In the case of the women's team, the head coach has a higher level 2 certificate. Both teams have assistant coaches. The women's team has additional coaches, including a goalie coach.

WKCI has had a men's hockey team for several years. There are three levels in the men's high school hockey league. The A division is the highest, followed by the B division, then the C division. With the exception of one year where it was in the A Division, the WKCI men's hockey team has been in the B Division for the past five or so years. The team has always been competitive in the B Division, this past year being the only year in which they may not have had a winning season.

One of the advantages of high school hockey over minor hockey is that the practices and games are held at more convenient times. Practices and games for the WKCI men's hockey team are scheduled for Tuesdays and Thursdays after school (from 4:00 to 6:00 p.m.).

#### Minor Hockey

Hockey Manitoba, which comes under the umbrella of Sport Manitoba, was described as the sports governing body for hockey throughout Manitoba. It looks after the development of players at all stages, from entry level to senior hockey. Hockey Manitoba currently has approximately 30,000 members, including players of both genders. The female sector comprises roughly ten percent of the membership, and was described as the

biggest growth area within hockey. Hockey Manitoba's policy is to allow female players to participate in both the boys' and girls' programs in minor hockey. Minor hockey includes ages 5 to 20.

The Province of Manitoba is divided into ten regions. In the Winnipeg region, the Winnipeg Minor Hockey Association ("WMHA") operates minor hockey, excluding high school hockey, by agreement with Hockey Manitoba.

The WMHA's regulations do not say anything specific about gender with respect to teams and players. The WMHA practice for the past ten years has been that girls can choose to try out and play for either a boys' team or a girls' team at their age level. Once that choice has been made, however, the player is required to remain with that team for the hockey season.

The WMHA encourages girls to play in the female program as there are several team levels of skill (i.e., AA, A1 and A2) available in the female program, and the provincial and national hockey programs are gender-specific. In the 2005-2006 season, the WMHA female program had 54 teams with 774 players. There were seven girls playing on male AA teams at the high school age.

By reason of an arrangement between the boys' high school hockey league and the WMHA or Hockey Manitoba, students can play for only one team in Winnipeg, either their boys' high school hockey team or a community (minor) hockey team. This is not the same for boys outside Winnipeg, who are allowed to play both in the minor hockey league and as affiliated players for their high school team.

In Winnipeg, the try-out period for the boys' hockey teams starts and ends at slightly different times for the different levels, with some overlap; the highest level, being AAA hockey, starts first, followed by high school hockey, then AA hockey. The system is designed so that students who try out for the AAA team and don't make it, can then try out for the high school team, and if they don't make that team, can try out for the AA team. The philosophy behind limiting the players to playing on one team only was said to be the

need for players to make a commitment to one program.

The female high school hockey program in Winnipeg is not directly associated with Hockey Manitoba and therefore not limited in the same way. Girls who play for a girls' high school hockey team may also play for a girls' or boys' team in the minor hockey league.

### The Expert Evidence

The Commission called one expert witness, Sandi Kirby, who was qualified as an expert in the area of gender equity in sport policies and programs. Dr. Kirby is chair of the Department of Sociology at the University of Winnipeg. She has a Bachelor of Physical Education, an M.A. in sport psychology and a PhD in sport science. She has competed in a number of sports, including representing Canada as a rower at the 1976 Olympics, at the 1985 World Masters Games, where she won two gold and a silver, and at the most recent World Masters Games, where she won a gold. Dr. Kirby has a long experience as a coach, some of which was as a high school phys-ed teacher. Dr. Kirby was also one of the founding members of the Canadian Association for the Advancement of Women and Sport ("CAAWS"), and was either a board member or on contract to CAAWS through the 1980's and well into the 1990's. Dr. Kirby played an important role in the development of the gender equity handbook for CAAWS and the National Sport Federation gender equity policy. She works principally in the area of gender equity and sport, including sexual harassment and abuse in sport.

With reference to a CAAWS document entitled "Making an Informed Decision About Girls' Participation on Boys' Teams", which was filed as an Exhibit, Dr. Kirby described CAAWS' policy as being, first, that if there is no girls' team, girls who want to play should be playing on boys' teams. Secondly, if girls' teams exist but are not of the same level or as well-resourced as the boys' teams and the female athletes are talented, they should be able to compete on a boys' team. Dr. Kirby stated that CAAWS would really like girls to be playing with girls, but that the issue, given the background of sport, is whether a team has the same resources and stature and offers the same opportunity. The

term "resources" must not be interpreted narrowly. Underneath it all, CAAWS wants to facilitate the participation of girls and women in sport; it does not want to facilitate, first and foremost, the participation of girls and women in girls' and women's sport.

Dr. Kirby said that she has watched people move to "developmental" teams, and observed the nature of their participation change; they became less oriented toward their technical development and more toward having to work to develop the other players on the team rather than themselves. While some athletes may want that role, others may not. In her view, equity is about choice, and about offering choice.

Dr. Kirby was of the view that the MHSAA policy, which "encourages" athletes to participate on same-sex teams where boys' and girls' programs are equitable, is consistent with CAAWS' policy. It would permit women to try out for a men's team. She also referred to the "et cetera" in that policy as the rider, as it would mean that the list of equitable resources would include access to develop skills, to compete at the level at which you can perform.

On the other hand, in Dr. Kirby's view, the MHSAA's rule that girls are to play on a girls' team where the school has a girls' team, and the Association's refusal to allow the twins to play on the boys' team, based on that rule, are not consistent with CAAWS' policy. She stated that a number of issues raised flags for her, including that the twins had a long history of participating in boys' hockey, which is where their skills had been developed, and that they were denied the opportunity to play at the level of their ability.

Dr. Kirby referred to dealing with gender equity in sport as dealing with something that is "historically on the move"; while we have come a long way from the time where sport was largely defined by males, run by males and participated in by males alone, we are still not there in terms of equity. The end, in her view, was that girls would be able to participate where they wanted to participate, at the level where they could perform.

It was Dr. Kirby's view that there was tremendous value in girls-only teams;

that sometimes a girls-only team is the only forum in which girls can develop their skill and ability, their self confidence and their leadership ability. But while same-sex sport is good for most girls, it is not good for all. In her view, to force a student to play on a lower performing team, regardless of whether it is a girls-only team, could not be good for a student, and would adversely impact the development of their skills and playing ability and likely result in their leaving the sport and being lost as potential leaders, including as coaches and educators.

The MHSAA called a number of individuals to testify as expert witnesses. Walter Kozak has had lengthy and extensive involvement with hockey, particularly as a coach. Among other things, he has coached major junior hockey, was a skill development coach for the 1988 Olympic team and has been involved with various national men's teams in Europe. In 1998, he became the mentor for the head coach of the national women's team in Nagano, and in 2002, was an assistant coach with the Women's Olympic Team in Salt Lake City. All of his experience since 1998 has been in the women's hockey program. From 2002 to 2005, he was the Head Scout/Manager of Player Development for the National Women's Hockey Program. As such, he was involved in observing female hockey across Canada and providing resource support from Hockey Canada to the branches in the provinces, to help them develop the female game. He has recently become the Manager of Player Development for the national under 18 team.

Mr. Kozak described the female game as being truly "a different game and a unique game". It is about skill, finesse and speed, not finishing checks and relying on physicality. There is no body checking. The female game is more about coordinated possession, protecting the puck, regrouping, making more passes, supporting the play. Coaches have to be educated about the uniqueness of the game. Coaching girls and women is itself generally different, as they are more visual learners and want to understand why they're doing what they're doing.

Mr. Kozak acknowledged that he operates at "a very high end" or "elite" level. He said that his advice to high level girls who are playing boys' hockey and their parents is

that because the nature of the girls' game is so completely different, it is very important that they become involved in the girls' game quickly if they want to play at the highest female level. He stated that in his experience it has taken a significant amount of time, at least a year and maybe two, for girls who played AA bantam hockey to adapt to the female game.

Mr. Kozak is a self-described advocate of female hockey as a great sport. He stated that he wanted to come and testify because he really feels that the female game of hockey is not appreciated. The girls who play the sport love it, and if they are going to compete on a national or provincial team, they are extremely dedicated, and put in unbelievable training hours to develop their skills, physically and mentally. In his words, he had come for the issue of human rights in female hockey, in the sense that females should be playing the female game, coaching it and helping it grow, and deserve the support of sports organizations. Unlike men's hockey, women's hockey is a sport, not a business.

In Mr. Kozak's opinion, Manitoba has very good female hockey. It is a matter of finding the right team and league, where a player can develop as a female player. Females cannot play the men's game all their lives, primarily because it would hurt them physically. He stated that if he were advising the twins, he would want them to develop and lead their school team, but that he would also find a female team at their age level on which they could play and be challenged.

He added that hockey is not the kind of game where you would want to take much time off, and that if a player hasn't played for two years, he or she would have some making up to do and would need to find good quality ice time to catch up on things such as skills, fitness and reflexes.

On cross-examination, Mr. Kozak stated that if you just want to play for fun, you can play anywhere, but that even on a high school team, you don't want to disrespect the nature of the game and being competitive. He stated that he would want everyone to have a positive experience.



Lauren Cartwright has been the principal of River East Collegiate since 1999. Dr. Cartwright began teaching in 1969. She taught phys-ed for several years, and has coached teams every year that she has been teaching. Dr. Cartwright received her Masters degree in counselling and educational administration in 1984, and a PhD in educational administration in 1986. Her Masters thesis, which was filed as an Exhibit at the hearing, was a study on the effect of participation in school-related activities and academic performance in school. Dr. Cartwright was qualified as an expert in the area of her Masters thesis and as a principal at a high school with respect to boys' and girls' high school sports.

Dr. Cartwright testified that she has always been a strong believer that all activities, including high school sport, are a very necessary part of the whole school experience for kids for two reasons: they are really good for the kids, in terms of socialization and the development of physical and life skills, and they are really good for the school, in terms of contributing to the culture of the school and developing spirit and camaraderie. In her view, the belief in Canada is on participation and quality. She described the interschool program as being like a challenge program for those kids who have a real interest or ability in a particular area, which enhances their total learning experience.

In Dr. Cartwright's view, what is important is tying kids to the school, giving them the opportunity to play for their school with their classmates. If a boy gets cut from a team, the opportunity is not there. Assuming he could do so, it would not be easy for him to play for a girls' team, as there is still a stigma attached to a boy playing for a girls' team.

Dr. Cartwright further stated that schools are not set up to run a third, or co-ed, league, and that she would hate to see the good things which exist in the boys' and girls' leagues lost by starting to develop such an additional league. In her view, it is good to separate sports in high schools along gender lines because of the differences in the games, and in the physical growth and emotional reactions of the students.

When asked to comment on the "additional opportunity" available to girls, i.e.,

to play both high school and community hockey, Dr. Cartwright stated that she believed that with boys' hockey, it was a question of the time commitment; with the practices and the games it was not manageable to play at both levels. She said that she would be very surprised if girls would be able to continue to play at both levels, because of the time commitment involved and the increasing quality and calibre of girls' hockey.

Dr. Cartwright stated that she would want every child to have the opportunity to play somewhere where they are comfortable and can develop their skills to the best of their ability so that they can do whatever they want, but that she does not believe that high school athletics is the proper place to develop elite skills. She spoke of how River East Collegiate has accommodated two of their athletes, enabling them to go elsewhere for training, while completing their academic requirements, so that they could graduate from that school with their friends.

When asked what her advice to the twins would have been, Dr. Cartwright answered that she would probably have talked to them about playing for the girls' team and contributing to the school. However, if they really felt that that was not going to be in their best interest in terms of their personal development, as with any student, she would probably have looked for an opportunity that would be appropriate for them, in whatever league.

Shawnee Scatliff was qualified as an expert in gender equity in sport, specifically in Sport Manitoba, and gender equity policies. Ms Scatliff has worked for Sport Manitoba for about ten years, and is currently under contract to its Sport Programs unit. She participated in the Canada Winter Games in 1967 and 1971 (bronze medallist, figure skating) and the Canada Summer Games in 1977 (tennis). She has acted as Chef de Mission or Assistant Chef de Mission for various teams, including Assistant Chef de Mission for Team Canada at the 2006 Commonwealth Games in Melbourne, Australia, and is the Assistant Chef de Mission for the 2007 Canada Winter Games and Western Canada Summer Games. Ms Scatliff was associated with CAAWS for at least eight or nine years, including two years as chair of that organization (2000-2002).

Ms Scatliff testified that we have come a long way towards making sports fair and equitable for men and women, but that we are certainly not there yet. Although women's hockey was not that strong years ago, Canada and Manitoba have now developed some amazing female hockey players, as was evident at the Olympics. She stated that we want to promote our women athletes as much as possible because they have been disadvantaged for many, many years, especially in hockey. If a girl wants to play, we want her to play to the highest level she can.

From Ms Scatliff's perspective, CAAWS would love to see a men's and women's team in any sport, with equitable resources. CAAWS and Sport Manitoba both want to develop female officials and coaches, and of course female athletes.

Ms Scatliff was provided with the MHSAA's Gender Equity Policy and asked to comment on it. Quoting from the Vision portion of that policy, she noted that it included all the concepts and areas of sport for a young girl or woman. She agreed that the policy looked consistent with what she would expect to see.

In terms of what the MHSAA is doing in practice, Ms. Scatliff indicated that to her knowledge the MHSAA is trying very hard to develop teams of both genders in all sports, and where they cannot do so, are still offering opportunities for female athletes to compete on male teams. She noted that while the policy states that if there is a male and a female team, those genders apply, it allows for exceptions to be made through an appeal process. Thus, there is an opportunity for girls to play on boys' teams, although it is a bit longer process. Exceptional or elite athletes would still have the opportunity to apply to try out for the male team.

When asked about the importance of girls or women playing against other girls or women, Ms Scatliff stated that many years ago, girls were dropping out of sport at age 11 or 12, and all-girl classes were seen as a way to provide a safe environment where girls could work on their skill development without being embarrassed or intimidated by boys. From there, they would have more confidence to move to a team, an all-girls' team, where they would still feel that they were in a safe environment. Part of increasing the

participation of girls and women in sports is providing what the girls want, and a lot of times it makes it easier for girls to stay in sport where there are all-girl teams.

When asked where she thought the twins' needs would best be met in terms of their advancing in sport, Ms Scatliff responded that she could not comment as she does not know them and has not seen them skate. She stated that if they want to develop to the best of their ability, they would have to discuss it with others, including their coach and their parents, to find what team would be best for them, and that it is a decision which they would have to make.

On cross-examination, Ms Scatliff agreed that equitable resources would include the opportunity to compete at one's own level. She agreed that CAAWS' policies are very good gender equity policies. Ms Scatliff also agreed that it would be fair to say that CAAWS would allow a talented hockey player to play on a boys' team even if there was a girls' team, depending on the circumstances. She stated that if all the resources and availabilities were equitable, they would definitely encourage a girl to play on a girls' team, but would be open to discussing it in exceptional circumstances. Ms Scatliff acknowledged that the CAAWS document which was filed as an Exhibit represented CAAWS' current position, and agreed that the words "elite" and "exceptional" do not appear in that document.

Ms Scatliff expressed the concern that as time goes by and females improve, she would not want a boy to be able to use the argument of equitable opportunity to enable him to play on a girls' team.

Reg Klassen was produced as an expert in girls' hockey in the minor hockey system and rural education programs. Mr. Klassen is the principal of W.C. Miller Collegiate in Altona. He has over 20 years of coaching experience at all levels. Among other things, he has been an evaluator of coaches for Hockey Manitoba for many years, and was the head coach of Team Manitoba (Program of Excellence) (female) for the 2003 Canada Winter Games. Mr. Klassen has also coached girls' minor hockey and has run an all-girls hockey school for the last seven years.

Mr. Klassen testified that in all the communities in which he has any involvement, the number of registrations in girls' hockey is constantly growing, as opposed to male hockey, where it is not. The level of skill has also changed significantly over the last five or ten years.

He said that his all-girls hockey school was created in response to a demand. Many girls had indicated that they wanted to go to an all-girls hockey school, as opposed to participating as a minority in a mostly male hockey school.

Mr. Klassen stated that while very few rural high schools have female programs at this time, some of them are considering it. His school, W.C. Miller Collegiate, is planning on having a girls' team next year. The intent is that the team would play only exhibition games for the first year, then apply for status in a league the following year. The parents have expressed a great deal of interest in such a program. The team has had two practices so far, and has a list of at least 20 players who would be eligible to play, which is more than enough for a team.

Mr. Klassen stated that extracurricular activities in a high school, specifically sport activities, are an incredibly worthwhile part of education. They enable the athlete to develop a variety of skills, and create a level of school spirit and pride. He expressed the view that, for various reasons, having a high school girls' hockey program will keep some of the female athletes in the sport longer, and as the program develops, will result in more girls participating in the sport.

When asked what it might mean if girls left to play on a better team somewhere, Mr. Klassen stated that it might mean that the program might not survive, or it might create some adversity in the school. He indicated that in those circumstances he would try to speak to the athlete and determine what she was really looking for and how to challenge her. With an elite athlete, he would look to see if there were other opportunities which would be available for her, such as summer hockey programs or camps.

W.C. Miller Collegiate has a men's hockey team, which advanced to the

provincial finals this year. There were no women playing on that team.

Mr. Klassen agreed that it would be fair to say that the minor system is a very good example of doing the right thing in terms of increasing interest in women's hockey and encouraging women athletes.

Although not called as an expert, Rhonda Young also testified as to her experience with respect to participation in sports in rural areas. Ms Young is a phys-ed teacher at Souris School in Souris, Manitoba, who has taught Grades 7 to 12 for a number of years in Thompson and Souris, Manitoba, and has coached a variety of sports during those years. Ms Young has also just completed a four year term on the Board of the MHSAA.

Ms Young testified that sports is a big part of student life at schools in rural areas, especially at the smaller ones. She stated that it would make a big hole in a team if you had players quitting for whatever reason; that a very talented or motivated player keeps the team whole and that if they don't play anymore it can become very difficult, especially in a small school if the numbers aren't there to keep it going. When asked to comment on the impact she might see if girls in particular leave a sports program, she testified, with reference to her volleyball team, that she thought they could still exist as a team, but that, depending on the calibre of the girls, it would probably be a little frustrating for the ones left behind and more difficult to develop a girls' team or program or to keep interest in the program.

Laura Solberg was qualified as an expert witness with respect to the coaching and development of girls' and women's minor hockey in the Province of Manitoba. Ms Solberg has more than ten years' experience in women's minor hockey. She started the University of Manitoba Bison Women's Ice Hockey program, and was that team's Head Coach for three years. She has been involved in scouting and coaching with the Canadian National Women's Team for several years, and is an Assistant Coach with the Program of Excellence (Team Manitoba) for the 2007 Canada Winter Games. For the last two seasons, she has also been the Head Coach of the St. Adolphe Hawks Female

Midget AA hockey team.

Ms Solberg spoke of her passion to develop girls' hockey in Manitoba and to watch girls aspire to their dreams. She described the development of girls' and women's hockey in Manitoba over the past five to fifteen years as escalating every year, noting that there have been definite improvements in ice time, practice times, and other resources, and that the play continues to improve and the number of players continues to grow.

In terms of choices, it was Ms Solberg's view that girls have the best of both worlds, in that they can play high school hockey as well as minor hockey, at various levels. She stated that six or seven girls on her midget AA team also played on their high school team, as a result of which they had a substantial amount of ice time and their confidence and skills were enhanced throughout the year. While she indicated that this had meant that the girls were not always available, she was of the view that this was a winning situation. She indicated that she has girls who were average players, and after playing in both leagues, have gone on to receive scholarships.

Ms Solberg expressed the view that the Manitoba minor girls' hockey program is an excellent program, in which girls have a great opportunity to play and compete. She confirmed that the rule in minor hockey in Manitoba is that girls are allowed to play boys' hockey, even if there is a girls' team. She noted that a new rule has been passed in St. Adolphe this year, whereby girls cannot switch teams once they have chosen a team and signed the roster. She indicated that she was very much in favour of this rule, as players should show their commitment to a team.

None of the expert witnesses who were called by the MHSAA had ever seen the Pasternak twins or the WKCI women's hockey team play.

### Decision

Subsection 13(1) of *The Human Rights Code* states 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*.

9(1) In this Code, "**discrimination**" means

(a) differential treatment of an individual on the basis of the individual's actual or presumed membership in or association with some class or group of persons, rather than on the basis of personal merit; or

(b) differential treatment of an individual or group on the basis of any characteristic referred to in subsection (2); or . . . .

The applicable characteristics for the purposes of clause 9(1)(b), as set out in subsection 9(2), include sex and gender-determined characteristics or circumstances.

Subsection 9(3) of the *Code* refers to "systemic discrimination" and states:

**Systemic discrimination**

9(3) In this Code, "**discrimination**" includes any act or omission that results in discrimination within the meaning of subsection (1), regardless of the form that the act or omission takes and regardless of whether the person responsible for the act or omission intended to discriminate.

It is clear that in a claim of discrimination under the *Code*, the onus is on the complainant to establish a *prima facie* case of discrimination. Where a *prima facie* case of discrimination is established, the onus then shifts to the respondent to prove that there is a bona fide and reasonable cause or justification for such discrimination.

In my interim decision on the issue of jurisdiction, I found that the MHSAA provides and administers services and programs which are available and accessible to the public or a section of the public (i.e., high school students) within the meaning of the *Code*. In general terms, the MHSAA provides and administers interschool or provincial athletic competition to and for high school students, and is the author of the rules which govern that competition.



To establish a *prima facie* case of discrimination, the Complainants must now establish, on a balance of probabilities, that they were treated adversely by the MHSAA with respect to those services and programs on the basis of their gender.

There is no question that the refusal to allow the twins to play for their school's regular or men's hockey team was based on their gender. The MHSAA rule expressly provides that if a school has a boys' and a girls' team, the students would play for their respective gender. When WKCI sought to appeal the application of that rule, the MHSAA Board denied its appeal, for the sole reason that the school has a boys' and a girls' team and that there was therefore "equal opportunity for the students". Similarly, in the written Reply which it filed with the Commission, the MHSAA stated that as WKCI has both a boys' and a girls' team, the girls should participate on the team of the same gender.

There is also little doubt that the girls were treated differently from the boys. The twins had been playing boys' or regular hockey in the community or minor leagues, including contact hockey, for 11 years. Most of that time, they had played at the highest level. They wished to continue playing regular or contact hockey, by playing for their men's high school team. Unlike the boys, they were told that they could not even try out for the team, and would have to play for the girls' team.

If the twins wished to play hockey at their school, they were therefore forced to play for the women's team. That team, which was in its first year in the league, clearly did not offer the same level of play and competition as the men's team.

In addition, as a number of the MHSAA's witnesses emphasized at the hearing, the women's game of hockey is significantly different from the men's game. One obvious difference is that body checking or full body contact is allowed in the men's game but not in the women's game.

This difference in terms of body contact was a determining factor in the case of *Blainey v. Ontario Hockey Association* (1987), 9 C.H.R.R. D/4549 (Ont. Bd. of Inquiry). In that case Ms Blainey was not allowed to play for a boys' Peewee "A" hockey team

pursuant to a policy similar to the MHSAA's rule in the instant case, which prohibited females from playing on male teams except where there was no comparable all-female team in the relevant geographic area. The evidence in that case was that there were a number of all-female teams in the area, and the Adjudicator found that there was no doubt that the women's hockey association offered females a meaningful hockey experience. However, Ms Blainey wanted to play hockey where body checking was allowed. The Adjudicator concluded that denying Ms Blainey the opportunity to play hockey for the male team amounted to unequal treatment and discrimination on the basis of her sex.

In refusing to allow the twins to try out for the men's high school hockey team because of their gender, the MHSAA denied them the opportunity to be judged on the basis of their personal merit. In the circumstances, I am satisfied that the twins were subjected to differential treatment on the basis of their gender, and that that treatment constituted, by definition, discrimination under the *Code*.

Counsel for the MHSAA acknowledged that the formal distinction between the Complainants and others easily passes the threshold of showing differential treatment based on an enumerated ground of discrimination. He argued, however, that this is not sufficient to satisfy the onus which the Complainants bear at this stage. He submitted that the analysis or guidelines set out in the decision of the Supreme Court of Canada in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 ought to be applied, and in particular, that the Complainants must also establish that the distinction has violated their dignity.

The argument, as I understand it, is that the twins belong to a class, namely high school girls, which has been historically disadvantaged. The MHSAA has a responsibility to all members of that class, and has worked hard to ensure that the class is on an equal footing with the boys. Far from promoting the view that girls are less capable or worthy of protection, the MHSAA has gone a long way to protecting their dignity by providing extra choices and a safe environment in which they can participate and excel, and promoting the view that girls do not have to compare themselves to boys in order to be

validated.

I do not believe that it is necessary or appropriate for me to address the issue of what, if any, application the *Law* analysis or guidelines may have in determining whether a *prima facie* case of discrimination has been established under *The Human Rights Code*, for several reasons.

The issue in *Law* was whether certain legislative provisions (ss. 44(1)(d) and 58 of the *Canada Pension Plan*) infringed on section 15(1) of the *Canadian Charter of Rights and Freedoms*, on the ground that they discriminated against widows and widowers under the age of 45 on the basis of age. The analysis was therefore developed in the context of a challenge under the equality provision of the *Charter* to legislation which set up a government program of financial support.

Counsel for the MHSAA relied on the case of *Gwinner v. Alberta (Human Resources & Employment)* (2002), 217 D.L.R. (4<sup>th</sup>) 341, 2002 ABQB 685, as a human rights case in which the *Law* analysis was applied. The circumstances in that case, however, were very similar to those in *Law*, in that it also involved an equality challenge to legislation which set up a government program of financial support.

In addition, in *Gwinner*, while concluding that the *Law* analysis was "particularly applicable", the Court stated that in many or most cases under human rights legislation, that "elaborate third step scrutiny to determine if the dignity interest of the Claimant is truly engaged" will be neither necessary nor appropriate. (para.104) One of the reasons for this was said to be that the Supreme Court of Canada has stated more than once, including in *Law*, that distinctions made on one of the enumerated grounds in the legislation will rarely escape a finding of discrimination.

There is certainly no consensus and no authority binding on me to the effect that the *Law* analysis should be applied with respect to a complaint of discrimination under human rights legislation. In fact, in *Gwinner*, the Court noted that many human rights tribunals have resisted application of the *Law* analysis or any argument that the decision in

*Law* has imported a requirement that the claimant establish a violation of human dignity as an element of a *prima facie* case under human rights legislation.

Finally, in three important human rights cases considered by the Supreme Court of Canada since *Law*, the Court continued to apply the traditional approach to the establishment of a *prima facie* case of discrimination, and did not employ the dignity analysis from *Law*. (*British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union*, [1999] 3 S.C.R. 3 ("Meiorin"), *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 ("Grismer") and *Quebec (Commission des droits de la personne et droits de la jeunesse) v. Montreal*, [2000] 1 S.C.R. 665, 2000 SCC 27)

There is no question that the distinction which was made in this case, was made on one of the enumerated grounds in the legislation, namely sex. There is also no question that the twins were adversely affected by such differential treatment, in that they were denied the right to be judged on their personal merit.

I therefore conclude that the Complainants have satisfied the onus of establishing a *prima facie* case of discrimination.

The onus thus shifts to the MHSAA to prove, again on a balance of probabilities, that there was a bona fide and reasonable justification for such discrimination.

In *Grismer, supra*, at para. 20, the Supreme Court of Canada stated that in order to establish justification, the respondent must prove that:

- (1) it adopted the standard for a purpose or goal that is rationally connected to the function being performed;
- (2) it adopted the standard in good faith, in the belief that it is necessary for the fulfillment of the purpose or goal; and
- (3) the standard is reasonably necessary to accomplish its purpose or goal, in the sense that the [respondent] cannot accommodate persons with the characteristics of the claimant without incurring

undue hardship.

The first step in this process is to identify the general purpose of the standard or rule and to determine whether it is rationally connected to the function being performed. The focus at this step is not on the validity of the particular standard that is in issue, but on the validity of the more general purpose of the standard.

I earlier identified the function being performed by the MHSAA as providing and administering interschool or provincial athletic competition to and for high school students. The MHSAA has described its mission in its Vision and Mission Statement as being 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 potential."

Counsel for the MHSAA submitted that the key to the role performed by the MHSAA is "participation". The value and importance of participation in school-related activities, including sports, to both the individual student and the school, was emphasized by Dr. Cartwright and others.

However, the role of the MHSAA is more than simply providing an opportunity for students to participate in sport. The MHSAA is not involved in administering sports programs within the schools themselves. Its role is at a different level; it provides for and administers competition between schools. The MHSAA's Rules and Regulations refer to the participating athletes as representing "the highest competitive level of school competition in their sport". One of the MHSAA's stated goals is to encourage participation and excellence in high school sport.

It was stated that it is not the role of the school to develop elite or Olympic athletes. I accept that; but these proceedings are not about Olympic or so-called "elite" athletes, or athletes who are necessarily aspiring to become Olympic or "elite" athletes. They are about interschool sports, and skilled and talented athletes. I agree with the comment made by Dr. Kirby that while participation is very important, it does a disservice to physical educators to say that their only concern is participation, and not to recognize

their responsibility for, and interest in, developing the skills and talents or "performance abilities" of their students.

There was no evidence with respect to the circumstances surrounding the adoption of the rule which is the subject of these proceedings that would indicate what the MHSAA's purpose was in adopting that rule. However, the wording of the rule indicates an intention to provide equal opportunities for athletes. Similarly, the message from the Board denying WKCI's appeal refers to there being equal opportunity for the girls. I accept that providing equal opportunities for athletes is a valid general purpose which is rationally connected to the function performed by the MHSAA.

The second step in establishing justification is to demonstrate that the particular standard was adopted with an honest and good faith belief that it was necessary to the accomplishment of its purpose, with no intention of discriminating against the claimant. Counsel for the Commission acknowledged that the Commission in no way questioned or doubted the good faith of the MHSAA. I have no hesitation in finding that this requirement has been satisfied.

The third step in the justification process is to demonstrate that the standard is reasonably necessary to accomplish its purpose, and that the respondent cannot accommodate the claimant and others adversely affected by the standard without experiencing undue hardship. Accommodation was not raised as an issue in this case. The question, therefore, is whether the MHSAA can demonstrate that its standard or rule is reasonably necessary to justify its purposes.

The reason which was originally given for refusing to allow the twins to play for the men's team was that there was equal opportunity for boys and girls, as there was both a boys' and a girls' hockey team. This is essentially a repetition of the wording from the rule which states that the "MHSAA endeavors to provide equal opportunities for athletes" and that "[i]f a school has both a boys and a girls team, then the students would play for their respective gender."

Yet, equal opportunity must mean more than simply having a team for each gender. And in this case, there is more. At the hearing, the MHSAA went further and adduced a considerable amount of evidence to show that the Association, its member schools and a large number of dedicated teachers and volunteers, have worked hard to develop girls' and boys' teams, to provide them with equal resources and benefits, and to facilitate the development of female coaches and officials. These are certainly positive and important steps which bode well for the future in terms of sports and gender equity.

Is this sufficient, however, to demonstrate that there is equal opportunity for boys and girls? I am not satisfied that it is. I am convinced that "equally-resourced" must not be interpreted narrowly. The MHSAA's own Gender Equity Policy refers to "a full and equitable range of opportunities for participation, officiating, competition and leadership in school sport activities". Both the Commission's and the MHSAA's experts in gender equity, Dr. Kirby and Ms Scatliff, agreed that the concepts of equal opportunity and equal resources include the opportunity to participate and compete at one's own level.

In this case, the twins were denied that opportunity. Leaving aside the differences between the women's and men's games, I am convinced that the level of hockey in the women's program, a developmental program, was significantly lower than the level in the men's program. There is no dispute that the twins would have been two of the best players on the women's team.

There is also no dispute that the twins were competitive at the try-outs for the men's team. While it was argued that there is no evidence that they would have made the men's team, this is explained by the fact that the twins were told that they could not play for that team before the try-outs had been completed and any decisions made as to who would make the team. In any event, whether the twins would have made the team or not is irrelevant. What is relevant is that they were not afforded the opportunity to even be considered for the men's team or be assessed on their merits.

It was suggested that there would have been other or different opportunities available to the twins in the women's program, such as the opportunity to be leaders and

to help other girls to learn the game. That may be so, but it was not their choice, and does not justify denying them the opportunity to participate and compete at their level in the game they were familiar with, and to be treated on the basis of their personal merit.

I do not believe that it would be considered acceptable to force a boy to play for a lower calibre team on the basis that he could help less skilled players to play better. Similarly, it is not acceptable to force a girl to play for a lower calibre team on the basis that she can help others to play better.

I am not satisfied that the opportunity to play for the women's team constituted an "equal opportunity" in this case, and certainly cannot conclude that this justified the MHSAA's refusal to allow the twins to play for the men's team.

Counsel for the MHSAA went on to argue that the Association has a very careful policy which was developed in consultation with CAAWS and is consistent with the overarching principles of gender equity as advanced by that organization. I am prepared to accept that this is the case. Generally speaking, neither expert in this area, Ms Scatliff or Dr. Kirby, took issue with the MHSAA's policy.

However, a distinction must be made between the MHSAA's policy, as set out in its Gender Equity Policy, and the MHSAA's rule, as set out in its Rules and Regulations. There are fundamental differences between the two. The MHSAA's policy thus speaks of encouraging students to participate on teams of their respective gender where both programs are equitable, while the rule indicates that students must participate on teams of their respective gender where both teams exist.

The rule predated the Gender Equity Policy, and while there was evidence that the Rules and Regulations are updated periodically, there was no indication that this particular rule was reviewed or revised, either at the time the Gender Equity Policy came into being or afterwards.

While Ms Scatliff went on to address the MHSAA's application of its policy, and stated that she believed that the MHSAA is trying to develop teams of both genders



and that what it is doing in practice is fair, her opinion was based on her understanding that the MHSAA policies or rules would still allow girls, or at least exceptional female athletes, to play on boys' teams, but that those exceptions would have to go through an appeal process, which she referred to as being "just a little bit longer process."

There are a number of problems with this. Although Ms Scatliff was provided with the MHSAA Gender Equity Policy while she was testifying, she was not referred to or provided with the MHSAA's rule or its response to the WKCI appeal in this case. The rule is stated in absolute terms, and makes no reference to any appeal. While a later rule provides that schools in exceptional circumstances may apply for special eligibility consideration for any student/athlete, this would suggest that any such application is not "just a little bit longer process".

Assuming that it was prepared to do so, the school would thus have to apply to the Board for an exemption from the rule and establish that there are exceptional circumstances. The student could not apply.

There is nothing which indicates that not having equal resources, including the opportunity to compete at one's level, or being a talented or exceptional athlete capable of competing at a higher level, would be considered sufficient to constitute the necessary "exceptional circumstances". On the contrary, a number of the MHSAA's witnesses indicated that they would expect a superior athlete to play on the women's team where they would be a leader and could help the other girls develop their skills and strengthen the developing team.

Even if being capable of competing at a higher level might be considered an "exceptional circumstance", how would the Board be able to assess that circumstance? Surely the coaches and try-out process would be better suited and able to evaluate and determine whether an athlete is in fact capable of competing at that level.

In fact, the MHSAA's evidence was that it has never made an exception to its general rule (except to allow girls to try out for the boys' team where a school did not have

a girls' team, which is not an "exception", but actually part of the rule.)

In the event that an application for an exemption was unsuccessful, as in this case, the MHSAA rule would apply, and any girl who wished to play would be forced to play for the girls' team, whether that team had equitable resources or not.

By contrast, the CAAWS and MHSAA gender equity policies indicate that a girl would be encouraged, but not forced, to play for a girls' team, even where the girls' and boys' teams have equitable resources.

Clearly, the MHSAA's rule and its refusal in this case to allow the twins to play on the men's hockey team are not consistent with the MHSAA's Gender Equity Policy, nor with what were referred to as the "overarching principles of gender equity" advanced by CAAWS.

I therefore conclude that the rule and the MHSAA's decision cannot be justified on the basis of that policy.

It was further argued that there were other alternatives available to girls. One of these would be that if girls wish to play contact hockey, they can still play for a boys' team in the minor league. I note that the Commission's evidence, which was uncontradicted, was that there was no AA or A1 boys' hockey team at that age level in the area in 2005-2006. Even if the twins had been able to play for an appropriate level of boys' team in their area or another area, there was evidence that the practice and game times for community or minor hockey are generally not as convenient as those in the high school leagues. In any event, this same option is also available to a boy, and is no answer to a student who wishes to play for their school. Any suggestion that this is a satisfactory alternative contradicts the MHSAA's own evidence as to the value and importance of school-related activities.

It was also suggested at one point that girls could transfer to another school which did not have a women's team and play for the men's hockey team at that school. Any high school student in Manitoba can transfer to the school of his or her choice in order

to participate on a specific athletic team. The right to transfer schools or choice of schools is mandated by law in Manitoba.

This suggestion that girls could transfer to another school to play for its men's team does not fit well with the MHSAA's evidence as to the importance of "tying" students to their school and enabling them to stay and graduate with their friends, and as to the value and importance of developing school spirit and pride. It also cannot be reconciled with the MHSAA's position that it would not be right or fair for a girl to take the place of a boy on their own school's men's team.

Counsel for the MHSAA argued that girls have additional options and choices which are not available to boys. In particular, at least in Winnipeg, boys who play high school hockey are not allowed to play minor hockey as well. They must choose between the two. By contrast, girls who play high school hockey (at least girls' high school hockey) may also play either boys' or girls' minor hockey.

While it was suggested that this constitutes a significant advantage, that suggestion does not withstand close scrutiny for several reasons. First of all, there was evidence that the reason the boys were allowed to play for one team only was the time commitment involved; it was simply not manageable for boys to play for two teams. No attempt was made to explain how or why that time commitment would be more manageable for girls, particularly for those who are playing a higher level of hockey.

Secondly, the evidence is that there are fundamental differences between the women's and men's games, including differences in technique and in the approach to the game. Mr. Kozak, one of the MHSAA's experts, testified that in his experience it takes a significant amount of time for girls who have played boys' hockey to adapt to the female game. Far from there being an advantage for girls in being able to play both male and female hockey at the same time, this evidence suggests that it would be not only very difficult, but also quite possibly detrimental, for girls to switch back and forth from one game to the other.

There was evidence from Ms Solberg that this particular arrangement had benefited a number of her players, who had thus been able to play for both her minor league team and their high school team. I note, however, that both teams were women's teams, and that playing on the two teams entailed a significant time commitment from the girls, not necessarily at the most convenient hours, as well as some flexibility and accommodation on the part of the coach.

I accept that the possibility of having such additional ice time and instruction may be beneficial for some girls, and would not want to be taken as suggesting in any way that this is not an appropriate and worthwhile feature for those girls who are able to, and wish to, avail themselves of it. I am not satisfied, however, that this is an advantage for most girls, or in any way justifies discriminatory treatment.

I therefore conclude that the MHSAA's rule and decision are not justified on the basis that other alternatives were available to the twins.

Counsel for the MHSAA also argued that the rule protects a class that has been traditionally disadvantaged. Counsel referred to paragraph (c) in the preamble to the *Code* which recognizes "the fact that past discrimination against certain groups has resulted in serious disadvantage to members of those groups", and that it is therefore "important to provide for affirmative action programs and other special programs designed to overcome this historic disadvantage".

Section 11 of the *Code* goes on to provide as follows:

**Affirmative action, etc. permitted**

11 Notwithstanding any other provision of this Code, it is not discrimination, a contravention of this Code, or an offence under this Code

...  
(b) to plan, advertise, adopt or implement an affirmative action program or other special program that

(i) has as its object the amelioration of conditions of disadvantaged individuals or groups, including those who are disadvantaged because of any characteristic referred to in subsection 9(2), and

(ii) achieves or is reasonably likely to achieve that object.

Section 11 is intended to ensure that special programs designed to assist disadvantaged persons or groups are not invalidated on the ground of "reverse discrimination". Members of advantaged groups cannot, therefore, argue that special programs from which they are excluded violate the *Code*. Nowhere in the *Code* is there any suggestion that as long as a special program is implemented to assist disadvantaged groups or persons, other programs are free to discriminate against those same groups or persons.

It was argued, however, that the Rule is necessary or justified in order to protect the women's high school hockey program (and presumably other women's high school sport programs) throughout the Province.

No objective evidence was called by the MHSAA in support of this position. A standard that excludes members of a particular group on impressionistic assumptions is generally suspect. (*Grismer, supra*, para. 31)

Mr. Klassen testified that if girls left to play on another team, it might mean that the program might not survive or it might create some adversity in the school. Ms Young similarly testified that if a player left, for example, her volleyball team, it would probably be a little frustrating and more difficult, but they could likely still exist as a team. In both of these cases, the witnesses were responding to a purely hypothetical question. Even then, in neither case did the answer suggest a reasonable possibility that the departure of one or more players would result in the demise of a team.

The MHSAA's Reply to the Complaints indicates that the WKCI women's team almost folded at the beginning, due to a shortage of players, and that the MHSAA had to make a special exception to allow them to use a player from another school in order to ice a team. This reference to a "special exception" was not elaborated on at the hearing. In any event, such a special arrangement is specifically contemplated by the MHSAA, and shows that there are measures available in the event that the continued

survival of a team is actually at risk. The fact that the twins did not play for the WKCI women's team did not result in the demise of that team.

The argument that it would be a threat to female hockey if girls were allowed to play on men's high school teams where women's teams exist is not consistent with the acknowledgment by the MHSAA that the interest and participation in girls' and women's hockey has increased significantly in the last several years and will continue to do so. The evidence at the hearing was clearly and emphatically to the effect that interest in women's hockey is constantly increasing, while interest and participation in men's hockey is not.

Mr. Klassen's evidence with respect to the pending formation of a girls' hockey team at W.C. Miller Collegiate next year is enlightening with respect to this argument. His evidence was that the proposed program has received a great deal of interest and support from the parents and students, and already has 20 girls signed up, enough to form a team. That interest, however, is in women's high school hockey, not boys' or contact hockey. Although W.C. Miller Collegiate has a men's hockey team, there was no suggestion that there has been any indication that any of these girls would prefer to try out for the men's team if they were allowed to do so. On the contrary, since the school has not had a women's team, girls have been allowed to play on the men's team up until now; in spite of that, there are no girls on that team.

Any suggestion that a significant number of girls would choose not to play for their high school women's team if they were allowed to play for their school's men's team also flies in the face of what has in fact occurred in the minor leagues, where even though girls have been allowed to play on men's hockey teams for years, there were only seven girls of high school age playing on male AA teams in the WMHA last year.

A number of the MHSAA's witnesses agreed that the minor hockey system is a very good example of the right way to increase interest in women's hockey and encourage women athletes. None of the witnesses suggested that that system poses a threat to women's (or men's) hockey.

The MHSAA's argument in this respect is very similar to one of the arguments which was raised and rejected in the *Blainey* case, *supra*, where the Ontario Women's Hockey Association (OWHA), which had similarly prohibited Ms Blainey from playing for a male hockey team, expressed the concern that if enough females left, particularly the better ones, the OWHA system and its credibility would be undermined. The Adjudicator in that case found that while these were real concerns, the weight of the evidence suggested that the number of females who would play male hockey if permitted to do so was quite limited. No female witnesses other than Ms Blainey had expressed a desire to play on a male hockey team, and no witnesses had referred to any other female on an OWHA team who had indicated a desire to play on a male team.

Given that similar concerns were expressed in *Blainey* almost 20 years ago, I would have expected to hear evidence to indicate that such concerns had been shown to be justified over time, if in fact that were the case. No such evidence was adduced. Further, as in *Blainey*, there was no evidence that any girls other than the Complainants have indicated a desire to play on their men's high school hockey team. Nor was there any evidence that any female student has indicated a desire to play on any other men's high school team in any other sport.

I am satisfied that permitting girls to play on the men's high school hockey team instead of the women's team where a school has a women's hockey team will not have a significant adverse effect on the women's program, that the MHSAA's rule is not necessary to protect that program, and that the rule is not justified on this basis.

The MHSAA's further suggestion that it would be unfair to allow a girl to possibly take a boy's place on the men's team, and that the rule is somehow required to protect boys and the boys' program, is not a reasonable justification for the rule. As stated above, the evidence indicates that there are not a lot of girls who would try out for the boys' team if they were permitted to do so. The evidence simply does not support any suggestion that men's hockey needs to be protected from females.

Quite apart from that, it cannot be said that the protection of boys and the

men's high school hockey program is a legitimate purpose. Boys have certainly never been a disadvantaged group in terms of hockey and are not in need of protection. If a girl were to succeed in making the men's team, and thus take the place of a boy, it would be on the basis of merit.

Finally, counsel for the MHSAA argued that it is not clear what the twins are seeking, but that if their goal is to play better hockey, they are misguided; they would be better off in the women's hockey program, where more and better opportunities would be available for them. Based on the evidence, these would presumably include, for example, the opportunity to become leaders and develop their leadership skills, to obtain scholarships and to advance to an elite level through the women's programs. (I note that this line of argument contradicts the MHSAA's assertion that it is all about participation and that its role is not to develop elite athletes.)

All of these so-called "better opportunities" presuppose that the twins have an interest in playing women's hockey. The evidence is clear, however, that at least at this point in time, they are not interested in doing so. The MHSAA's argument further assumes that the twins aspire to play women's hockey at an elite level. There is, of course, no evidence to this effect.

The MHSAA's argument ignores the evidence with respect to the superior skill and abilities of the twins and the generally lower calibre of hockey on the WKCI women's hockey team and in the women's high school league. It also ignores the testimony from several experts as to how important it is that players be challenged, that they play at a competitive level and that they have a positive experience.

The argument also fails to take into account the individual circumstances and views of the Pasternak girls themselves. The girls' views as to what is in their best interests may be open to challenge, but as in the *Blainey* case, I have no doubt that they are honestly held.

I find that the MHSAA's suggestion that its rule is justified on the basis that



the girls would be "better off" in the women's hockey program also fails.

I therefore conclude that the MHSAA has not satisfied the onus of establishing that its requirement that girls play on the girls' hockey team if the school has a girls team, or that its refusal to allow the Pasternak girls to try out for, and if successful, play for the WKCI men's hockey team, is justified.

Accordingly, I find that the MHSAA contravened section 13 of the *Code* by subjecting the Complainants to differential treatment based on their gender.

### Remedy

Given that I have found that the Complainants have been discriminated against, and the *Code* contravened, I must now determine the appropriate remedies for that contravention.

The Commission is seeking three orders. The first is an order requiring the MHSAA to remove the requirement that girls try out and play for a girls' team if the school has a girls' team, at least with respect to hockey. Counsel for the Commission acknowledged that the evidence did not deal with a wide range of sports, and asked that I strongly urge the MHSAA to be sure that it has objective evidence which would justify such a requirement with respect to other sports, or to eliminate the discriminatory effects of that requirement.

Under section 43(2)(a) and (b) of the *Code*, an adjudicator has jurisdiction to order a party to do or refrain from doing anything in order to secure compliance with the *Code*, to rectify any circumstances caused by the contravention and to compensate any party adversely affected by the contravention for any benefits lost by reason of the contravention.

I am satisfied that an order that the MHSAA remove its requirement that girls try out and play for a girls' hockey team if the school has a girls' hockey team is warranted.

I decline to make a similar order with respect to the other sports administered by the MHSAA, as there is no evidentiary base for any such order. However, as requested by the Commission, I strongly encourage the MHSAA to consider whether it has objective evidence which would justify that requirement with respect to each of the other sports, and if it does not, to remove that requirement or the discriminatory effects of that requirement with respect to each sport.

The second order being sought is an order that measures be taken to compensate the twins for the loss of skills they have suffered, in the form of one on one coaching support for the men's high school hockey team for goal and defence, and one session of hockey school appropriate to the girls' level and age, such measures to be determined by agreement between the MHSAA, the WKCI men's hockey team's coaching staff and the twins, with any cost to be borne by the MHSAA, and the possibility of returning before me to address any issues that cannot be resolved. Counsel for the Commission stated that she was confident that agreement could be reached in this regard.

Counsel for the MHSAA submitted that this request ought not to be dignified, in that any loss of skills can be attributed to the twins themselves. The remedies which they are seeking were available to them. They could have played minor hockey, and they could have had extra coaching, specifically for their positions, on the women's high school team. Instead, they chose to sit out and not play hockey for two years.

The MHSAA's submission in this regard is unfortunate. The evidence is clear that the twins did not just "sit out". They participated in other sports. They played hockey in the rookie tournament in the spring of 2005. They attended the try-outs for the WKCI boys' hockey team in both 2004-2005 and 2005-2006, right up until the end when they were told that they could not be on that team.

With respect to the suggestion that they could have played minor hockey, there is evidence that there was no AA or A1 boys' hockey team in their area in 2005-2006. The twins would therefore have had to play for a team in another area, and at significant expense. In addition, as practices and games are held at times which are less

convenient than high school hockey, playing minor hockey would have impacted on the time available to them for their school work, which is clearly a very important consideration for the twins.

The MHSAA's suggestion that the twins could have had extra coaching on the women's team completely ignores its evidence that the women's and men's games are very different. Any such coaching would obviously have been geared toward developing the skills necessary to play women's hockey. That is not the type of hockey the girls wished to play. What is more, coaching is only part of the equation in terms of skill and player development. Actual competition at an appropriate level is another. The MHSAA's suggestion is no answer to the adverse effects which would result from playing at a lower level and from lack of competition.

The MHSAA's own evidence indicated that the twins would need good quality ice time to catch up on what they will have missed in the past two years, including skills, fitness and reflexes. In the circumstances, I am satisfied that an order of this nature is justified.

I therefore order that the MHSAA take, or cause to be taken, the following measures to compensate the twins for loss of skills, such measures to be determined by agreement between the MHSAA, the WKCI men's hockey team coaching staff and the twins, namely one on one coaching support for the WKCI men's hockey team for the positions of goal and defence, and one session of hockey school appropriate to the twins' level and age, with all reasonable costs to be borne by the MHSAA. I will retain jurisdiction for the purpose of resolving any issues which may arise out of the implementation or interpretation of this decision.

The third order being sought is an order of general damages in the amount of \$3,000 to \$4,000 for each of the Complainants, for injury to self-respect and dignity. In this regard, counsel for the Commission pointed to the evidence of the emotional impact that this has had on the twins, and the loss they have suffered in terms of the benefits of participation in high school sports which witnesses for the MHSAA so eloquently

described.

Damages may be ordered under section 43(2)(c) of the *Code* for injury to a complainant's dignity, feelings or self-respect. I believe that the evidence demonstrates that the Pasternak girls did suffer significant distress and loss as a result of the MHSAA's denying them an opportunity to play on their school's men's hockey team, and that an award of damages is warranted.

Counsel for the Commission submitted that the range of damages which the Commission is seeking is consistent with the amount awarded in the *Blainey* case in 1988 (*Blainey v. Ont. Hockey Assn. (No. 2)*, 9 C.H.R.R. D/4972), where Ms Blainey was awarded the sum of \$3,000.00. It is also consistent with the damages awarded by the Ontario Board of Inquiry in *Casselman v. Ontario Soccer Association* (1993), 23 C.H.R.R. D/397, where a 15 and a 16 year old girl, who had been denied the opportunity to play soccer for a boys' team on the basis of their gender, were each awarded \$3,500.00 in compensation for loss of dignity.

I conclude that the Commission's suggested range of damages is appropriate and supported by the authorities. As a result, I order that the MHSAA pay to each of the Complainants the amount of \$3,500.00, to compensate them for injury to their dignity, feelings and self-respect.

#### Order

I therefore order:

1. That the MHSAA remove its requirement that girls try out and play for the girls' hockey team if the school has a girls' hockey team.
2. That the MHSAA take, or cause to be taken, the following measures to compensate the Amy and Jesse Pasternak for loss of skills, such measures to be determined by agreement between the MHSAA, the WKCI men's hockey team coaching staff and the Pasternaks, namely one on one

coaching support for the WKCI men's hockey team for the positions of goal and defence, and one session of hockey school appropriate to the Pasternaks' level and age, with all reasonable costs to be borne by the MHSAA.

3. That the MHSAA pay to Amy Pasternak and Jesse Pasternak the sum of \$3,500.00 each, to compensate them for injury to their dignity, feelings and self-respect.

I retain jurisdiction for the purpose of resolving any issues which may arise out of the implementation or interpretation of this decision.

Dated at Winnipeg, Manitoba, this 22<sup>nd</sup> day of September, 2006.

  
\_\_\_\_\_  
M. Lynne Harrison

