

# Gender Equity in Canadian Ice Hockey: the Legal Struggle

**Abstract:** In this article, John Eaton details Canadians' passion for ice hockey and chronicles the legal struggles of Canadian women to partake in the sport on an equal basis to men. Readers interested in the law of ice hockey are referred to the authoritative work on the subject, John Barnes's *The Law of Hockey* (Markham: LexisNexis Canada Inc., 2010) and those who wish to read more of the story of women's ice hockey in Canada should consult Etue, Elizabeth & Williams, Megan K., *On the Edge: Women Making Hockey History* (Toronto: Second Story Press, 1996).

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As I write this the motion picture 'Goon' has just opened in my home town of Winnipeg, Manitoba. I imagine that only in Canada would it be instinctual that a film with that title would be about ice hockey, specifically that very unique species of ice hockey player, the on-ice pugilist who metes out "justice" with his fists when opposing players start taking liberties with his team's star players, otherwise known as the team goon. Like many Canadians I shall see this film in the hopes that it can be added to the tiny list of ice hockey movies worth watching.



John Eaton

Ice hockey is referred to in Canada and the United States, simply as hockey. On this side of the Atlantic there are two types of hockey: hockey played on ice and field hockey which is played on grass. I shall be calling the sport "hockey" throughout this article and needless to say, I am referring exclusively to the hockey played on ice.

Canada is a small country with a population of 32 million souls who live in the shadow of their brash neighbour to the south. There are few endeavours in which Canadians are world leaders. There are two sports, however, in which we can lay credible claim to supremacy: curling and hockey. Both are very popular in Canada but the popularity of curling is far surpassed by that of hockey. Hockey is by far and away the most popular sport in Canada and is in many ways infused into the cultural soul of the country. Although the world's pre-eminent league, the National Hockey League, has more teams in the United States than in Canada, one should not surmise that hockey is more – or even equally – popular in the United States. Hockey remains a "boutique" sport south of the border and is a distant fourth in popularity there to American football, baseball, and basketball.

To provide some idea of the significance of hockey to Canadians it has been calculated that during the 2010 Olympic Gold Medal game between Canada and the United States, 26.5 million of Canada's 32 million people tuned into the game at some point with 16.6 million watching it in its entirety, making it the most watched television event in Canadian history<sup>1</sup>. Happily for that vast audience Canada won the match 3-2 with an exciting, sudden-death, overtime goal.

Given that so many Canadian watch, follow, and play hockey it is not surprising that the worlds of law and hockey sometimes come into contact. There have been some noteworthy occasions when hockey helped shape the law – and vice versa. There are many areas of law, such as contracts, business, labour, and intellectual property, which frequently intersect with hockey. However, I have chosen to look at hockey and the struggle of female players to achieve a measure of parity with male hockey players as regards access to facilities and opportunities to play, as it provides us with an interesting microcosm of the overall fight for gender equality in Canada.

As of 2011, according to International Ice Hockey Federation numbers, there were 572,411 registered hockey players in Canada of whom 85,827 were female<sup>2</sup>, comprising fifteen per cent of the total. This might not sound like a significant percentage but when looked at the context of how recent a phenomenon organised women's hockey is, it is remarkable. In the course of my lifetime I have seen organised women's hockey go from being non-existent, as was the case in my childhood in the 16.0, to being the focus of widespread interest particularly in the Olympics and women's World Championships (in which Canada and the United States invariably vie for the championship medal).

Vast numbers of Canadians hockey fans, both female and male, watch these matches. The names of many of the members of the national team are commonly known throughout the country and some women hockey players are even media stars. Hayley Wickenheiser, for example, who is almost universally acknowledged as the world's best female hockey player, has featured in a number of Canadian television advertisements and is as familiar a face in Canada as any male hockey star.

So while the growth of women's hockey in Canada has been exponential, it certainly has not been smooth and there have been a great number of barriers, societal and legal, which have been placed before it, on its journey to general acceptance.

Hockey, like many sports, was for years the preserve of men and a bastion of "maleness." No one ever questioned that it was a male activity and that every effort should be made to provide any boy who wished to play hockey, the opportunity to do so. After all, it was only boys who might one day grow up to be professional hockey players and therefore no one questioned preferential arrangements for boys' hockey leagues over those of girls. While it is true that hockey can be played on any stretch of ice large enough to accommodate a game, like a frozen pond, lake, or river, in reality organised hockey is played in special indoor and outdoor ice rinks constructed exclusively for this purpose. The demand for ice and ice-time greatly outweighs the supply and for years it was boys and men who got first crack at these facilities. I can personally attest to the rarity of ice-time by way of my experience when I was a law student in Toronto when a group of my friends decided to play hockey on a weekly basis and we were delighted to be able to secure ice-time from midnight to 1:00 am each Monday at a city centre rink. While it might have been a late hour, there were still many groups playing in the hours that followed.

In the 1970s, girls' interest in playing in organised leagues began to become more commonplace and as a result there were a number of legal challenges on behalf of young girls to be admitted to existing boys' leagues, in communities across the country. For the most part, these attempts were successful and it was around this time that children's leagues in the country started to admit both boys and girls. In some larger centres, leagues exclusively for girls were formed.

The formation of girls' leagues, however, demonstrated some real disparities in the access to facilities and ice-time between boys' and girls' leagues and female leagues had to lobby hard for equal treatment. One Saskatchewan case is particularly instructive. In 2000 an informal, unincorporated group of women student hockey players, who for litigation purposes called themselves Women 2000, filed a complaint against the University of Saskatchewan pursuant to the Saskatchewan Human Rights Code<sup>3</sup> on the basis that the university demonstrated preferential treatment of male hockey players. The women won before the Saskatchewan Human Rights Commission which agreed to appoint a tribunal to inquire into the complaint. The University of

Saskatchewan appealed, finally losing at the provincial Court of Appeal.<sup>4</sup> In 2007 the University of Saskatchewan settled the complaint with the Human Rights Commission by committing to taking significant steps toward effecting equality between the men's and women's hockey programmes such as increased funding for the women's team, the hiring of a top-level coach, and equity in the distribution of funds for athletic awards, *inter alia*.

Inequities in facilities and ice-time are still a source of frustration for many female hockey players. Another matter, however, has proved more troublesome. Once it became commonplace for girls and women to play organised hockey, some players found that they could not fulfill their potential continuing to play in all-female leagues, and that the best and most challenging environment was to be found playing in male or mixed leagues. In Canadian recreational hockey, most communities will have a "house league" of teams for whom anyone can play regardless of ability – it is these leagues which are most likely to accommodate girls – and "representative leagues" of the best players who represent the community in contests against the representative teams of other communities. These games often involve travel and it was in this context that the most important of all such cases occurred.

In 1985 in Canada's most populous province, Ontario, a twelve year old girl named Justine Blainey sought to improve her hockey abilities by playing at the highest level she could manage. She tried out for a representative league team in the Metro Toronto Hockey League (MTHL) and won a spot. The MTHL was a component part of the Ontario Hockey Association (OHA) who rejected her registration indicating her league was exclusively for males. At that time the OHA was paralleled by a women's amateur hockey association, the Ontario Women's Hockey Association (OWHA). The OHA took the position that Blainey should play in a girls' league while her argument was simply that in order to develop her considerable talent she needed to play at the highest possible skill level and that was to be found in the MTHL.

Ontario had rewritten its Human Rights Code in 1981.<sup>5</sup> Some of the changes had a direct impact on complaints involving sports associations. The most profound was subsection 19(2) which, under the guise of maintaining public decency, protected same-sex sports organisations against allegations of gender discrimination. In other words, an action could not be brought pursuant to the Code in cases where a player of one sex wished to be accommodated in a league of the other.

At the federal level, the Canadian Charter of Rights and Freedoms<sup>6</sup> came into effect in 1982. Subsection 15(1) of the Charter guarantees equal treatment before and under the law for all Canadians. In the Blainey case the OHA fashioned a subsection 19(2) defence and argued there was nothing in the Human Rights Code to prohibit what they were doing, or to assist Blainey. The trial court agreed with the OHA but the Ontario Court of Appeal found section 19(2) to be inconsistent with the Charter.<sup>7</sup> As the Charter operates exclusively in the public sphere, the Court of Appeal could not consider it in reference to

the activities of the Ontario Hockey Association, but it could strike down subsection 19(2). It did so and invited Blainey to relaunch her complaint. She did and she won acknowledgement that prohibiting her from playing on a boys' representative league team was discriminatory and a nominal damages award.<sup>8</sup> The net result was that the Ontario Hockey Association had to accommodate any player capable of playing in a representative league.

Two facets of the Blainey case and its fallout are quite interesting: one is that the Ontario Women's Hockey Association joined the OHA in barring Blainey's attempts to play in a boys' league fearing the possible erosion of the quality of women's hockey leagues if its most talented players fled to male leagues. The other is that section 15(2) of the Charter allows for discrimination in the context of affirmative action programmes. It exempts any "law, program, or activity that has as its object, the amelioration of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability;" from a Charter-based action. Organised hockey in Canada has become an example of the general acceptance of affirmative action practices in that while men's hockey leagues must accommodate qualified female players, there is no reciprocal right of male players to play in female leagues.

Most of the disputes involving the rights of females to play on male teams have involved young, often pre-pubescent girls. Hockey is a physically punishing sport in which players operate in a confined space, hurtling around at high speed on ice, and in which body checking is allowed. Many female players eventually find themselves physically incapable of keeping up with their male teammates and either quit the game or return to play in women's leagues. There have been few accommodation disputes involving girls in their latter teenage years or older. As a result, the case involving seventeen year old Winnipeg twins, Amy

and Jesse Pasternak is somewhat anomalous. The Pasternaks were very good hockey players who played for their high school girls hockey team. Like Justine Blainey and many others, they sought to play at the highest level possible and when refused admission to the school's boys team, they brought their complaint before an adjudicator of the Manitoba Human Rights Code<sup>9</sup> who ordered the Manitoba High School Athletics Association mandate their high school to allow them the opportunity to try out for the boys team. They were also awarded nominal damages and the school athletic association was ordered to provide them with appropriate coaching at the school.<sup>10</sup> The high school athletics association sought judicial review of the adjudicator's decision but their application was refused by the Manitoba Court of Queen's Bench.<sup>11</sup> In the end neither sister made the boys team.

Women's struggle for equality plays out in many spheres of activity, the most significant being of course the workplace; but it is not only in the realm of work that women must fight for equity with men, it can also be in the pursuit of non-work related interests and activities that they battle for equal treatment. As hockey is so interwoven into the fabric of everyday Canadian life, it is of little surprise that it has been a forum in the fight for Canadian women's equality with men. While it is not realistic to state that women's hockey generates the same interest and revenues that men's hockey does, it is unequivocally the case that it is yet another activity that was once the sole preserve of men but is now unquestionably accepted as equally appropriate an activity for women, as it is for men. Furthermore, one hopes that the profound countrywide affection felt for Canada's national women's hockey team will cause some to ponder and appreciate the obstacles and overt discrimination faced by many women hockey players in their pursuit of enjoyment playing the sport so many Canadians adore.

## Footnotes

<sup>1</sup> <[www.tsn.ca/nhl/story/?id=312025](http://www.tsn.ca/nhl/story/?id=312025)>

<sup>2</sup> <[www.iihf.com/iihf-home/countries/canada.html](http://www.iihf.com/iihf-home/countries/canada.html)>

<sup>3</sup> S.S. 1979, c. S-24.1

<sup>4</sup> *University of Saskatchewan v Women 2000 et al.*, 2006 skca 42, 268 D.L.R. (4<sup>th</sup>) 558

<sup>5</sup> *Human Rights Code*, S.O. 1981, c. 53

<sup>6</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982, c. 11

<sup>7</sup> *Blainey v Ontario Hockey Association* (1986), 26 D.L.R. (4<sup>th</sup>) 728 (Ont. C.A.)

<sup>8</sup> *Blainey v Ontario Hockey Association* (1987), 9 C.H.R.R. D/4549 and (1988), 9 C.H.R.R. D/4972 (Ont. Bd. of Inquiry)

<sup>9</sup> *Human Rights Code*, C.C.S.M. c. H175

<sup>10</sup> *Pasternak v Manitoba High Schools Athletic Association Inc.*, [2006] M.H.R.B.A.D. No. 1 and No. 2

<sup>11</sup> *Manitoba High Schools Athletic Association Inc. v Pasternak et al*, 2008 MBQB 24

## Biography

John Eaton is Librarian & Associate Professor of Law at the University of Manitoba, in Winnipeg. He is, like many Canadians, an avid fan of ice hockey and is unfortunately, a passionate devotee of the Toronto Maple Leafs which is, in British terms, like supporting a football team in constant threat of relegation.