

**THE PASTERNAK CASE AND AMERICAN GENDER EQUITY POLICY:
IMPLICATIONS FOR CANADIAN HIGH SCHOOL ATHLETICS**

Dean M. Beaubier, *Elton Collegiate Institute*, Shannon A. Gadbois, *Brandon University*,
and Sheldon L. Stick, *University of Nebraska - Lincoln*

In 2004 twin sisters Amy and Jesse Pasternak competed for the prospect of playing high school hockey, vying for the boys' team rather than the girls'. The sisters' opportunities were negated by the Manitoba High School Athletic Association (MHSAA). This paper examines the 2006 decision by the Manitoba Human Rights Commission and a 2008 judgment by the provincial Court of Queen's Bench regarding an application for judicial review. We argue that these decisions imply that Canadian high school governance bodies should study gender equity policies and the judicial decisions surrounding similar high school challenges in the United States. This ultimately has implications for future such circumstances.

Introduction

Goddard and Hart (2007) argued that Canadian public schools consistently have neglected gender equity issues because developed policy has been absent (Coulter, 1996; Sandford & Blair, 2002). The result has been to subordinate gender differences in public schools in academic and other realms of school life, including that of high school athletics. Web searches

of policy handbooks from Canadian provincial associations or federations governing high school athletics yielded minimal information addressing gender equity.* Although these organizations utilized relevant terminology in their mission statements or included gender equity as one in a list of several objectives, most did not have in-depth policy directives.

As distinct from Canadian rulings, this paper emphasizes thorough knowledge and consideration of the value of American Title IX policies and case documentation. In order to demonstrate Title IX's potential, this article examines the requests of two Manitoba youth, Amy and Jesse Pasternak, to participate on a male athletic team and the Manitoba High School Athletic Association's (MHSAA) response. The rulings and judicial commentary by the Manitoba Human Rights Commission (MHRC) (2006) and provincial Court of Queen's Bench (2008) in the Pasternak proceeding bore a strong resemblance to arguments and legal conclusions of gender equity issues in high school and college athletic programs in the United States. The outcomes allow for believing that increased attention to American athletic gender equity policy may have helped avoid the dilemma and ameliorated the conditions surrounding participation in sport.

The case is particularly important because: (1) it illustrates difficulties for concerned parties when the aforementioned absence of developed gender equity policy exists in a provincial school system, and, (2) it highlights the argument that problems particular to circumstance, access, and participation should be central foci when creating a well-crafted policy (Sammons, 2007). Without clear policy, we argue that an unsatisfactory outcome arose for both the Pasternaks and the MHSAA. This case seemed to show a lack of thorough consideration of relevant policy research and the development of appropriate guiding principles and/or courses of

* The key words we used in a Google web search included each individual province's name, and the terms *provincial, athletic, association, federation, handbook, gender, equity, and policy*. These words were used in various combinations in order to exhaust all possibilities in order to access provincial athletic handbooks.

action for dealing with such situations. The result of the dispute led to the belief similar outcomes will ensue for other provincial bodies that either fail to anticipate similar challenges to vague gender equity policies or continue to avoid re-examination of such directives.

American Gender Equity Policy and the Canadian Context

Athletic gender equity policy in the United States started with the development of the Title IX, June 23, 1972 policy which states “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance” (U.S. Department of Education, 2005, para. 2). Title IX, also known as the Patsy T. Mink Equal Opportunity in Education Act, was modeled after Title VI and Title VII of the *Civil Rights Act* of 1964 (Orleans, 1996; Passeggi, 2002). Title VI prohibited racial discrimination in activities benefiting from federal funds while Title VII prohibited employment discrimination on the basis of race and gender. On July 21, 1975, the United States Federal Government Regulation (34 C.F.R. Part 106) became effective. It focused on the application of Title IX to athletic programs, stating in part:

A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the [Athletic] Director will consider, among other factors: Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes (34 C.F.R.; 106.41[c] [1999]).

Legal arguments surrounding female sport participation and issues of athletic gender equity also have drawn on the U.S. Constitution’s Fourteenth Amendment Right: “No State shall make or enforce any law, which shall abridge the privileges or immunities of the citizens of the

United States ... nor deny to any person within its jurisdiction the equal protection of the laws” (U.S. Government Printing Office, 2002, p. 1671).

Arguments for the Study of American Policy

Goldstein (2006) stated that gender equity policy in Canada has been shaped in part by cross cultural factors such as Canadian scholars attending U.S. law schools and the establishment of studies and organizations parallel to those initiated by the American women’s movement. The author also observed the striking similarities between constitutional decisions made by the two countries. In fact, the considerable utilization of decisions from American jurisprudence to resolve issues in Canadian courts is well documented. The Canadian Supreme Court regularly looks to the constitutional jurisprudence of other countries to help in its analysis of the Canadian Charter of Rights and Freedoms (2010) (commonly referred to as the Charter) in the aftermath of its enactment in 1982 (Tjaden, 2010). Manfredi (1990) reported that more than 40 percent of the citations from U.S. decisions in the history of the Canadian Supreme Court occurred in the period between 1984 and 1988, and almost half of them appeared in Charter decisions. The author predicted a surge in U.S. citations as the Canadian Supreme Court considered more cases brought forth under section 15 of the Charter (equality rights). He pointed to the fact that in the first section 15 decision, *Law Society of British Columbia v. Andrews*, the Court cited seven American cases (p. 507).

These congruities fostered the view that if Canadians saw benefit from the study of American Title IX law they would be open to its potential adaptation or adoption. In fact, the two countries share an original vision of what constitutes athletic gender equity. In July 1993, the U.S. National Collegiate Athletic Association (NCAA) Gender Equity Task Force reported, “an

athletics program can be gender equitable when the participants in both men's and women's sports programs would accept as fair and equitable the overall program of the other gender" (NCAA, 1993, p.2). In December of that same year the Department of Athletics and Recreation's Task Force on Gender Equity at the University of Toronto released its report, stating: "An athletics program is gender equitable when the men's program would be pleased to accept as its own the overall participation, opportunities, and resources currently allocated to the women's program and vice versa" (Hall, 2002, p. 203). Using this principle, the institution became the first university in Canada to establish an athletic gender equity program (Naylor, 2008).

Beyond these facts and statistics, the fundamental question is whether Title IX provides any different or greater protection in the area of athletic gender participation rights currently afforded to Canadian citizens. We believe the answer is yes. Title IX is a legislated policy with two distinct advantages. First, the U.S. policy has federal implications and this advantage is illustrated by the limitations found in the legal avenues provided for Canadian sex equality cases. The Charter (2010) contains two sex equality provisions – sections 15 and 28, which state:

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

15. (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or economic origin, colour, religion, sex, age or mental or physical disability.

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons (para 20, 21, 44).

Despite these provisions, the Charter's direct influence on sport in Canada has been minimal (Findlay, 2008). This is because the Charter applies to matters of government action. This means it protects individuals in matters that are related directly to the government. The

Charter does not have a relationship to or binding authority in private or civil action (Findlay, 2008). While legal disputes involving gender equity and athletic participation have arisen between individuals and sport organizations in Canada, they generally have not involved schools. Thus, the Charter has not been applicable to these various challenges. Furthermore, actions related to public schools have not been subject to the Charter because of the unique nature in which extra-curricular activities are organized. They are regulated by governance bodies that technically are independent of individual schools and school boards. In *Blainey v. Ontario Hockey Association* (1986), the court ruled that private sports agencies were not subject to the equality provisions of the Charter, regardless of the degree to which they received government funding (Williams, 1996). So, while schools are government related entities subject to the Charter, the provincial associations or federations governing high school athletics are not.

Civil actions in athletic gender equity involving provincial sport organizations are subject to human rights legislation and have been referred instead to provincial human rights tribunals or commissions. These commissions have been criticized as quasi-judicial in nature, understaffed, and slow-moving (Robinson, 2002; Taylor, 2010; Canadian Bar Association, 2010). A major problem with this jurisdictional arrangement is that decisions in one province are subject to that province alone and independent from another; therefore, a judgment involving the actions of a sport organization in one province does not legally influence similar bodies in the other provinces. This was evident in how the 1986 Ontario *Blainey* decision affected the 1996 British Columbia *Merkley* grievance. The Ontario Court of Appeal determined 12- year old Justine Blainey had the right to play in a boys' hockey league, but 10-years later Melanie Merkley still had to petition the British Columbia Human Rights Commission for the same opportunity in her province (Hall, 2002, p. 203). As is discussed later, the Pasternak outcomes (2006, 2008)

demonstrated this same issue: the findings failed to automatically translate into similar rights for female athletes in other provinces.

The federal nature of Title IX guarantees that court decisions and government mandated changes have far-reaching connotations. Unlike the fragmented intra-provincial policies existing in Canada, American directives influence every level of education with a considerable sense of immediacy. For example, in March 2005 the U.S. Supreme Court ruled that those who are penalized for complaining about gender discrimination can go to court to challenge the retaliation to which they are subjected. The case, *Jackson v. Birmingham Board of Education* (2005), illustrated the magnitude of influence one decision can generate in a milieu where the policy framework is interconnected. Jackson acted as a catalyst for litigation of this nature and it led to a wave of retaliation claims (Buzuvis, 2010). Similarly, the recent finding in *Biediger, et al. v. Quinnipiac University* (2010) exemplifies the degree of impact the U.S. legislation has. That ruling determined that competitive cheerleading was not a sport. As a result, institutions hoping to establish compliance with Title IX through the provision of participatory opportunities in cheerleading must now explore other avenues and create alternative options for students.

The second major advantage of Title IX is that it provides specific means for athletic institutions and organizations to establish gender equity. There is an absence of such directives in Canadian legislation. In 1979, the U.S. Department of Education issued a letter to educational institutions that outlined the “three-part test.” The letter responded to requests for specific guidance, including examples, regarding the existing standards for measuring nondiscriminatory participation opportunities. Institutions were given three options for demonstrating compliance with the law: have the same proportion of women on sports teams as there were female undergraduates, have a history and continuing practice of expanding opportunities for women, or

prove they were fully and effectively accommodating the interests and abilities of women on the campus and among the institution's potential students (U.S. Department of Education, 1979).

While Title IX has not been a panacea for athletic gender equity in the United States, it has survived challenges in all three branches of the U.S. federal government – legislative, executive, and judicial. Documented shortcomings include alleged roles in the reduction of men's athletic teams and the support of gender quotas (Brake, 2004; Epstein, 2002; Gavora, 2002; Langton, 2009; Staurowsky, 2003, Kasic, 2010). Nevertheless, no argument has altered the original framework of the American policy, critical when studying any discussion that profiles the limitations of Title IX.

Title IX also has been acclaimed for its contributions to providing equity in terms of both participation and program development in higher education athletics (de Varona & Foudy, 2003; Grossman, 2003). In 1971, only 294,015 girls participated in American high school athletics but that number has grown to more than three-million (Stevenson, 2007), and, concomitantly the number of female athletic teams at both the high school and college levels has increased considerably. From 1981 to 1999, the total number of college women's teams increased by 66 percent (U.S. Department of Education, 2003). Illustrative of the explosive growth, according to the U.S. General Accounting Office (2001), is that United States colleges created over 846 new women's soccer teams.

In Canada, men participate in sport much more actively than women (Statistics Canada; 2005). Trussell and McTeer (2007) cite gender as a central issue in children's organized sport participation and note that male participation rates continue to be higher than those of females despite the introduction of Canadian policy and legislation. They surmise that this difference in participation "may be representative of a disconnect from policy to practice, and inadequacies found in the quantity and quality of opportunities provided for girls at the community level" (p. 126).

The beneficial outcomes of the U.S. policy prompted mention by the Canadian Association for the Advancement of Women and Sport and Physical Activity (CAAWS) in a 2002 brief to the Canadian federal government. The body encouraged any new legislation put forth in the development of Bill C-54, the Physical Activity and Sport Act, to “have the same impact on women’s participation in sport and physical activity as Title IX legislation has had in the United States for the past 30 years” (CAAWS, 2002, p. 1). Regarding this impact, Shannon Miller, former Canadian national women’s hockey coach, commented, “I moved to the United States to coach women's college hockey for a living simply because of Title IX. If by now, in the year of 2005, athletic directors and university presidents have not implemented 'equality' among men's and women's athletic programs on their own, then I believe it has to be legislated by government. Title IX was legislated in the United States and it has helped close the abyss between women's and men's athletic programs with respect to support in all necessary areas. Because of Title IX, many more women participate in sport in the United States, believe in themselves and become successful people in life” (paraphrased personal communication from S. Miller, August 6, 2005).

The Pasternak Case

Amy and Jesse Pasternak were twin sisters who attended West Kildonan Collegiate Institute (WKCI) in Winnipeg, Manitoba, Canada. In September 2004 the sisters were entering grade 10 and decided to try out for the boys’ school hockey team. The school had a girls’ hockey team but the program was in its infancy and the girls believed the skill level was weak (CBC, 2006). The Pasternaks wanted to play in a program that had full body contact. Incidental contact occurred in the girls’ program but body checking was not allowed. The sisters always had played

together on boys' teams in the Winnipeg minor hockey association, and never on a girls-only hockey team.

The girls participated in the first two-weeks of practice at WKCI, and were supported by the team's manager even though he was aware of the eligibility rules put forth by the MHSAA, one stating, "If a school has both a boys' and a girls' team, then the students would play for their respective gender" (MHRC, 2006, p. 3). Although WKCI offered a girls' hockey team, the manager for the male team had secured letters supporting the twins' potential participation on the boys' team from: the school principal, the athletic zone president, and the president of the Winnipeg High School Hockey League. He enclosed all relevant documents in an appeal letter sent to the Executive Director of the MHSAA that sought an exemption from the stated policy.

On September 21, 2004 an email from the MHSAA Director denied the appeal, stating they [the Board] "felt that as your school has a boys' and a girls' team, there is equal opportunity for the students." Subsequent letters of appeal from the girls' mother and the team manager were not answered, and on the last day of try-outs the twins were told they could not play. On October 22, 2004 the Pasternaks filed a complaint with the MHRC.

A Manitoba Human Rights Officer investigation led to a recommendation (July 21, 2005) that the matter be heard by an adjudicator. In September 2005 the twins again tried out for the WKCI boy's hockey team. On September 14 the MHSAA Executive Director informed the school that the girls' involvement was a matter still to be resolved by the MHRC, and under the prevailing rules "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" (p. 9). The school unsuccessfully examined the possibility of private insurance, and the twins again were told they could not play for the boys' team.

For two-years the MHSAA denied Amy and Jesse Pasternak the opportunity to compete for their high school boys' hockey team. The justification was predicated on existing policies that apparently had not been revisited since their inception. There was no evidence supporting the inception for such a rule (requiring boys to play on boys' teams and girls to play on girls' teams) but the Executive Director testified that it was policy when he took the job in 1974. On September 22, 2006, after nine-days of hearings involving expert evidence in June and subsequent consideration of the matter, the Manitoba Human Rights Adjudicator found in favour of the complainants. It was determined that the twins girls had a right to play on the boys' team, be judged on the basis of their merit, and the denial had been due to gender-based discrimination. The MHSAA was ordered to remove the disputed restriction from its rules for the purposes of hockey only, to compensate the Pasternaks for hockey instruction and to pay them each the sum of \$3,500.00 for injury to their dignity, feelings, and self-respect (MHRC, 2006, pp. 9-10).

The ruling was challenged by the MHSAA in an appeal brought before the Manitoba Court of Queen's Bench in June 2007. The sport organization based its application for judicial review of the MHRC (Court of Queen's Bench of Manitoba, 2008) upon six distinct arguments related to skill and financial compensation (see Appendix A for all six areas of disagreement). After a two-week hearing, the judge ruled that the sisters could try out for the boys' team September, 2008. Ironically, they were cut from the squad after the final day of try-outs. Both sisters publicly acknowledged their disappointment but believed the coach's decision was based entirely on merit (CBC News, 2006). On January 21, 2008 Justice J. McKelvey, from The Court of Queen's Bench, found that the MHRC had acted appropriately when rendering its initial decision, and subsequently dismissed an application for judicial review submitted by the

plaintiffs. Amy and Jesse Pasternak refused comment on the case in the aftermath of the decision.

In 2006 the MHSAA revised its gender equity policy regarding student-athlete participation to read: “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.” (MHSAA, 2006, p.2). But despite the ostensible policy change, the organization’s constitution continues to advocate a gender participation directive that implies the word ‘encourages’ should be replaced with ‘requires’ when discussing the majority of opportunities put forth for female athletes. After the Pasternak decision, the organization’s revised constitution stated, “The MHSAA endeavors to provide equal opportunities for athletes. If a school does not have a girls’ team, then a 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. (except in hockey, where a girl may try out for a boys’ team, even if the school has a girls team.)” (MHSAA, 2008, p.10). This limitation in the policy revision failed to address the scope of the problem, maintains the status quo of general inequity in athletics, and is addressed subsequently in this manuscript.

The Pasternak Case: Through the Title IX Lens

It seems some of the MHSAA arguments defending its gender equity policy might not have been made if United States athletic gender equity policy had been adequately considered. This shortcoming became evident when examining two of the arguments put forth in the MHSAA appeal for judicial review. The first was that a justifiable reason existed for the

particular act of discrimination. The second maintained that the actions of the MHSAA did not validate financial compensation to any alleged victims of discrimination.

Justifiable Discrimination

The most important argument or question the MHSAA put forth when it sought a judicial review was: should this Court set aside the Adjudicator's finding that the MHSAA had failed to prove, on a balance of probabilities, that there was a bona fide and reasonable justification for the prima facie discrimination. The justification for the policy action of the MHSAA is found in the American regulation implementing *Title IX* effective July 21, 1975. At that time specific provisions governing athletic programs were put forth in Code of Federal Regulations at 45 CFR 86. In December 2005 these provisions became part of 34 CFR 106.41 which states in part: "[W]here a recipient [of federal funds] operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try out for the team offered unless the sport involved is a contact sport" (U.S. Department of Education, 2010, para 106.41(b)). Title IX, therefore, indicates that: members of an excluded sex could try out for a sex-segregated team only if there was no equivalent team available to them, or that gender separation could be enforced if the team in question involved a contact sport. Contact sports are defined in the statute as "boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact" (U.S. Department of Education, 2010, para 106.41(b)). Furman (2007) noted that the rationale for the inclusion of the contact sport exemption in Title IX has never been clear (p. 1179).

When denying the Pasternak twins an opportunity to compete on boys' hockey team, the MHSAA governing body relied extensively on the argument that the girls' opportunity to participate was fully addressed by the fact that an equivalent team was available to them. The MHSAA went to great lengths to demonstrate that the school's teams were equivalent in resources provided to players of both genders. Both groups received equal ice time for practices, the same number of scheduled games, the same training facility, and the equivalent in terms of well-qualified coaching. The lawyer for the MHSAA stated, "Separate but equal is a reasonable way to proceed" and maintained "[t]here has to be a regime in high school, so the maximum number of students get maximum benefits" (Martin, 2007, p. B3).

The cornerstone of the governing body's (MHSAA) defence was that a form of discrimination was necessary to ensure that the boys did not lose their opportunity to play hockey. Such reasoning had been supported in instances during the early history of Title IX (Bucha v. Illinois High School Association (1972); Ritacco v. Norwin School District (1973); Ruman v. Eskew (1976); O'Connor v. Board of Education of School District No. 23 (1981)). The doctrine of separate but equal has been well-documented in athletics during the decade after Title IX legislation (Kadzielski, 1983) and has continued with lower courts upholding its constitutionality (Kiselewich, 2008).

A specific American case similar to the Pasternaks' situation was *O'Connor v. Board of Education of School District No. 23* (1980). In that situation the plaintiff, Karen O'Connor, was a middle-year female student who wanted to play on her school's all-male basketball team because it offered a higher level of competition than did the female team. Despite basketball being considered a contact sport under Title IX policy, she received a preliminary injunction ordering the school to allow her to try out for the male team. However, the 7th Circuit overturned the

District Court ruling, stating that O'Connor was not allowed to try out for the male team because she had the opportunity to play on the reportedly inferior female team.

The plaintiff appealed to the Circuit Justice, who determined there was no claim by the defendants that the boys' athletic program would be harmed by allowing O'Connor to participate, nor was there any assertion that her exclusion was necessary in order to protect her from harm. The Justice noted that the plaintiff did not appear to dispute the defendant's representation that the separate athletic program for the girls was equal to the boys' program in terms of time, money, personnel, and facilities devoted to each.

When rendering the court's decision, Justice Stevens focused on the defendant's argument that there was adequate reason for discriminating against O'Connor because of her sex. In his final opinion he maintained that any advantage the plaintiff gained from competing in a boys' program did not outweigh potential damage created in the aftermath of the elimination of gender-based classification in competitive sports. It was noted there might be "substantial risk that boys would dominate the girls' programs and deny them an equal opportunity to compete in interscholastic events" (O'Connor, 1980, para. 14).

Thus, in the Pasternak case the MHSAA appeared to have a relevant argument that the alleged discrimination was, in fact, both reasonable and acceptable. However, it appears this governing body overlooked or disregarded relevant American judicial decisions that might have more effectively informed their decision making. Similar legal challenges prior to and after the O'Connor case resulted in successful challenges involving female participation on male teams. Those cases avoided invoking Title IX support and, instead, claimed a violation of Fourteenth Amendment rights. For example, in *Darrin v. Gould* (1975), the Washington Supreme Court applied the State's equal rights amendment and rejected the defendant's argument that female

plaintiffs could sustain injury in boy's football. The Court noted injury to the average male was never a reason applied to justify exclusion to any boy who wanted to participate. In *Israel v. West Virginia Secondary School Activities Commission* (1989), a case similar to the Pasternak's, the plaintiff was a female who wanted to play on an all-male baseball team. She was deemed ineligible because a separate female softball team was available. The court ruled that softball and baseball were different sports and the plaintiff's state and federal equal protection guarantees had been violated.

Furman (2007) said a number of important principles could be extrapolated from the successful challenges to rules restricting female participation on male teams through the application of the Fourteenth Amendment. He argued that relevant decisions demonstrated that: (1) gender classifications that perpetuate stereotypical notions of gender roles without regard for the abilities of the individual student violate the Fourteenth Amendment, and (2) notions of equity dictate that talented and qualified females should be given the opportunity to compete at a potentially higher level (for example, on a men's team) (p. 1179).

A careful analysis of United States policy and legal discourse on the issue of gender equity in secondary schools should have dissuaded the MHSAA from pursuing the argument that its policy was a form of acceptable discrimination. Two points were germane. The first involved expert opinion regarding policy directives. When appearing before the MHRC, the MHSAA utilized several 'expert' witnesses to buttress their position against the Pasternak twins. The Adjudicator ruled those experts did not provide sufficiently cogent arguments in comparison to the sole expert produced by the complainants.

In its appeal for a judicial review the MHSAA argued that the Adjudicator's deference to the complainants' single expert was unreasonable in the face of what they deemed a "mountain

of expert evidence” (Court of Queen’s Bench, 2008, p. 38). The reviewing Judge rejected the MHSAA position and in doing so pointed out that the MHRC claim was valid: “to accept the ‘mountain of evidence’ argument could equate to the possibility of an acceptance of many forms of discriminatory conduct which have taken place over the years” (p. 44). She cited the MHRC counsel’s argument that experienced individuals in the system “require evidence, objective evidence and not assumptions or impressions to justify discrimination” (p. 44).

The MHSAA’s apparent reliance on generalization and opinion rather than fact and solid evidence was a substantive concern. It failed to comprehend the problem with its initial argument, as evidenced by the persistent dependence on it when seeking a judicial review. If that governing body had perused United States cases it is possible they would have realized its position was unsound and predicated upon improbable grounds. *Adams ex rel. Adams v. Baker*, 919 F. Supp. 1496, 1503 (D. Kan. 1996) and *Leffel v. Wis. Interscholastic Athletic Ass’n*, 444 F. Supp 1117, 1122 (E.D. Wis. 1978) both illustrated that point. In those cases the defendants supported the exclusion of females from male teams arguing they were protecting girls from potential injury they might sustain from playing contact sports with boys. Those claims were supported by generalized evidence or stereotypes about the size and strength of males versus females. Ultimately, the courts rejected the arguments as the basis for exclusion because they did not address any individualized assessment of the female athletes’ abilities (George (2002)).

The second contention the Association sought to employ when defending its gender equity policy was that it inevitably protected female teams. In its appeal for judicial review, the MHSAA submitted evidence stating the Pasternaks’ exclusion from the boys’ hockey team was necessary, in part, because “allowing girls to try out for boys’ teams could mean the demise of girls’ teams” (Court of Queen’s Bench of Manitoba, 2008, p. 39). In the aftermath of the MHRC

decision and prior to the MHSAA appeal to the Court of Queen's Bench, the governing body issued a media release in which its executive director, Morris Glimcher said, "Does this now mean that boys can tryout [sic] for girls teams? Do we eliminate gender specific teams? How will this affect female participation?" (personal email, September 25, 2006). Again, a review of cases involving the Fourteenth Amendment and Title IX likely would have answered these questions.

Powell (2004) noted the U.S. courts consistently have espoused the exclusion of males from participating on all-female teams through the use of the Equal Protection Clause that allows for: (1) "redressing past discrimination against women in athletics," and (2) "maintaining, fostering, and promoting athletic opportunities for girls" (Darowski, p. 165). Cases where Title IX violations have been alleged by male high school students challenging to play on all-female teams also have proven unsuccessful for plaintiffs, [Mularadelis v. Haldane Central School Board (1980), and Forte v. Board of Education (1980)] because Title IX had not been violated and male student athletes already had an advantage in overall athletic opportunities to participate in interscholastic athletics. In fact, in the first female Title IX challenge to an educational institution – Cohen v. Brown University, the Court actually referred to female athletes as "the historically disadvantaged sex" (Cohen v. Brown University, 1993, para. 52).

When resolving the Pasternak case, the Court of Queen's Bench (2008) did not address the specific issue of boys challenging for spots on female teams, but it is reasonable to surmise that rulings similar to U.S. findings would be made. The Adjudicator in the Court's decision referred to the Pasternak twins as belonging to a class, high school girls, which have been "historically disadvantaged" (p. 26), the same language used in Cohen (1993). Further, it was stated, "... 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" (p. 40). This viewpoint exemplified the conceptual framework mirroring the legal perspective in U.S. court decisions involving the inverse situation, whereby boys try out for girls' teams.

Financial Compensation

The MHSAA also wanted a judicial review based in part on the Adjudicator's award of general damages for alleged injury to the Pasternaks' dignity, feelings and self-respect. In its appeal to the Court of Queen's Bench, the Association asserted there had been no injury whatsoever and, thus, no financial compensation to the twins should be forthcoming. The MHSAA maintained that the absence of any injury was evident because the Pasternaks "continued to do well in school, played other high school sports and did not require any personal or private counselling to assist with any alleged damage to their dignity, feeling and self-respect" (p. 54). The governing body further advocated the sisters had not been denied an opportunity to participate because they were encouraged to try-out for the girls' hockey team and they could have pursued opportunities in male contact hockey that existed outside of high school athletics within the Winnipeg Minor Hockey Association. The MHSAA argued "... any loss of dignity, feelings or self-respect was, in part, instigated by choices made by them [the Pasternak twins]" (p. 54).

The Queen's Bench Judge (2008) found once more in favour of the MHRC's original decision, to allow the girls to compete for positions on the boys' team. The Judge stated that an award of general damages could be found in a significant volume of case law where

discrimination had been determined under the particular statute and code in question. In addition, the judge agreed with the MHRC's Adjudicator that the award of damages pertained to the MHSAA's discriminatory action in refusing to let the Pasternaks complete the try-out process for the male hockey team. The chance to play on boys' teams in other leagues or a requirement for personal counselling was deemed irrelevant to such an award.

This second context illustrates, again, that with study of similar issues in the American setting, the MHSAA might not have been surprised that an eventual challenge to their gender equity policy would be posed by an individual party rather than a body, like the local school board or the provincial department of education, and it should have been prepared for the eventuality that litigation could result in financial compensation to the complainant(s).

Illustrative of compensatory findings was the case of *Cannon v. University of Chicago* (1979). That was important because the emphasis placed on the U.S. federal government's administrative investigations of Title IX violations was circumvented in the aftermath of the court's ruling. Four-years after the approval of the Regulation (34 C.F.R. Part 106), the U.S. Supreme Court handed down the decision that individuals with complaints arising under Title IX could avoid the time-consuming administrative procedures of the Office for Civil Rights (OCR) and instead proceed with a private right of action in the legal system. The significance of such a decision was summed up by Hunt (1999): "this move precipitated a flood of new litigation and essentially installed the courts as the primary enforcers of Title IX" (p.6).

Subsequently, the U.S. Supreme Court held that students could seek injunctive relief under Title IX but also could obtain monetary damage awards (*Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 73 (1992)). Orleans (1996) cited that decision as "the most important cause for the ultimate inception of Title IX litigation" (p.138). Thus, failure to comply

with Title IX meant institutions not only could face the costs of ensuring the accommodation of student interests, but also incur the financial burden of paying out personal damages.

Discussion

In the Pasternak (2006) case the MHSAA believed its directive to be the best available approach to a quandary that could not be solved in a consensual fashion. This was borne out by the Adjudicator's observation that the Association had not acted in bad faith ("Editorial-The Right Decision," 2006). However, the case demonstrated a need for governance bodies to ensure their gender equity policies were developed based upon the best information possible, and to explore resources from all relevant sources. In this instance, the MHSAA defended its judicial stance using educators directly involved with high school athletics. Its lawyer stated, "I have 171-years of expert testimony. We have 171-years of 'you got it right', from teachers and principals with decades of experience in high school academics and sports, who back the MHSAA" (Martin, 2007, pB3). The problem with such a statement was those 'decades of experience' did not translate into knowledge of what constituted athletic gender equity and underscored an historic trend of gender discrimination in athletics.

Boutte (2008) believed many teachers are overwhelmed by the rapidity of changing demographics because they lack a knowledge base in critical pedagogy and corresponding strategies for addressing issues of oppression and discrimination. Using material from Shaul (1999, p. 16) she argued that "inherent in many conventional educational knowledge bases and teaching methods is a deficit perspective that 'functions as an instrument that is used to facilitate the integration of the younger generation into the logic of the present system and bring about conformity to it'" (p. 166).

The Pasternak case illustrates that implementation of equity initiatives is not an easy task. Kezar, Glenn, Lester, and Nakamoto (2008) found that educational change agents of contextual conditions tend to follow a ‘cookie cutter’ approach to the strategies undertaken, and it often leads to quantitative measures of the existing circumstances. Such an approach appears to have been employed in the Pasternak (2006) case. When attempting to persuade both the MHRC and the Court of Queen’s Bench that the Pasternaks were afforded a gender equitable opportunity, the MHSAA often referred to the equality between the boys’ and girls’ hockey program created at West Kildonan Collegiate Institute. The problem with that argument was that it did not distinguish between equality and equity.

Canadian sport activist Bruce Kidd stated, “Equality focuses on creating the same starting line for everyone; equity has the goal of providing everyone with the same finish line” (Hall, 1995, p. 268). The process to establish equity might include equal treatment of two groups. However, the governing body’s attempt to address the issue primarily through the establishment of equal elements of athletic programs did not, in fact, constitute a gender equitable situation. While addressing issues of coaching, funding, practice time, and facility access, the MHSAA did not consider the quality and nature of the opportunity in relation to the Pasternaks’ ability and interest. When revising and developing a meaningful athletic gender equity policy, governing bodies must ensure that their policy directives move beyond solely quantifiable objectives.

The MHSAA’s approach to ensuring equity was similar to what often is referred to as the “laundry list” in United States athletics, areas and means of compliance set forth for educational institutions to examine (NCAA, 2010, p. 33). The Title IX Regulation of 1975 introduced 11 areas and means of compliance (see appendix) and the U.S. federal government’s 1979 Policy Interpretation added two more (support services and recruitment of student athletes). While

helpful, they are not an exclusive map for U.S. institutions seeking to ensure equity for student-athletes. Although the concepts of equivalency and proportionality are important policy objectives, other distinctions include athletic benefits and opportunities and effective accommodation of student interests and abilities (Judge, O'Brien, and O'Brien; 1995). In the United States there are policy methods associated with the formation and substantiation of athletic gender equity. They are transparent, available for reference, and could be utilized as platforms for Canadian purposes. In addition to the Regulation, the Policy Interpretation, and the Three-Part Test, this includes the recent 2010 Clarification Letter regarding survey use to determine athletic interest.

Future Directions

The Pasternak rulings (2006, 2008) opened doors for exploring Canadian athletic gender equitable environments. It should have provided an impetus to re-examine equity policies but two-years after the decision, the Ontario Federation of School Athletic Associations (OFSAA) continued to include a gender equity policy bylaw similar to the one the Manitoba court deemed discriminatory: "OFSAA supports student-athlete participation on same-sex teams *if* programs are equitable in terms of coaching, funding, practice time, or facilities. If a sport activity is not available for a female, she is eligible to participate on the boys' team. If a sport activity does not exist for a boy then he is not eligible to participate on the girls' team" (OFSAA, 2009, p. B37). However, in 2010 then 17-year-old Courtney Greer was denied the opportunity to play for the boys' soccer team at Sir John A. Macdonald Secondary School in Waterloo, Ontario. Like the Pasternaks, she had the support of her school's coach and administrators (Alphonso, 2010, para 6). Greer filed an application with the Human Rights Tribunal of Ontario, arguing that the

OFSAA's policy prohibited her from playing in a setting of her choice on account of her gender. On April 19, 2010 the Association announced that Greer would be granted the opportunity and that its gender equity policy would be revised to state a young woman "is eligible to participate on a boys' team if she demonstrates comparable skill and ability during a successful try out" (Human Rights Legal Support Centre, 2010, para 3). The OFSAA president, Doug Gellately, said the executive board's decision to change the policy was directly related to the Pasternak case but was only after the board's lawyer advised him that Ms. Greer would probably win her case (Mick, 2010, para 7 and 8).

Many provincial school athletic associations continue to maintain gender equity policies similar in nature to Ontario's previous model. In fact, high school sports officials from a number of provinces, including Alberta and Saskatchewan, said they would maintain their policy status quo until an individual challenged them (Mick, 2010, para 11). Others have modified their policy more on a sport to sport basis rather than the overall change Ontario chose.

New Brunswick Interscholastic Athletic Association's (2010) current policy lists sanctioned sports and the gender eligibility for each. Ignoring the Pasternak (2008) decision in hockey and the Greer (2010) decision in soccer, only baseball, cheerleading, and football are open for either gender to try-out for the same existing team. The policy reads: "Where parallel programs are provided student-athletes must participate in the appropriate gender category. The onus is on individual member schools to provide programs consistent with the Association's sanctioned activities. However, if a member school elects not to register in a particular activity, a female-athlete may try-out for the team of the opposite gender within the school" (p. 56).

For the 2010-11 season Nova Scotia School Athletic Federation (NSSAF) released new rules and regulations with regard to gender equity and participation. "In NSSAF sports

designated as Boys or Girls, only students of the appropriate sex may participate in the designated classification. However, if a school elects not to have a female team in a gender-designated sport, a female student-athlete may try out for the male team within the school. The onus is on individual schools to provide programs consistent with NSSAF-sanctioned activities” (NSSAF, 2010, para 3). Like New Brunswick, they too have ignored the Pasternak and Greer Human Rights decisions and only baseball, cheerleading, and football are designated as open to both genders for try-outs. Ironically, when it was stated that the Pasternak ruling applied in Manitoba to girls trying out only for boys’ high school hockey, the MHRC adjudicator cautioned the MHSAA to be ready to defend its gender barriers in other high school sports (Martin, 2008, pB2).

The danger of inaction with regard to updating policy is that sport organizations often contain take-for-granted structures, policies, and behaviours that continually reinforce and perpetuate the gendered nature of athletics (Shaw & Frisby, 2006). Fink (2007) observed, “sport is still a powerful mechanism by which male hegemony is constructed and reconstructed” (p. 146). The study of American athletic gender equity policy and the issues pertaining to its more than thirty-eight year history should be considered a resource for providing Canadian policymakers with valuable insights.

With regard to the evaluation and development of equity policy, Canadian policymakers would benefit from examining the *Secretary’s Commission on Opportunity in Athletics* (U.S. Department of Education, 2003). This report resulted from a panel of 15 experts appointed by the U.S. Secretary of Education. Their task was to hear concerns about Title IX from various stakeholders such as athletic directors, coaches, scholars, and athletes. The Commission made 23 key recommendations to strengthen and improve the law. Although the Bush administration

sought to ameliorate the policy and effectively eliminate the limitations evident in Title IX, the government ended up accepting Title IX status quo. The report gives readers a perspective of how Title IX directives aim to resolve issues through the best possible means available. While an increase in knowledge rarely leads to a concrete solution for a policy problem, a quest for better information and improved analyses often results in formation of directives that are rationally more persuasive to constituents (Green, 1994).

Finally, improved knowledge of American judicial findings in cases of athletic gender equity policy also would be beneficial for Canadian sport bodies. Case law has been a powerful change agent regarding participation because of its potential to change interpretation and application of equity and equality for all (Caldwell, Shapiro, & Gross; 2007). The pursuit of such knowledge might help Canadian athletics leadership to envision how an individual's rights might be interpreted or misinterpreted in disputes, and it could provide examples of how resulting policies have been shaped. For these reasons, Canadian policymakers should read *Gender equity in intercollegiate athletics* (NCAA, 2010). Although it focuses on post-secondary athletics, it devotes an entire chapter to current U.S. case law. The chapter discusses legal actions that range from those involving separate programs, like the Pasternak situation, to those focused on issues of effective accommodation, program elimination, and retaliation.

It is believed that although there are significant differences in the governance of high school athletics between Canada and the United States, Canadian officials would find U.S. policies significantly instructive given their substance. Hopefully greater consideration and oversight will be extended to evolving gender equity policy directives by all Canadian high school athletic governance bodies.

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Appendix A

1. Should this Court set aside the Adjudicator's determination that the Pasternaks had made out a case of prima facie discrimination on the basis of the utilization of an erroneous legal test?
2. Should this Court set aside the Adjudicator's finding that MHSAA had failed to prove, on a balance of probabilities, that there was a bona fide and reasonable justification for the prima facie discrimination?
3. Should this Court set aside the Adjudicator's findings of fact with respect to the Pasternaks' skill level?
4. Should this Court set aside the Adjudicator's finding of fact with respect to the level of competition available in the Winnipeg Women's High School Hockey League?
5. Should this Court set aside the Adjudicator's award of general damages to the Pasternaks for alleged injury to their dignity, feelings and self-respect?
6. Should this Court set aside the Adjudicator's award of individualized hockey instruction for the Pasternaks? (appeal document, p. 8).

Appendix B

The controlling regulation requires that institutions “provide equal athletics opportunities for members of both sexes.” In order to determine whether a school provides equivalent athletics benefits and opportunities, the OCR will review the following “laundry list” of treatment issues:

- Provision and maintenance of equipment and supplies
- Scheduling of games and practice times
- Travel and per diem expenses
- Opportunity to receive tutoring and assignment and compensation of tutors
- Opportunity to receive coaching, and assignment and compensation of coaches
- Provision of locker rooms, practice and competitive facilities
- Provision of medical and training services and facilities
- Provision of housing and dining services and facilities
- Publicity
- Support services and
- Recruiting