# worldsportslawreport

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# Women's Ski Jumping and Olympic programme inclusion

A group of female ski jumpers took legal action against the Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games, alleging that its failure to include a women's ski jumping event amounted to a breach of the Canadian Charter of Rights and Freedoms. Seema Patel, a Lecturer in Sports Law and Management with Nottingham Trent University, examines the International Olympic Committee's criteria for inclusion in the Olympics, the exceptions that exist for traditional Olympic events and the current status of the appeal.

In the case of Sagen v Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games[1], a group of 15 highly ranked female ski jumpers from five countries brought a claim against the Vancouver Organising Committee for the 2010 Winter Games (VANOC), contending that a female ski jumping event should be included into the Games, just as it is for men. They argued that because VANOC plan, organise, finance and stage the ski jumping events for men, failure to offer an equal event for women is an infringement of women's equality rights as protected under Section 15(1) of the Canadian Charter of Rights and Freedoms[2];

'Every individual is equal before the 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'.

Essentially, they claimed that they were being excluded from participation because of their sex.

## Did VANOC breach the Charter?

In order for VANOC to be held accountable, the claimants needed to prove that VANOC were either controlled by government or performing a governmental function. On this point, Justice Fenlon held that there was no government control over VANOC and instead they were 'like a franchisee of the IOC [International Olympic Committee], than a purchaser of a product'[3]. However, a private entity that is not controlled by government can still be subject to the Charter if they carry out a 'government activity'[4]. Whilst the IOC owns the Olympic Games, it was VANOC's responsibility to stage the event. The staging of the Games was considered to be a 'rare but uniquely governmental activity'[5] that resulted in VANOC being subject to the Charter.

Yet in a 'grotesque twist of legal logic'[6], VANOC was not in breach of the Charter because 'designating events as "Olympic events" is neither part of that government activity nor within VANOC's control'[7]. Instead, it is the IOC who controls event selection, but they are not bound by the Canadian Charter because they are a Swiss based organisation[8]. It is fair to assume that VANOC were not directly responsible for the exclusion of the female athletes, because they have no authority within IOC event selection process. However, it could be suggested that they are condoning discrimination by agreeing to host an event (the Olympics) that has been structured by the IOC upon a set of rules that may be discriminatory. The wording of Section 15 (1) seems incompatible with this behaviour. Any direct challenge against the IOC event selection criteria has historically been unsuccessful as Lines and Heshka demonstrate[9], drawing upon the US case of Martin v International Olympic Committee[10]. Indeed, a number of IOC policies escape the legal fishing net and continue to exist to restrict individuals or groups from participation.

## Is the IOC selection criteria discriminatory?

In May 2006, the Federation Internationale de Ski (FIS) voted to recommend the inclusion of the women's ski jumping 'normal hill' (the 90m jump) in the 2010 Winter Games. However, the IOC vetoed this proposal in November 2006 on the grounds of 'technical merit'.

According to Rule 47 (3.2) of the

Olympic Charter, events must have a recognised international reputation and must have staged two world championships to be included in the Games. Women's ski jumping has only staged one world championship, which took place in Liberec, Czech Republic in February 2009. However, during the FIS congress in Antalya, Turkey in June 2010, members agreed to create a women's ski jumping world cup circuit for 2011-2012[11].

Rule 47 (3.3) states that only events practiced by men in at least fifty countries and on three continents, and by women in at least thirty-five countries and on three continents, can be included into the Games[12]. The claimants asserted that the application of this rule by the IOC was discriminatory because in fact both men's and women's ski jumping fall short of the required 'universality' under this criteria[13]. Despite this, Rule 47 (4.4) attempts to validate the inclusion of men's ski jumping;

'Sports, disciplines or events included in the programme of the Olympic Games which no longer satisfy the criteria of this rule may nevertheless, in certain exception cases, be maintained therein by decision of the IOC for the sake of the Olympic tradition'[14].

It is worth noting that the 2006 revised version of the Olympic Charter does not include these criteria, but the IOC continues to apply them[15]. Justice Fenlon agreed that this exception rule was discriminatory as it amounted to historical stereotyping and prejudice that serves to exclude women and include marginalised men's events in order to maintain Olympic traditions. Because ski jumping has been a Winter Olympic sport since 1924, it is exempt from an Olympic gender equity policy which requires that since 1991, all new sports wishing to be included on the Olympic programme must include competition for both men and women[16].

**The claimants were successful in proving the inconsistent application of the selection criteria, but not that the selection criteria itself was discriminatory**

The application of these rules is inconsistent with the true 'technical merit' of women's ski jumping, a sport which appears to be more successful than other existing Olympic sports[17]. Many of the female claimants have competed against and succeed over their male counterparts in mixed international competitions[18]. American Skier Lindsey Van currently holds the record for the Whistler 90m ski jump having beaten her male competitors in an earlier competition at the facility[19]. Whilst Justice Fenlon accepted these achievements and sympathised that 'societal headwinds' have compromised the inclusion of female ski jumpers in the Olympics, at the same time she appeared to be protecting the IOC by highlighting their policy initiatives aimed at including women in sport[20]. She subsequently held that any discrimination suffered by the claimants derived from Rule 47 (4.4) and nothing else.

The claimants were successful in proving the inconsistent application of the selection criteria, but not that the selection criteria itself was discriminatory. On both issues, therefore, the claimants were unsuccessful. The Supreme Court later added that it will not hear an appeal by the female ski jumpers. However the athletes argue "this is about human rights and discrimination and it's a wrong that must be righted"[21].

## Overt and covert practices of inclusion and exclusion

The Olympic Charter overtly promotes non-discrimination and labels the practice of sport as a human right[22]. Changes to the Olympic Programme have been made to include women's boxing and even to consider new events in wrestling, swimming and cycling as well as the consideration of the inclusion of a mixed doubles tennis event.

The FIS has also re-submitted its proposal to the IOC, to include women's ski jumping into the Sochi Winter Games 2014 and with the approval of a new top tier world cup event for women, it is hoped that this will be achieved.

However the arbitrary grandfathered Rule 47 (4.4) reflects the covert implications of IOC policies that result in the unreasonable exclusion of women from sport. Without recognition as an Olympic event, funding has been strained for women's ski jumping[23].

The tensions between overt and covert practices are illustrated by Carr[24], who uses the example of sailing to explore further discrepancies between the ideals of the Charter and their application. This event is overtly equal for both men and women, but is covertly restrictive to women because of the physical size of the boats selected by the International Sailing Federation (ISAF).

## Conclusion

In Sagen, Justice Fenlon delivered a host of contradictory messages that represented a clear legal struggle to intervene in Olympic matters, even though there was an identification of discriminatory practice. Irrespective of who the defendant may be, international commitments to universal policies such as the Universal Declaration of Human Rights 1948, the United Nations Convention on the Elimination of Discrimination Against Women (CEDAW) 1980 and the Brighton Declaration 1984, place positive obligations upon the state to avoid and regulate discriminatory behaviour. The judgment in this case is difficult to

reconcile with these obligations. It has been argued that whilst Canada is a leading participant in international conventions, there have been examples of their failure to implement specific equity laws and policies to promote sports for women[25].

The reluctance to hold VANOC accountable may have been economically driven - Justice Fenlon could have been concerned that a decision against VANOC may prejudice any future Olympic opportunities for Canada. This places significant political and economic power with the IOC, which has the autonomy to exercise a regulatory function as a private entity, and essentially apply whichever rules they wish. However, they are operating in a manner that is not accountable to fundamental norms such as human rights and equality. To justify this, exemption on an economic basis is unacceptable.

The approach of the Canadian courts certainly favours and maintains certain Olympic traditions. These covert cultural traditions operate to control sport and often alienate women in sport. There is no logical rationale for the Sagen decision, but when it comes to the influence of sporting culture, maybe there never will be.

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