

The IOC Made Me Do it: Women's Ski Jumping, VANOC, and the 2010 Winter Olympics

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Introduction

Equality cases under the *Canadian Charter of Rights and Freedoms*¹ are discussed mostly for the complexity of their equality dimensions and the corresponding jurisprudential challenges such nuances present litigator and judge alike. The recent *Charter* equality challenge in *Sagen v. VANOC*² — the women's ski jumping case — presents a modification to this theme. It was a tricky case for the challengers, but not because of the discrimination issue. Rather, the novelty of the state action problem in this case caused the ski jumpers the most trouble, and, formally, defeated their claim. Indeed, at both the British Columbia Supreme Court and the British Columbia Court of Appeal this state action issue befuddled the equality analysis itself. The result is a case that has tremendous immediate popular power as an instance of sex discrimination but that nonetheless has no purchase under the *Charter*.

One might choose to discuss at length this doctrinal twist. After all, both court decisions add to the free-for-all that equality reasoning under section 15 has become. Delphic utterances from the Supreme Court of Canada and lower court creativity have combined to render section 15 jurisprudence the ski cross of *Charter* litigation. This comment will discuss some of the problematic turns the two decisions took in rejecting the claimants' arguments about violation of the *Charter's* equality provisions. However, the point of doing so is not to argue that there is another, doctrinally truer, course the

courts should have taken, one that guarantees just, fair, and right results. Rather, the purpose is to demonstrate that application questions under the *Charter* are condemned to jurisprudentially “uncomfortable” outcomes as a result of an indeterminacy at the base of bills of rights — such as the *Charter* — born of and nourished by liberal legalism. As law professors Hutchinson and Petter argue, “inevitably the foundation collapses, like a false bottom, disclosing the political chasms beneath.”³

The outcome in *Sagen* is, perhaps, not quite the disaster that the quote implies. The women ski jumpers, while clearly facing gender discrimination, are not the most indigent equality claimants one can imagine. Even excluded from jumping at the Olympics, they are not fording the Styx. The case on its own immediate terms is less distressing than those of other defeated equality claimants — such as that of Louise Gosselin in *Gosselin v. Quebec (Attorney-General)*,⁴ where the ideological shaping that guided both the Quebec legislative regime and the majority judgment at the Supreme Court of Canada displayed deeply problematic (but popular) political assumptions about young welfare recipients — assumptions that left untroubled severe economic deprivation. Nonetheless, sanctioned sex discrimination in a publicly funded exercise on the scale of the Olympics is no small issue. It reinforces and perpetuates a troubling but traditional discriminatory message about women, athletics, and social citizenship. (More about this later.) But even more remarkable is what the decisions say about the relevance of the *Char-*

ter to government activities. A programme of activity successfully located as governmental under section 32 of the *Charter* can still evade *Charter* scrutiny as long as the element at issue in that programme simply follows directions issued by some private actor. It is another turn of the screw: even governments can escape *Charter* responsibilities. It becomes less and less clear just what progressive contribution the *Charter* makes to struggles for a just and fair society. Or, perhaps, it becomes more and more clear that the *Charter* is not of any great direct or special help to such endeavours.

The “Inrun”⁵ to the Case

The facts surrounding the ski jumping case have become part of the larger political fabric of the 2010 Winter Olympics in Vancouver. Already contentious for its civil, economic, and environmental impacts, the Winter Olympics became notorious for the International Olympics Committee’s (IOC) refusal to include women’s ski jumping as an event⁶ in the Olympic games programme, and for the Vancouver Organizing Committee’s (VANOC) apparent acquiescence in this decision. Ski jumping has the dubious status of being the only sport in the Winter Olympics that is not open to both men and women.⁷ Men have jumped in the Olympics since 1924. Three men’s ski jumping events were scheduled for the 2010 Games.⁸ No women ski jumpers’ competitive events have ever been scheduled at any Olympics.

A string of events led to the initiation of a constitutional challenge before the British Columbia courts. Women ski jumpers have argued for inclusion in the Winter Olympics for several past Olympics. In May 2006, the International Ski Federation, the governing body for international skiing competitions, voted 114 -1 to approve a request to the IOC that women’s ski jumping be added to the 2010 Games programme. The following November, VANOC, after receiving a request to do so from members of the Canadian Women’s Ski Jumping Team, sent a letter in support of inclusion to the IOC. Days later, however, the IOC Executive Board decided not to include women’s ski jumping in the Games. The IOC claimed the ruling was

based on “technical merit” and had nothing to do with gender discrimination.⁹ President of the IOC Jacques Rogge elaborated: “We do not want the medals to be diluted and watered down.”¹⁰ At this point, by all appearances, VANOC quietly accepted the IOC ruling and the exclusion. The women ski jumpers did not. Four mothers of female ski jumpers filed a discrimination complaint with the Canadian Human Rights Commission.¹¹ The complaint resulted in a mediated settlement which, it has been reported, required the federal government to press the IOC to include women’s ski jumping in the 2010 Olympics.¹² Efforts by Helena Guergis, federal Secretary of State for Sport, were unsuccessful. Faced with this outcome, on May 21, 2008 a group of nine elite women ski jumpers — from five countries including Canada — filed a *Charter* challenge to their exclusion from the Olympic Games.¹³

A year and a half later, the case has failed: a rejection of the challenge by the British Columbia Supreme Court¹⁴ was confirmed by the Court of Appeal¹⁵ and leave for a further appeal was denied by the Supreme Court of Canada.¹⁶

The Jump: Argument at Each Level of Court

The case raised two key doctrinal issues: does the *Charter* apply to VANOC and, if so, has VANOC unjustifiably infringed the *Charter*’s equality rights by staging men’s ski jumping but not women’s ski jumping at the 2010 Olympics? And there was one critical fact: the IOC alone has control over the selection of events staged at the Games. The results at both levels of court in British Columbia revolved around this fact, although its doctrinal significance varied.

Application of the *Charter*

Jurisprudence on the application of the *Charter* is complex. It relies on a fundamental, but ultimately porous and indeterminate, distinction between government and non-government. The result is that Supreme Court of Canada case law is a labyrinth of qualifications and alternative lines of argument. Even the first decision on *Charter* application, *RWDSU v. Dol-*

phin Delivery Ltd.,¹⁷ is contradictory—holding that the *Charter* both does and does not apply to the common law.¹⁸ Comment on this inconsistency is not novel¹⁹ but it reminds us that, from the start, *Charter* application jurisprudence has been plagued by judicial insistence on a false positivism with consequent contradiction and confoundment.

The reason for this is simple. The *Charter*, like any other liberal rights protecting document, has a central (but impossible) necessity: it must articulate a coherent boundary between the public and the private, between government and non-government. And it must use this boundary to determine whether the *Charter* applies. Protecting the individual from the powerful state is one thing. Indeed it is the ambition that animates liberalism: in classical liberal thought, the concentrated power of the state imperils the “heroic individual.” For many liberals, this core “anxiety” is addressed by the imposition of formal, legally imposed rights to maintain the ideologically mandated boundary between state power and individual liberty.²⁰ But requiring non-state actors to adhere to constitutional virtues is something else. This use of rights smacks of the very state coercion of individuals that liberalism fears: an attack on the moral autonomy of the individual.²¹ It tips rights protections on their liberal heads, changing them from markers of liberty to instruments of state control.²² The application of rights to non-state actors is thus contradictory within classical liberalism’s prism. Liberal rights documents must preserve a sphere of untouchable private action clear of obligatory constitutional norms and “state” virtues.²³ And, this separation of the public sphere from the realm of private activity sets limits on the types of rights claims the courts recognize.²⁴

Section 32 of the *Charter* governs the reach of the *Charter*²⁵ and has been interpreted by the Supreme Court to instantiate such a public/private distinction. This is done by way of the doctrine of vertical application and that doctrine’s reliance on the distinction between government and non-government. Thus the *Charter*, we are told, applies only to government actors and actions. This requires in any *Charter* application

case some analytical inquiry into whether or not the state, as the Supreme Court of Canada’s interpretation of section 32 understands it, is involved.²⁶

Of course, it is impossible to draw a clear and predictable line between what is an exercise of state power and what is not. The state is so fully imbricated in all aspects of social and economic life, in both the retention of current distributions of resources and changes to that distribution, that convincing arguments can almost always be made that something both is and is not a product, somehow, of state action. Reliance on such a distinction ignores how the “public” and the “private” influence and reinforce each other. While the distinction is an interesting and sometimes useful abstraction, attempts to use it to draw a line in the real world are “at best futile and at worst covertly ideological.”²⁷ That is, while the line between the public and private is indeterminate, the articulation of it, in this instance by courts, is not apolitical but rather follows often clear ideological lines.²⁸ (Indeed, the line-drawing involved is always political — sometimes just more starkly so depending on where the observer stands.) Still, the larger point is that *Charter* application jurisprudence is committed to a distinction that is analytically central but practically indeterminate. When judges, then, are asked to decide if an entity or an action lies inside or outside the realm of *Charter* scrutiny, they are “engaged in political and partisan decision-making.”²⁹ Liberal democratic theorists generally need not deny this — but certainly some (liberal) defenders of judicial review do.³⁰

The result is case law that skates on thin ice — using fancy judicial footwork, and the occasional leap, to distinguish past jurisprudence when new and compelling factual scenarios emerge. In this manner, at least two lines of argument for holding an entity or an activity accountable as government under the *Charter* have emerged from the Supreme Court. First, the *Charter* will apply if the entity in question is itself “government” for the purposes of section 32. This entails an examination of the nature and degree of governmental control and requires a finding of routine, daily governmental

oversight of the entity.³¹ The test is one of form, rather than function: are the markers of government control present? If the entity in question or the action under issue is subject to the requisite degree of government control, then it will be deemed governmental for the purposes of *Charter* application. The second line of argument holds that, even if the entity itself is not “governmental” in this first sense, the *Charter* will be held applicable to an otherwise private entity to the extent that the entity is carrying out a government policy or programme. This second test’s ancestry lies in *Eldridge v. British Columbia (Attorney General)*,³² a judgment where the Supreme Court of Canada, faced with sympathetic rights claimants, had to find a way around its previous holding that hospitals were private (not governmental) entities and thus immune from *Charter* oversight.³³ The Court’s solution in that case was to generate a second line of argument for *Charter* applicability — one that looked to the activity not the entity.³⁴

The ski jumpers, at least at the trial court, argued that VANOC was subject to the *Charter* along both lines of argument. VANOC’s argument here, and at every stage of argument at both levels of court, was simply that the IOC alone had the power to set Olympic events.

The issues of *Charter* application were canvassed at most length in the trial judgment of the British Columbia Supreme Court. Madam Justice Fenlon rejected the plaintiffs’ contention that VANOC was subject to “routine or regular” control by government.³⁵ This was despite the following facts:

1. the governments collectively³⁶ appoint a majority of the members of the Board of Directors, at pleasure (not fixed terms), and can also name special appointees to the Board;
2. the governments have a series of rights to financial and business information and approvals;
3. the governments make significant direct and indirect financial contributions to the Games’ budget;
4. VANOC is prohibited from amending

its bylaws or essential governing structure without consent of all governments;

5. VANOC’s original by-laws and letters patent are subject to approval of three of the governments;
6. VANOC is fiscally accountable to government.

Instead, the court stated that VANOC was subject to the “routine and regular” or “day-to-day” control of the IOC, a private, Swiss non-governmental entity.³⁷

Madam Justice Fenlon continued nonetheless, stating that “hosting the 2010 Games is uniquely governmental in nature.”³⁸ The Olympic Games are awarded not to a private entity but to the host governments: only a government can bid for and host Olympic Games.³⁹ The IOC, while it owns the Games, does not actually stage them. The result, Justice Fenlon concluded, was that “VANOC is subject to the *Charter* when it carries out the activity of planning, organizing, financing, and staging the 2010 Olympics.”⁴⁰ Thus, the *Charter* is applicable as an extension of the second line of argument, initially elaborated in *Eldridge*.⁴¹

However, despite her earlier conclusion that the *Charter* applied to VANOC as it delivered the Olympics, Justice Fenlon found that section 15 could not apply to the exclusion of women ski jumpers from the Olympics. A breach of section 15 cannot be found for decisions that VANOC cannot control: “only those activities and the decisions that VANOC has the ability to make while delivering those activities can be the source of a breach of the *Charter*.”⁴² VANOC did not, the court asserted, exercise any of its decision-making power in delivering the 2010 Games in breach of section 15. In short, the application issue reemerges, this time as spoiler of the section 15 claim.

Like a piece of Swiss cheese, the activity of delivering the Olympics has holes in it. VANOC, staging a government programme with a discriminatory element, gets to say it is merely acting on the orders of the IOC and is therefore immune to section 15 obligations. The government activity named in the application discus-

sion turns out not to include the selection of competitive events — only the staging of those events.⁴³ The result allows government to carry out or assign a programme with any number of explicitly discriminatory events, provided that the control over the decision to discriminate is contractually left with some entity other than the government or the stager of the event. This effectively folds the “ascribed government activity” test back into the government control test, albeit at the section 15 stage, and the slice of government activity is now more holes than cheese.

Reasoning at the Court of Appeal followed this result but by a different route. The Court of Appeal began its section 32 analysis from the position that VANOC is a private entity controlled by another private entity, the IOC: “no government has legal power to control VANOC even if government wished to do so.”⁴⁴ The court goes on to say that even if the hosting of the Games could be construed as a matter within the authority of the government under section 32 of the *Charter* (and thus a governmental programme), the selection of the events at the Games could not. This is because the IOC has the exclusive authority to set those events. Moreover, the government contracted for the Olympics before the events had been set, indicating that “it is clear that the specific events to be staged were not important to the goals of government.”⁴⁵ This is unpersuasive. Governments may have been agnostic as to what events are scheduled generally. But surely they should be assumed to have as at least an implicit goal that constitutional standards are observed in any programme in which they participate.

At the Court of Appeal, the *Charter* application focus is narrowed to the decision to exclude the women. The broader context is irrelevant and the question of whether the staging of the Games is otherwise subject to the *Charter* is left open. Thus the claim fails at the *Charter* application stage: there is no government actor nor government activity involved in the exclusion of the women ski jumpers. The import is the same as at the lower court: leave decision-making responsibility for some element of a (possible) government programme with some other pri-

vate player and that decision — no matter how odious — is *Charter* immune.

The British Columbia Supreme Court and Court of Appeal both ignored that the IOC’s decision to exclude the women is implemented and realized by VANOC’s staging of the Games. VANOC must take a myriad of small and large actions to ensure that the men can compete: construction of the ski jumps, transportation to Vancouver and to the competitions, provision of housing in Vancouver, provision of athletes’ seats at the Opening Ceremonies, conducting medal ceremonies with medals, and so on.⁴⁶ VANOC excluded the women from each of these activities and the men’s exclusive participation is made possible only by these activities. Pointedly, in practice, there is no clear and sharp line between the IOC’s decision and VANOC’s implementation of it.⁴⁷

Contractual obligations ought not to negate VANOC’s duty to refuse to implement a discriminatory decision if the law, here the Constitution, requires such a refusal. To say that VANOC had no control over the question, and therefore no constitutional obligation, is to reverse the proper order of analysis and to allow contract to trump constitution. It was a variant of this concern that led the Supreme Court of Canada to elaborate an alternative course to *Charter* applicability in the *Eldridge* decision: “Just as governments are not permitted to escape *Charter* scrutiny by entering into commercial contracts or other ‘private’ arrangements, they should not be allowed to evade their constitutional responsibilities by delegating the implementation of their policies and programs to private entities.”⁴⁸ Otherwise, governments can simply privatize their way out of *Charter* compliance.

The Court of Appeal, despite its section 32 conclusion, also considered the section 15 aspect of the case, if merely to recycle its initial arguments about control. Here the court narrowed the guarantee of equality proffered by section 15 to a guarantee that applies only to “the way that the law affects individuals.”⁴⁹ Relying on the Supreme Court of Canada judgment in *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*⁵⁰, the court argued that the

ski jumpers must show that the unequal benefit (the availability of men's but not women's ski jumping events) is "in some way a product of 'law'."⁵¹ This, the Court stated, is a threshold requirement for section 15 breaches.⁵² And because the decision to exclude the women does not stem from statutory authority (or from any other power flowing from the Crown) there was no "law" involved to trigger section 15 analysis.⁵³ Moreover, even if the Multiparty Agreement or the Host City Contract (the two contracts "assigning" the Olympics to Vancouver) qualified as law,⁵⁴ the policy that is the subject of the ski jumpers' complaint lay within the exclusive authority of the IOC, not those contractual documents.⁵⁵ The issue under section 15, for the Court of Appeal like the trial court, then, was control — more specifically, VANOC's lack of control over the choice of events at the Olympics.

This is an unconvincing argument. It makes little sense to restrict section 15 to a narrower ambit than other *Charter* rights and to exclude actions otherwise caught by section 32.⁵⁶ The argument immunizes significant ranges of the modern administrative state's allocation of resources and powers. And this argument also effectively allows government to contract out of equality rights responsibility for elements of programmes for which it is otherwise accountable under the *Charter*. Too thin a parsing of government action that is accountable under section 15 adds yet another mogul to the run for equality litigants.

Discrimination Against the Women Ski Jumpers

While the issue of discrimination was not the legal fulcrum on which these judgments turned, it was, after all, the whole point of the case. Some observations consequently are warranted. This case is just one moment in the history of women in ski jumping but it encapsulates the larger and long-standing gender issues of the sport. Commentators have noted that the sport of ski jumping, in particular, "offers an illuminating discourse in gender stereotypes and expectations."⁵⁷ Organized sport in general both

constructs and enforces historical myths about women's physical inferiority.⁵⁸ Ski jumping offers a particularly compelling illustration, as it is a sport from which women have until quite recently been excluded, yet it is also a sport in which women's abilities are roughly comparable to men's.⁵⁹ Thus, tensions around women's exclusion and the threats their inclusion represents to the gendered texture of the sport are easier to read.⁶⁰ Certainly, despite women's performance as jumpers, gender stereotypes about women and the sport persist. Only a few years ago, Gian Franco Kasper, at the time head of the International Ski Federation, opined to the media about ski jumping for women: "Don't forget, it's like jumping down from, let's say, about two meters on the ground about a thousand times a year, which seems not to be appropriate for ladies from a medical point of view."⁶¹ Apparently, exploding uteri threaten.⁶²

Consequently, the equality issue in this case is, as equality issues go, an easy one. It is simple, formal equality that is at stake. The much-maligned "similarly situated" test does just fine as a vehicle for showing up the discrimination at issue here. As a number of commentators have already noted, rights claims that require significant redistribution or state expenditures tax our courts.⁶³ Claims where the female equality litigants are much the same as comparable men "but for" their gender are the most section 15 friendly.⁶⁴ In the *Sagen* case, the jumps were already built. No subtle understandings of gendered nuance or complications of the social manifestations of sex difference are needed. The women jump as well, sometimes better, than the men and the evidence is clear that it is only their gender that holds them back.

This case is also not unique, nor is the discrimination newly noted. Sex discrimination challenges to sporting facilities and organizations abound. One of the first section 15 gender discrimination cases involved a successful challenge by a twelve year old girl, Justine Blainey, who wished to play in a boys-only hockey league.⁶⁵ Since *Blainey*, every year or two it seems, a sex discrimination challenge based on exclusion from full benefits of some organized sport surfaces, although typically these cases

are brought under statutory human rights law and not the *Charter*.⁶⁶ While the ski jumpers were considering their legal action at least two other sport sex discrimination complaints were in the news.⁶⁷

Madam Justice Fenlon's conclusion on the question of different treatment was stark: "the exclusion of women's ski jumping from the 2010 Games is discriminatory... [T]he plaintiffs will be denied this opportunity for no reason other than their sex."⁶⁸ Her reasoning was straightforward. Neither the male nor the female ski jumpers met the requisite degree of "universality" required by the IOC's formal criteria for event inclusion.⁶⁹ Both fail by roughly the same amount (taking into account the differential rates the criteria set for men and women), yet the men got to jump by virtue of their historic involvement in the "Olympic tradition."⁷⁰ And the "Olympic tradition" by which the men benefit incorporates and is shaped by historic stereotyping and prejudice against women athletes — women ski jumpers in particular. The "grandfathering" of the men into the Olympics "perpetuates the effect of that prejudice and is, therefore, discriminatory."⁷¹ The only problem for the ski jumpers' case was that the discrimination was done by the IOC, not VANOC.

The IOC escaped lightly. The British Columbia Supreme Court took at face value the IOC's many expressions of good will towards gender equity. The court gave only slight weight to expert findings of extensive discrimination against women in the ski jumping movement and in sport generally, and the impact of this discrimination on the IOC's decision.⁷² The women had argued that historic prejudice against women in ski jumping meant that, even though the IOC's criteria determining the required degree of universality for a sport to be included in the Olympics set a lower threshold for women than for men, the criteria for women were discriminatory.⁷³ Historic prejudice had acted as "societal headwinds" preventing women from reaching technical merit requirements.⁷⁴ The ski jumpers gave evidence about lower levels of funding, support, and training opportunities than their male counterparts, making the achievement of a world-class level

very difficult, if not impossible.⁷⁵ Inclusion in the Olympics was cited as a key and necessary mechanism for the growth and expansion of the sport.⁷⁶ The court rejected these broader arguments, arguing that discrimination flowed only from the application of the "Olympic tradition exemption" to the men's ski jumping.⁷⁷

Outside of the courts, more realistic and less naive understandings hold sway. Observing that other events newly scheduled for the 2010 Games — notably women's ski cross⁷⁸ — also fall significantly below the universality threshold for inclusion that the IOC claims it applies, some argue that: "What matters to the IOC is: Will the event sell tickets, will it sell TV time, is it popular?"⁷⁹ Partner this observation with the following comment by Dick Pound, a long-time Canadian IOC official, about future IOC treatment of the ski jumpers, and the IOC's insistence that the decision was based "purely on technical merit"⁸⁰ becomes increasingly suspect:

But if in the meantime, you're making all kinds of allegations about the IOC and how it's discriminating on the basis of gender and so on then the IOC, in a very human reaction, might say, "Oh yeah, I remember them. They're the ones that embarrassed us and caused us a lot of trouble in Vancouver. Maybe they should wait another four years or eight years or whatever it may be."⁸¹

Only 17 per cent of the IOC members are women and only one woman sits on the IOC executive.⁸² The evidence suggests that the commercial imperatives of a private corporation that owns the rights to a very expensive sporting event — as well as personal grudges or biases — can significantly and unfairly influence selection of new competitive Olympic events.

The "Outrun:"⁸³ Reflections on the Challenge

The decisions by the two courts were not particularly popular. Editorials in the local papers supported the women⁸⁴ and a recent poll showed that 73 per cent of Canadians were in favour of including women ski jumpers in the Olympics.⁸⁵ A comment by Lindsay Van, one of the defeated ski jumpers, sums up one par-

ticular sentiment: “The Canadian court system is a little bit weak if it can’t stand up to the IOC and apply Canadian law.”⁸⁶ Even the trial judge found “something distasteful”⁸⁷ about the outcome.

Certainly, one could argue for an improved theory of *Charter* applicability. Both academics and judges have articulated more functional tests for designating an entity or activity as governmental that better fit the landscape of contemporary Canadian society.⁸⁸ But such doctrinal finessing is not the main mission of this comment. Rather, the purpose is to show how even a fairly simple claim of sex discrimination can founder when forced to seek resolution through *Charter* litigation.

Law can variously moderate, confirm, or challenge power.⁸⁹ *Charter* law, in particular, has been touted as establishing a set of guarantees that moves us towards a better and fairer society. But as we have seen in *Sagen*, the distinctions at play in *Charter* argument can instead “provide formal paraphernalia behind which private power thrives relatively unchecked and substantive issues are arbitrarily and unjustly resolved.”⁹⁰ More specifically, the private power of both the IOC and VANOC as the two corporations roll out a large public event — at considerable public inconvenience and expense, with broad government involvement — is rendered unproblematic. VANOC’s complicity in IOC treatment of the women is excused, even legitimated. The exclusion of the women ski jumpers, even though condemned by the lower court judge, is left intact. Governments, the IOC, and VANOC, after expressions of concern for the “girls,” quickly move on.⁹¹ The *Charter* case, it seems, simply reinforces the power of the Olympics corporations to treat women however they see fit.

To return to the earlier point that the drawing of any line between the public and the private is inevitably political, what was at stake in this case? How can we understand the courts’ refusal to draw the line so that VANOC and the exclusion of the women ski jumpers lie within the reach of the *Charter* and its equality rights? Certainly, VANOC occupies a hazy middle ground between formal government and its

legislative acts, and other entities now clearly doctrinally accepted as private. Would holding VANOC subject to the *Charter* threaten the collapse of these older distinctions? Perhaps. Anytime a new and challenging factual scenario forces a recalibration of the line, there is the risk that the indeterminacy of the whole public/private edifice will be clearly revealed. If this corporation (VANOC) or this programme (the Olympics) is considered governmental, then who knows what corporation is within range of the *Charter*’s strictures?

But maybe it is also important that this case is about sport, and about women in sport. Imagine if the exclusion had been of some other group, say black or Jewish participants, and if the event had been some other form of international meeting hosted by our governments. Would the courts have been as hands-off in such a case? Would the governments and local organizers been as quick to defer to an extranational decision maker?

Much has been written about sport as transmitter of social and cultural values, its replication of hierarchical, racist, militaristic, and patriarchal social structures, and its centrality to Western society.⁹² A history of exclusion and discrimination (of many sorts) marks national and international sports organizations. “The history of modern sport is a history of cultural struggle.”⁹³ But it often takes clever and persistent social archaeology to reveal how this history persists and shapes what we consider normal and natural about sport, and how sport plays such a powerful and structural role in our societies. Perhaps the ski jumpers’ application of the *Charter* to the Olympics ran afoul of deeply entrenched ideas about sport — of dominant assumptions about sport as essentially private and individual, not a public institution. That Canadian human rights law had a tradition (now defunct) of allowing sex discrimination in sports speaks to long-standing assumptions about, among other things, the preferability of private ordering in sports and its organization.⁹⁴ It may also be that sport just seems too trivial to engage the full force of constitutional law; it is okay, that is, to leave it to its own devices, even if a few women suffer some missed competitions.

So, at the end of the day, what can one say about this case? Certainly, it is a shame that the women are shut out. Their exclusion has implications for the development of their sport, as funding — both governmental and sponsorship — so often is dependant upon Olympic eligibility. But there are other observations more specific to the sport of *Charter* litigation as it plays out in the Canadian polity. *Charter* litigation has contingent and unpredictable significance. In addition to its containment of the struggles of subordinate groups and its legitimization of that subordination, it can on occasion catalyze broader political support for those struggles. It is also possible that, despite what Dick Pound says, the public black eye the case gave the IOC will make a positive difference to the fate of the women ski jumpers at the 2014 Olympics. Already, movement on the issue is discernable. The Governor General of Canada, Michaëlle Jean, reports lobbying IOC President Jacques Rogge at the opening ceremony of the 2010 Olympics for inclusion of women's ski jumping at the next Winter Olympics. Rogge is reported by her to have commented favourably on the women's chances.⁹⁵ (Although in the wake of the 2010 Olympics and the domination of women's hockey by the Canadian and American teams, Rogge waded into gendered controversy again by hinting that women's hockey may soon be on the chopping block.⁹⁶) The story continues, with a new flight of ski jumpers to carry the cause and another chapter in women's ski jumping to be written. But the *Charter* has once again proven resilient to attempts to use it to obtain gender justice. The orchestration of the 2010 Olympics was the wrong playing field for *Charter* claims, and women ski jumpers continue to be consigned to the bleachers and kept from the podium.

Notes

- * Associate Professor, Faculty of Law, University of British Columbia. Thanks to Ted Murray for excellent research assistance. Comments from Martha Jackman, Natasha Affolder, and Andrew Petter gratefully received. Funding support from Foundation for Legal Research and SSHRCC CURA programme.
- 1 *The Constitution Act, 1982*, being Schedule B to

- the *Canada Act 1982* (U.K.), 1982, c. 11.
- 2 *Sagen v. Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games*, 2009 BCCA 522, 98 B.C.L.R. (4th) 141 (CanLII) [*Sagen* (BCCA)], affirming *Sagen v. Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games*, 2009 BCSC 942, 98 B.C.L.R. (4th) 109 (CanLII) [*Sagen* (BCSC)].
- 3 Allan C. Hutchinson & Andrew Petter, "Private Rights/Public Wrongs: The Liberal Lie of the *Charter*," in Andrew Petter, *The Politics of the Charter: The Illusive Promise of Constitutional Rights* (Toronto: University of Toronto Press, 2010) 77 at 77 [Hutchinson & Petter].
- 4 2002 SCC 84, [2002] 4 S.C.R. 429 (CanLII).
- 5 The inrun is the name of the approach ramp the skier travels down to build speed heading into the jump.
- 6 The programme of the Olympic Games includes sports, disciplines and events.
- 7 Because the Nordic Combined event includes ski jumping as an element, this event has no women in it either.
- 8 The first measured jump was made in 1809 by a Norwegian lieutenant, Olaf Rye, to impress his soldiers. For an engaging summary of the history of the sport, see Patricia Vertinsky, Shannon Jette & Annette Hoffman, "'Skierinas' in the Olympics: Gender Justice and Gender Politics at the Local, National and International Level over the Challenge of Women's Ski Jumping" (2009) 18 *Olympika* 43 [Vertinsky et al., forthcoming]. Ski jumping competitions are held on three types of hills: Normal Hills, Large Hills and Ski Flying Hills. The men were scheduled to compete on the Normal and Large Hills at the 2010 Games and also in a Team Event. The women asked to be included with only a Normal Hill event.
- 9 Canadian Press, "IOC 'Technical Merit Keeping Women's Ski Jumping Out of Games'" *TSN* (19 November 2008) online: TSN.ca <http://tsn.ca/olympics/story/?id=25607&lid=sublink07&lpos=headlines_olympics>.
- 10 Canadian Press, "Rogge: Women jumpers would dilute Olympics medals" *CTV News* (28 February 2008) online: CTV.ca <http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20080228/ski_jumping_080227/20080228/>.
- 11 Randy Starkman, "Ski jumpers face an uphill battle" *The Star* (10 January 2008) online: TheStar.com <<http://www.thestar.com/printArticle/292590>>.
- 12 "In an announcement Tuesday, Canada's federal government and the Canadian Olympic Committee promised to step up the pressure to get

- female competitors the same chance to take flight as their male counterparts. 'It's about equality,' Helena Guergis, Canada's secretary of state for sport, told CTV British Columbia." "Feds confirm they will push for female ski jumping" *CTV News* (8 January 2008), online: CTV.ca <http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20080108/Ski_Jumpers_080108/20080108?hub=Politics>.
- 13 The number at the Supreme Court soon grew to 10 and at the Court of Appeal level the number of ski jumper appellants grew to 14.
- 14 *Sagen* (BCSC), *supra* note 2.
- 15 *Sagen* (BCCA), *supra* note 2.
- 16 *Sagen* (BCCA), *supra* note 2, leave to appeal to S.C.C. refused 33439 (22 December 2009).
- 17 1986 CanLII 5 (S.C.C.), [1986] 2 S.C.R. 573 [*Dolphin Delivery*].
- 18 *Dolphin Delivery* concerned the legality of a common law injunction granted by the British Columbia Supreme Court against an action of secondary picketing. McIntyre J. wrote in response to the question of whether the Charter applied to the common law: "In my view, there can be no doubt that it does apply." But he then went on to rule that the Charter did not apply because the case involved only a common law rule with no government actor: "While, as we have found, the Charter applies to the common law, we do not have in this litigation between purely private parties any exercise of or reliance upon governmental action which would invoke the Charter." *Ibid.* at paras. 25, 41.
- 19 Hutchinson & Petter, *supra* note 3 at 80-81.
- 20 Martin Loughlin, "Rights, Democracy, and Law," in Tom Campbell, K.D. Ewing, & Adam Tomkins, eds., *Sceptical Essays on Human Rights* (Oxford: Oxford University Press, 2001) 41 at 42 [Campbell et al.]. For a judicial articulation of this concern, see Wilson J. in *R. v. Morgentaler*: "Thus, the rights guaranteed in the Charter erect around each individual, metaphorically speaking, an invisible fence over which the state will not be allowed to trespass." 1988 CanLII 90 (S.C.C.), [1988] 1 S.C.R. 30 at 164.
- 21 Peter W. Hogg, "The Dolphin Delivery Case: The Application of the Charter to Private Action" (1987) 51 Saskatchewan Law Review 273 [Hogg]; John Whyte, "Is the Private Sector Affected by the Charter" in Lynn Smith, Gisele Cote-Harper, Robin Elliot & Magda Seydegart, eds., *Rights in the Balance: Canada's New Equality Rights* (Saskatoon: Canadian Human Rights Reporter, 1986) 145 at 149 [Whyte].
- 22 "The legal system, at least, is theoretically implicated in all that we do, but if the Charter's rights are to prevail everywhere many valuable aspects of private arrangements will be lost." Whyte, *ibid.* at 179.
- 23 Hogg, *supra* note 21 at 274; David Dyzenhaus, "The New Positivists" (1989) 39 University of Toronto Law Journal 361 [Dyzenhaus]; Whyte, *ibid.* This is no less true of human rights legislation than of constitutional rights documents. Human rights legislation may have a larger sphere of public action regulated by the law but it nonetheless also articulates a line between that sphere of public action and action that lies outside the ambit of the legislative structuring.
- 24 Judy Fudge, "The Canadian Charter of Rights: Recognition, Redistribution, and the Imperialism of the Courts" in Campbell et al, *supra* note 20, 335 at 351 [Fudge].
- 25 Section 32(1) reads:
This Charter applies:
(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.
- 26 Hutchinson & Petter, *supra* note 3 at 83.
- 27 *Ibid.* at 84.
- 28 See generally, Susan B. Boyd, "Challenging the Public/Private Divide: An Overview" in Susan B. Boyd, ed., *Challenging the Public/Private Divide: Feminism, Law and Public Policy* (Toronto: University of Toronto Press, 1997) at 3.
- 29 Dyzenhaus, *supra* note 23 at 372.
- 30 For a discussion of this, see Dyzenhaus, *ibid.*
- 31 *McKinney v. University of Guelph*, 1990 CanLII 60 (S.C.C.), [1990] 3 S.C.R. 229 [McKinney]; *Stoffman v. Vancouver General Hospital*, 1990 CanLII 62 (S.C.C.), [1990] 3 S.C.R. 483 [Stoffman].
- 32 *Eldridge v. British Columbia (Attorney General)*, 1997 CanLII 327 (S.C.C.), [1997] 3 S.C.R. 624 at para. 44 [Eldridge].
- 33 *Stoffman*, *supra* note 31.
- 34 *Eldridge*, *supra* note 32 at paras. 41-45.
- 35 La Forest J. writes in *Stoffman*, *supra* note 31 at 513 that there is a difference "between ultimate extraordinary control, and routine or regular control"; *Sagen* (BCSC), *supra* note 2 at para. 24.
- 36 Four governments (Canada, B.C., Vancouver, and Whistler) were involved in hosting the Olympics and the British Columbia Supreme Court treated them collectively as "government."
- 37 *Sagen* (BCSC), *supra* note 2 at para. 39. For discussion of the factors of the IOC's routine and

- regular control see paras. 35–38. For an interesting discussion of just what kind of entity the IOC is, see David J. Ettinger, “Comment: The Legal Status of the International Olympic Committee,” (1992) 4 Pace Yearbook of International Law 98.
- 38 *Sagen* (BCSC), *supra* note 2 at para. 56.
- 39 Fenlon J. buttresses her conclusion by noting as well that governments have imposed on VANOC obligations similar to those imposed in the *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.), procurement policies, policies in relation to tobacco advertising, investment restrictions, participation by the national government in aspects of the opening ceremonies, and pay equity and equal employment standards: *Sagen* (BCSC), *supra* note 2 at para. 63.
- 40 *Sagen* (BCSC), *supra* note 2 at para. 65.
- 41 *Eldridge*, *supra* note 32 at paras. 41-45.
- 42 *Sagen* (BCSC), *supra* note 2 at paras. 121, 123.
- 43 *Ibid.* at para. 123.
- 44 *Sagen*, (BCCA), *supra* note 2 at para. 45.
- 45 *Ibid.* at para. 48.
- 46 *Sagen v. Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games*, 2009 BCCA 522 (Factum of the Appellant) at para. 33 (on file with author).
- 47 The women ski jumpers were clear in their legal arguments that their first choice was that VANOC host both male and female events. However, failing that they understood their section 15 rights to require VANOC to refuse to host any ski jumping if the men alone were authorized by the IOC to jump. *Ibid.* at para. 28, on file with author.
- 48 *Eldridge*, *supra* note 32 at para. 142.
- 49 *Sagen* (BCCA), *supra* note 2 at para. 54.
- 50 2004 SCC 78, [2004] 3 S.C.R. 657 (CanLII) [Auton].
- 51 *Sagen* (BCCA), *supra* note 2 at para. 56.
- 52 *Ibid.* at para. 58.
- 53 *Ibid.* at paras. 62-64; **Madam Justice Fenlon**, conversely, had no difficulty finding that a contract entered into by a private entity not controlled by government could be the source of a “benefit of the law” within the meaning of section 15. Whether the government activity flows from legislation, government policy, or contract is irrelevant to the general principle that governments should not be able to circumvent *Charter* obligations through use of other than formal statutory instruments: *Sagen* (BCSC), *supra* note 2 at paras. 69-72.
- 54 The trial judge had indeed ruled that these contractual arrangements were “law” for the purposes of section 15: *Sagen* (BCSC), *supra* note 2 at para. 72.
- 55 *Sagen* (BCCA), *supra* note 2 at para. 64.
- 56 For elaboration of this argument, see Peter W. Hogg, *Constitutional Law of Canada*, vol. 2 looseleaf, 5th ed. Supp. (Toronto: Carswell, 2007) “Application of s. 15” at s. 55.5(b).
- 57 Vertinsky et al., *supra* note 8 at 44.
- 58 Eileen McDonagh & Laura Pappano, *Playing With the Boys: Why Separate Is Not Equal in Sports* (New York: Oxford University Press, 2008).
- 59 Vertinsky et al, *supra* note 8 at 44. Some contend that women are better suited to the sport than men, arguing that characteristics geared to accomplishment in ski jumping (slight build, flexibility, balance, mental focus) are associated more with women’s physical and mental attributes than men’s. See Gerd von der Lippe, “Ski Jumping,” in Karen Christensen, Allen Guttmann and Gertrud Pfister eds., *International Encyclopedia of Women and Sports*, vol. 2 (New York: MacMillan Reference, 2001) 1046 at 1047, quoted in Vertinsky et al, *supra* note 8 at 56.
- 60 See Annette R. Hofmann, Shannon Jette & Patricia Vertinsky, “The Rocky Road on Mount Olymp: Women’s Fight to Enter the Olympic Venue in Ski Jumping” in Gigliola Gori (ed.), *Sport and Gender Matters in Western Countries: Old Borders and New Challenges* (Germany: Academic Verlag, 2008) 111 at 117 [Hofmann et al.].
- 61 “Profile: Women Lobby for Olympic Ski Jumping Events,” *North Country Public Radio* (14 November 2005), online: < <http://www.womenskijumpingusa.com/news04.htm>>. (Accessed January 29, 2010. This comment has since been retracted.)
- 62 See Hofmann, et al, *supra* note 60 at 116.
- 63 See, for example, Fudge, *supra* note 24 at 349. Fudge employs Nancy Fraser’s distinction between recognition and redistribution claims. See Nancy Fraser, “From Redistribution to Recognition? Dilemmas of Justice in a ‘Post Socialist’ Age” (1995) 212 *New Left Review* 68.
- 64 Nitya Iyer, “Categorical Denials: Equality Rights and the Shaping of Social Identity” (1993-94) 19 *Queen’s Law Journal* 139; Margot Young, “Sameness/Difference: A Tale of Two Girls” (1997-98) 4 *Review of Constitutional Studies* 150.
- 65 *Re Blainey and Ontario Hockey Association et al.*, 1986 CanLII 145 (ON C.A.), (1986) 54 O.R. (2d) 513 [Blainey]. See also *Re Cummings and Ontario Minor Hockey Association*, (1978), 21 O.R. (2d) 389, 90 D.L.R. (3d) 568, 7 R.F.L. (2d) 359 (Div. Ct.), and *Re Ontario Human Rights Commission et al. and Ontario Rural Softball Association*,

- (1979), 26 O.R. (2d) 134, 102 D.L.R. (3d) 303, 10 R.F.L. (2d) 97 (C.A.).
- 66 For example, see recent reports of a human rights complaint filed after cancellation of a girls' hockey league in Nanaimo, British Columbia. Dustin Walker, "Parents file complaint against Nanaimo Minor Hockey Association" *Vancouver Sun* (13 November 2009), online: VancouverSun.com < <http://www.vancouversun.com/sports/Parents+file+complaint+against+Nanaimo+Minor+Hockey+Association/2218295/story.html>>. See also *Hawkins obo Beacon Hill Little League Major Girls Softball Team v. Little League Canada*, 2006 BCHRT 606. For a discussion of past cases, see Canadian Association for the Advancement of Women and Sport and Physical Activity, *Sex Discrimination in Sport: An Update*, (November 2008), online: CAAWS.ca < http://www.caaws.ca/e/resources/pdfs/discrimination_full.pdf>.
- 67 Mary Ormsby, "Move over, boys, girls are getting their ice time: Gender discrimination outcry prompts mayor's order to protect female leagues" *The Star* (12 November 2009), online: TheStar.com < <http://www.thestar.com/sports/hockey/article/724701>>; "Girls win big victory in softball team's discrimination battle" *CBC News* (13 January 2009), online: CBC.ca < <http://www.cbc.ca/canada/british-columbia/story/2009/01/12/bc-softball-team-victory.html>>.
- 68 *Sagen* (BCSC), *supra* note 2 at para. 7.
- 69 The criteria applied by the IOC for admission of new events are set out in Rule 47 of an older version of the Olympic Charter. This rule was removed from the 2006 version of the Olympic Charter but is still applied by the IOC in practice. Rule 47 stipulates the factors of sport development required for inclusion; a lower threshold is set for women as compared to the threshold set for men's events.
- 70 The former Rule 47(4.4) stipulates that events that no longer satisfy the criteria can be maintained for the sake of the Olympic tradition: *Sagen* (BCSC), *supra* note 2 at para. 84.
- 71 *Ibid.* at para. 90.
- 72 *Ibid.* at para. 93.
- 73 *Ibid.* at para. 92.
- 74 *Ibid.*
- 75 *Ibid.* at para. 94.
- 76 *Ibid.* at para. 96.
- 77 *Ibid.* at para. 99.
- 78 Women's ski jumping has 135 elite athletes registered in 16 countries. The newly added ski cross has 30 women athletes in 11 countries. When admitted, women's snowboard cross had 34 athletes in 10 countries and women's bobsled had 26 athletes in 13 countries. The IOC rules also require at least two world championships before admission to the Olympics. Cross country skiing was admitted in 1952 having had no world championships. Hofmann et al., *supra* note 60 at 119.
- 79 Ski cross is tremendously popular with television audiences. See Christa Case Bryant, "Why women can't ski jump in the Winter Olympics" *The Christian Science Monitor* (11 November 2009), online: CSMonitor.com < <http://www.csmonitor.com/USA/Society/2009/1109/p17s03-ussc.html>>.
- 80 Associated Press, "Women ski jumpers out because of low participation" *USA TODAY* (19 November 2008), online: USAToday.com < http://www.usatoday.com/sports/olympics/2008-11-20-ioc-women-skijumpers-out_N.htm>.
- 81 Beau Dure, "Women's ski jumpers wish they were Olympians, not spectators" *USA TODAY* (19 February 2010), online: USAToday.com < http://www.usatoday.com/sports/olympics/vancouver/nordic/2010-02-19-womens-ski-jumping_N.htm>.
- 82 Philip Hersh, "To walk the walk about supporting women, IOC must pick softball for 2016" *Chicago Tribune* (6 August 2009), online: Chicago-Tribune.com < http://newsblogs.chicagotribune.com/sports_globetrotting/2009/08/by-philip-hershnext-thursday-when-its-executive-board-announces-the-two-sports-chosen-for-possible-inclusion-in-the-2016-sum.html>.
- 83 This is the term for the landing slope of the ski jump.
- 84 See for example, "IOC's flimsy reasons for banning female ski jumpers boil down to discrimination," Editorial, *Vancouver Sun* (11 January 2008), online: VancouverSun.com < <http://www.canada.com/vancouversun/news/editorial/story.html?id=2b4634fd-27f5-409b-89bf-8eae0cb-9d7aa>>; Vaughn Palmer, "The IOC is accountable to no one — as female ski jumpers now know" *Vancouver Sun* (24 November 2009), online: VancouverSun.com < <http://www.vancouversun.com/sports/2010wintergames/ski-jumping/accountable+jumpers+know/2261280/story.html>>; "Editorial: Dragging the IOC into the 21st century" *The Province* (23 December 2009), online: The Province.com < <http://www.theprovince.com/sports/Editorial+Dragging+into+21st+century/2373122/story.html>>.
- 85 Stephen Hui, "73 percent of Canadians want women's ski jumping in 2010 Olympics, poll finds" *Georgia Straight* (18 December 2009), online: Straight.com < <http://www.straight.com/article-275965/vancouver/73-percent-canadians->

- want-womens-ski-jumping-2010-olympics-poll-finds>.
- 86 Rod Mickleburgh, “Olympic dream dashed for women ski jumpers” *The Globe and Mail* (13 November 2009), online: CTV.ca <<http://www.ctvolympics.ca/ski-jumping/news/newsid=19752.html>> [Mickleburgh].
- 87 *Sagen*, (BCSC), *supra* note 2 at para. 124.
- 88 See for example Wilson J.’s judgment on this issue in *McKinney*, *supra* note 31 at 320-379; Whyte, *supra* note 21 at 179.
- 89 Judy Fudge & Brenda Cossman, “Introduction: Privatization, Law, and the Challenge to Feminism” in Brenda Cossman and Judy Fudge, *Privatization, Law, and the Challenge to Feminism* (Toronto: University of Toronto Press, 2002) 3 at 5.
- 90 Hutchinson & Petter, *supra* note 3 at 94.
- 91 After the court decision, Mr. Furlong expressed sympathy for the young women ski jumpers. “It’s an unhappy day for these girls. It’s not fun watching it. But for us, this is a chance to move on and focus our attention on preparing for the Olympics.” Mickleburgh, *supra* note 86.
- 92 See, generally, Laura Robinson, *Black Tights: Women, Sport, and Sexuality* (Toronto, Harper Collins Publishers Ltd, 2002); Sarah K. Fields, *Female Gladiators: Gender, Law, and Contact Sport In America* (Chicago: University of Illinois Press, 2005).
- 93 M. Ann Hall, *The Girl and the Game: A History of Women’s Sport in Canada* (Peterborough: Broadview Press, 2002) at 1.
- 94 See, for example, the now repealed section 19(2) of the Ontario *Human Rights Code, 1981*, S.O. 1981, c. 53 at issue in the *Blainey* case; *Blainey*, *supra* note 65.
- 95 David Ebner, “Governor-General joins fight for women ski jumpers” *The Globe and Mail* (19 February 2010), online: CTV.ca <<http://www.ctvolympics.ca/ski-jumping/news/newsid=47119.html>>.
- 96 Ann Killion. “When it comes to women’s Olympic sports IOC just doesn’t get it” *Sports Illustrated* (2 March 2010), online: SI.com <http://sportsillustrated.cnn.com/2010/writers/ann_killion/03/02/olympics.women/index.html#ixzz0h46z343U>.