



HUMAN RIGHTS TRIBUNAL OF ONTARIO

B E T W E E N:

**Fiona Miller, Catherine Boyd, and
Cheryll Corness**

Applicants

-and-

InterCounty Tennis Association

Respondent

DECISION

Adjudicator: Jo-Anne Pickel
Date: July 12, 2018
File Numbers: 2015-22992-I; 2016-23027-I; 2016-23048-I
Citation: 2018 HRTO 907
Indexed as: **Miller v. InterCounty Tennis Association**

APPEARANCES

Fiona Miller, Catherine Boyd, and)
Cheryll Corness, Applicants) Self-represented
)
)

InterCounty Tennis Association,)
Respondent) Wade Poziomka and Jennifer
) Zdriluk, Counsel

[1] These three Applications allege that the respondent, InterCounty Tennis Association (“ICTA”), discriminates against women in the provision of services on the basis of sex by offering men twice as many opportunities to play tennis in its Mixed League as it offers to women. Playing opportunities in the ICTA Mixed League are organized into “fixtures” which are a series of matches between doubles pairs on two teams. The Mixed League fixtures are comprised of eight men and four women. This format has remained unchanged for over fifty years, since the ICTA’s formation in 1962. The applicants submit that the 8:4 male to female fixture format discriminates against women. The ICTA denied the allegation.

[2] Over the course of three and a half hearing days, I heard evidence from the three applicants and eight witnesses in support of the ICTA’s case. At the hearing, all witnesses adopted the witness statements they filed with the Tribunal and they were provided a period of time to clarify or supplement their witness statements before being cross-examined in the usual way.

[3] For the reasons that follow, I find that the applicants have established discrimination on a balance of probabilities.

FACTUAL BACKGROUND

[4] At the outset, I note that there was little to no dispute about most of the facts relating to the playing opportunities currently being offered by the ICTA to men and women who play in its Mixed League. The main factual disputes between the parties centred on two issues: (1) the extent of the demand by women for playing opportunities in the ICTA’s Mixed League and (2) the effect that the provision of equal playing opportunities would have on the ICTA.

The Parties

[5] The applicants are all women who have played tennis on teams playing in the ICTA’s Mixed League.

[6] The ICTA is an association of tennis clubs that was formed in or about 1962 as a non-profit entity. It was incorporated as a not-for-profit corporation in 2015.

Structure and Purpose of the ICTA

[7] The ICTA is composed of its member tennis clubs. Individuals who play tennis in one of the ICTA's leagues are not members of the ICTA. They are members of local tennis clubs and the clubs themselves make up the ICTA's voting membership. Under the ICTA's by-law, it is clubs that vote on the internal rules or by-laws that are applicable to the ICTA. The ICTA then enforces the decisions made by member clubs. The ICTA Board of Directors can propose changes to rules and by-laws but these proposed changes are subject to a vote of the ICTA membership. Each tennis club appoints a club representative who represents the club in its dealings with the ICTA.

[8] The purpose of the ICTA is set out in section 12 of its by-law:

...to encourage and promote tennis activities, through the organization of intercounty regional team play and to otherwise carry on such other activities as are reasonably incidental to or in furtherance of such purposes.

[9] The ICTA leagues offer an opportunity for players to play interclub tennis which generally is played at a more competitive level than the house leagues run by local tennis clubs. When asked in cross-examination about ICTA promotional materials that state the ICTA is a league for all abilities, the ICTA's President, Anton Katz, confirmed that there is no minimum skill level to play on a Mixed League team although there are restrictions at the upper end. He testified in cross-examination that the ICTA "takes all comers" but that there are limits at the upper end to prevent clubs from fielding a "dream team" of professionally skilled players.

[10] The ICTA currently offers four leagues: Ladies, Mixed, Junior and Plus 55. Clubs choose to enter teams in leagues. The leagues are divided into skill levels based on ability. All four leagues play in the spring and summer.

[11] Mr. Katz testified that a small number of teams come and go from the ICTA each year for various reasons. However, he described the ICTA's membership as "sticky" which he clarified means that the membership is loyal.

The ICTA Mixed League

[12] The Mixed League is very large and, at the time of the hearing, consisted of approximately 160 teams and 80 fixtures or approximately 480 matches per week. The Mixed League's season runs for 14 weeks. The Mixed League is one of the largest in Ontario and it is by far the largest league within the ICTA. The Mixed League is divided into the following levels from high to low skill level: Majors, A, B and C. Unlike some of the ICTA's other leagues, for example the Ladies League, the Mixed League's matches are played in the evening.

[13] Teams that participate in the ICTA Mixed League face each other in a round robin format of fixtures against other teams within their geographical division. Under the Mixed League Rules, clubs put forward 12 player teams consisting of eight men and four women. From those 12 players, there are three men's doubles teams, two mixed doubles teams and one women's doubles team. As noted above, this 8:4 male to female format has been in place since the ICTA's formation in 1962. However, since 2013, the Mixed League Director has the authority, under the Mixed League Rules, to use a different six match format if all teams agree. I review below the evidence admitted in this case about a division within the ICTA that adopted a 6:6 male to female format for a period of time.

Previous Attempts to Equalize Playing Opportunities for Women

Use of 6:6 Format in C North Division

[14] Bill Crothers, Director of the ICTA Mixed League between 1982 and 2014, stated that, at the Fall 2011 AGM, two women from tennis clubs in the ICTA's C North Division asked him to consider altering the Mixed League format to a 6:6 format. Mr. Crothers told the women that the ICTA did not have the power to change the Mixed League

format without the agreement of member clubs. The clubs in attendance at the AGM did not support the women's position and no format change was made.

[15] Mr. Crothers approached the women after the AGM and told them that, if they could find seven or eight clubs who were willing to try a new format, he would be happy to let them do so. The women found eight clubs in the C North Division that were willing to try out a 6:6 format. Mr. Crothers agreed to try it out on the condition that, if any of the teams made the playoffs, they would have to switch to the usual 8:4 male to female format. The alternative format in the C North Division was approved at the Spring 2012 AGM. It lasted three years. The witnesses in the case provided differing evidence as to why the gender equal format in the C North Division did not last past three years. Some respondent witnesses stated that the clubs involved had difficulties finding enough women to sustain a gender equal format. The applicants stated that one of the difficulties faced by the clubs in the C North Division was the requirement to change to the 8:4 male to female format if teams made the playoffs.

[16] Mr. Crothers testified that, after he created the alternative format in the C North Division, a few women from different divisions approached him to request a similar format for their Division. He told them that he would be happy to implement a format change if they could find enough clubs in a geographic area to support it. On more than one occasion, the individuals who approached Mr. Crothers about a format change told him that clubs and/or their captains told them that they would not be able to support a 6:6 format.

Motions at ICTA Meetings

[17] There have been at least two motions put forward at ICTA Annual General Meetings ("AGMs") to propose providing the same opportunities for women as for men in the Mixed League.

[18] At the 2013 Spring AGM, a female player moved to change the format of Mixed League fixtures to a 6:6 format. The motion was defeated as it was not properly seconded.

[19] At the same AGM, Mr. Crothers, put forward a motion to amend the Mixed League Rules to allow a Mixed League Director to initiate an optional trial format when requested to do so provided that the trial did not negatively impact other leagues or clubs. The motion passed and led to the amendment of the definition of “fixture” in the Mixed League Rules to provide the League Director with the authority to use a different format if all teams agree.

[20] At the 2015 AGM, one of the applicants, Ms. Miller, proposed that the Mixed League change to a 6:6 male to female format made up of two women’s doubles, two men’s doubles and two mixed doubles. Ms. Miller testified that there were approximately 131 member clubs in the ICTA at the time but only 36 club representatives were present at the meeting. Ms. Miller’s motion was seconded but it was defeated in a 30-6 vote as clubs expressed a concern that they would not have enough women players to field a team using the proposed 6:6 format.

[21] The ICTA discussed the format of the Mixed League again in a special meeting of its member clubs held in June 2016 after the filing of these Applications. Forty clubs were represented at the special meeting. Out of 40 clubs present at the meeting, 30 voted to retain the 8:4 male to female format, four clubs supported a change to a 6:6 format and five clubs abstained.

[22] The respondent’s witnesses interpreted these votes as solid evidence of the concern by clubs that they would not be able to find a sufficient number of female players to field teams with a 6:6 male to female format. Ms. Miller was challenged in cross-examination about these three votes in which the membership consistently voted down proposals to change the Mixed League to a 6:6 format. Ms. Miller replied that the 8:4 male to female format has served men well and it is difficult to change because the

governance of the ICTA is controlled by people who are benefiting from the format established in the 1960s.

[23] According to former Mixed League Director Bill Crothers, in addition to the formal votes discussed above, individuals would on occasion raise questions at AGMs about the difference in playing opportunities for women as compared to men in the Mixed League. Mr. Crothers testified that in the over 30 years that he acted as Director of the Mixed League, the issue of equalizing playing opportunities for women arose in the form of questions at AGMs at least 10 times. Mr. Crothers testified that people had differing opinions on the issue. He said that clubs typically resisted any change to the Mixed League format by saying that they could not find enough women to play. On the other hand, it is his personal view that 30 years ago there were not as many women participating in sport period, let alone competitive sport. He testified that times have evolved and there are more women who work full-time and who cannot play in the daytime.

[24] Mr. Crothers testified that a significant factor in the resistance to equalizing playing opportunities for women is that the Mixed League has almost reached capacity in some geographic areas due to restrictions on court time etc. Due to these restrictions, any increase in the number of spots for women in the Mixed League would mean a decrease in the number of spots for men. According to Mr. Crothers, the easiest geographic regions in which to modify the fixture format were the newer areas in which the ICTA had expanded.

[25] Ms. Miller asked Mr. Crothers in cross-examination whether he or anyone else at the ICTA had ever made any attempt to lead clubs to a gender equal format given what he described as an increase in the number of women wanting to play tennis especially in the evening. Mr. Crothers indicated that he had not taken up that charge given that he had enough to do to run the league as a volunteer without taking on the role of advocating for changes in the league. Mr. Crothers said his approach had always been that, if anyone came to him with enough teams that were willing to attempt a different format, he would make it happen.

Evidence of Demand by Women to Play in the Mixed League

Oral Evidence at Hearing

[26] The respondent's witnesses testified that many clubs have difficulties finding "competitive" women to play within the Mixed League. The term "competitive" can be used in at least two different ways: it can be used as a synonym for "driven" or "keen" and it can also be used as a synonym for "strong" or "good enough". It was clear at the hearing that most, if not all, of the respondent's witnesses were using the term "competitive" to mean "strong" or "good enough". The respondent's witnesses testified that some clubs had difficulties finding sufficiently strong women to fill just four spots on their teams and therefore filling six spots with strong women players would be even more difficult.

[27] John Mowat, Director of the Mixed League in 2015-2016, stated that four teams left the Mixed League in 2015. Two of them cited difficulties in finding competitive women players as the reason they left. The reason given by the two other teams was that there was a change in the rules around the promotion of top performing teams to higher levels which entailed a change in the evening on which the teams would play. In 2016, four new teams joined the Mixed League and four dropped out: two dropped out due to difficulties finding competitive women players and two dropped out due to the changes in evenings they were required to play due to being promoted to a different level.

[28] Mr. Mowat testified about what he saw as the importance of having strong women players on a team. In his view, women players have an inordinate influence on the outcome of matches -- in other words, a team's ability to win a match. He testified that, in doubles tennis, the weaker player usually has more balls aimed at them. Mr. Mowat testified that, in general, male players are faster and stronger and have faster reaction times than female players. He did note that there are exceptions and, in particular, he mentioned that his wife is a better player than he is as she has improved through hard work and consistent play. Nevertheless, Mr. Mowat testified that, in

general, the physicality of men is superior to that of women. He said that there are not enough great players in the club setting and, even though the numbers of men and women are approximately equal, the number of “competitive” men is greater as women are slightly weaker. Mr. Mowat testified that he thought that, at this point, making a change to a 6:6 male to female gender equal format might work at the C level but that there currently are not enough competitive women to make it work at the Majors, A, and B levels.

[29] The ICTA’s President, Anton Katz, stated that the ICTA seeks to ensure that it offers consistent and competitive playing opportunities for those who want to play regardless of their gender. Like the respondent’s other witnesses, he testified that many clubs have difficulty fielding teams with four strong women. In addition, he stated that it is his understanding that defaults most frequently occur due to a lack of female players available for fixture nights. He stated that there are normally many men that a club can call on to substitute in these situations but there are fewer women who are available, and able, to do so.

[30] No statistics were entered into evidence to establish that women are more responsible for defaults than men. In cross-examination, Mr. Katz stated that even if there were statistics on the default rate the ICTA would not have information on the reasons for the defaults. When Ms. Miller questioned Mr. Katz on whether the ICTA had sought to generate statistics to compare the default rate as between women’s and men’s lines, Mr. Katz indicated that the ICTA’s attempts to do so were inconclusive.

[31] The President of the Davisville Tennis Club, Stuart Teather, testified that there are fewer competitive female tennis players as compared to competitive male players at the Davisville club. As such, he stated that the club has had difficulty finding “appropriately competitive women” to play on Davisville’s Mixed League teams. He presented evidence showing that female players have a lower average skill rating than male players at the Davisville club. He also presented figures on try-out participation for 2015 and 2016 which showed that women tried out for spots on ICTA Mixed league

teams at a significantly lower rate than men. Try-out rates for women varied between 28-31% for the Majors, A and B teams.

[32] Adwynna MacKenzie, Director of the ICTA Ladies League, testified that, until Ms. Corness expressed concerns about the format of the Mixed League in 2008, she had never heard anyone express a concern with the league's 8:4 male to female format. She also testified that there are fewer women who wish to play, and are able to play, in competitive tennis leagues like the Mixed League. She said that it is often a struggle for clubs to fill women's spots. She testified that many women inside and outside Toronto have told her that they have no interest in playing in the evening due to the travel that is required and that they prefer to play in the daytime Ladies League. She testified that a large number of women who work outside the home compete in tennis leagues during the day and many women, such as the applicants, play both in the daytime and in the evening.

[33] Bill Crothers, the Director of the Mixed League for over 30 years, also testified that many clubs had expressed a concern about attracting and retaining strong women players. When asked in cross-examination whether he had seen an increase in the number of women participating in tennis over the last 30 years, Mr. Crothers said that he does think that there are more women wanting to play tennis and sports in general. He said that 30 to 40 years ago girls were not encouraged to participate in sport as much as boys whereas today the gender balance is even. In his view, one of the reasons for the increased interest and participation of women is linked to the existence of more competitive female role models than 30 years ago.

[34] When asked in cross-examination about the difficulty clubs had finding and retaining women to play in the Mixed League, Mr. Crothers testified that most clubs that reacted most strongly to the idea of equalizing playing opportunities were the older clubs within Toronto. He said that the clubs outside of Toronto probably would have been more tolerant of a change in format to equalize playing opportunities for women.

[35] When Ms. Miller asked Mr. Crothers whether he could be more specific about the difficulties clubs had in attracting and keeping women, Mr. Crothers said he could not comment further. He then related his experience being an Olympic track and field athlete in the 1964 and 1968 Olympics. According to Mr. Crothers, during his time at the Olympics, there were far fewer events for women whereas today the numbers are almost equal. He said that we have seen the same trend in winter sports. He commented that his grand-daughters are just as involved in sports as his son ever was and more so than his daughters. He testified that we have seen an evolution over the years – while the percentage of men who gravitate toward competitive sport has not changed the opportunities for women in sport are generally better today than 35 years ago. Mr. Crothers testified that overall there have been a lot of changes but that people have difficulty changing, even today.

[36] The applicants generally testified that there exists a demand by women for an equal number of playing opportunities in the Mixed League, whether that is in a 6:6 male to female format or a 4:4 format. Ms. Miller testified that the number of women working full-time outside the home has increased and therefore it is difficult for women to play in the daytime Ladies League. Both Ms. Boyd and Ms. Corness cautioned against using try-out numbers to estimate demand by women. Ms. Boyd testified that many women do not bother to try out for teams at certain clubs because they know that the same four women will make the team year after year. Similarly, Ms. Corness stated that, since 2003, she has not tried out for an ICTA Mixed League team at the Davisville club because there are many women vying for the lesser number of spots that exist for women.

ICTA Surveys

[37] The parties in this case formed a Survey Committee composed of two members of the ICTA Executive and two of the applicants in this case. The Committee set out to gather data from players and tennis clubs on a number of issues, most significantly the level of demand by women to play in the ICTA's Mixed League. The Committee conducted two surveys: a survey of clubs that, in most cases was completed by club

representatives, and a survey of players which was sent to clubs who were asked to forward the survey to all of their members. The response rates to the surveys were robust. It appeared that all members of the Survey Committee were satisfied with the level of response to the surveys both by players and by clubs. Fifty nine out of 93 clubs (63% of clubs) responded to the club survey. The total membership of clubs that responded was 15,296 people. Two thousand two hundred and eighty three players responded to the players' survey. Players were asked to self-identify their gender: 1102 identified themselves as female and 1181 identified themselves as male.

[38] The 59 clubs that responded reported that their adult membership was composed of approximately 45% women and 55% men. Clubs were asked to provide information on their team selection process. Most of the clubs that responded (57%) indicated that they held court try-outs for members. The next most common selection process (13%) was to keep returning teams mostly intact. The responding clubs indicated that the proportion of women to men who signed up or tried out for ICTA Mixed League teams in 2017 was 36% women (533 women) versus 64% men (931 men). This percentage is roughly equivalent to the ratio of slots available that is 33% of slots for women (4/12) and 67% of slots for men (8/12). The respondent's witnesses saw this as a confirmation that the 8:4 male to female format was appropriate, whereas the applicants' interpretation was that women sign up or try out in proportion to the lesser number of slots they know are available to them.

[39] The players' survey asked players a number of questions about their participation in the ICTA Mixed League. In particular, the players were asked about their satisfaction level with the current format of the Mixed League. Approximately 51% of women answered that they were either "not at all satisfied", "slightly satisfied, or "moderately satisfied" whereas 25% of men chose one of these three categories. The players were asked whether their level of satisfaction would increase, decrease or remain the same if certain factors were changed. When asked how having an equal number of men and women playing each week would affect their level of satisfaction, 43% of women responded that their satisfaction would increase, 21% said it would decrease, and 36%

said it would remain the same. By comparison, only 8% of men said their level of satisfaction would increase if an equal number of men and women played each week, 55% said it would decrease and 36% said it would remain the same.

[40] Roughly the same percentages of men as women who were not currently playing in the ICTA Mixed League indicated that they were “very interested” (23-24%), “interested” (38%) or “not interested” (37-38%) in playing the Mixed League in the future. When asked whether different factors would encourage them to play in the Mixed League in the future, 29% of women and 10% of men indicated that they would be encouraged to play in the future if the ICTA Mixed League had an equal number of men and women playing each week.

Other Tennis Leagues In and Around the Greater Toronto Area

[41] In addition to the ICTA leagues, there exist a number of other interclub leagues in the geographical area served by the ICTA. The main leagues include the Toronto Ladies Tennis League (“TLTL”), the Toronto Men’s Tennis League (“TMTL”) as well as various other leagues that are specific to certain regions (for example, Durham, Scarborough, and Lakeshore and North York, etc.). Many women and men who play on teams in the ICTA Mixed League also play on teams in these other interclub leagues.

[42] All of the interclub leagues in the geographical area served by the ICTA play in the evening except for the TLTL which has divisions that play in the daytime and others that play in the evening. The TLTL divisions that play in the daytime play during a short seven week season whereas the divisions that play in the evening play a 10 week season. The TMTL’s season is 10 weeks in length. Some of the leagues that are specific to certain regions play a 14-18 week season.

[43] The evidence admitted at the hearing showed that, during the ICTA playing season in 2016 there were 628 playing opportunities per week for women in the ICTA Mixed League and 1256 playing opportunities per week for men. If one expands the focus to the capture all four of the ICTA leagues, there were more playing opportunities

for women due to the existence of the ICTA daytime Ladies League and no corresponding men's league within the ICTA.

[44] If one expands the focus further to capture the number of evening playing opportunities in the geographical area served by the ICTA, there were 1752 playing opportunities per week for women and 1866 playing opportunities per week for men. Finally, if one expands the focus even further to capture both daytime and evening playing opportunities, there were 2424 playing opportunities per week for women and 2194 playing opportunities per week for men. However, it must be noted that these numbers relate to weeks during which all of the different leagues in the geographical area served by the ICTA are functioning.

[45] If one were to consider the number of playing opportunities over the full spring/summer season, one would have to factor in the differing season lengths across the different leagues. In particular, the TLTL and the TMTL have significantly shorter seasons than the ICTA Mixed League.

Possible Financial Effects of Equalizing Playing Opportunities

[46] The ICTA's Treasurer, Sagar Karri, testified to the possible financial consequences if ICTA member clubs were to withdraw teams from the Mixed League and/or leave the ICTA altogether due to an inability to field the number of required female players.

[47] Mr. Karri testified that the majority of the ICTA's revenue is based on membership fees which include club fees and team fees. At the time of the hearing, the Mixed League constituted 43% of the ICTA's entire membership.

[48] Mr. Karri developed a model to estimate the different financial consequences that might be associated with different attrition rates if clubs were to pull teams out of the ICTA. Mr. Karri was not in a position to testify as to what the attrition rate might be, only to the financial consequences that might be expected if different attrition rates were to

occur. Mr. Karri testified that, if only 10% of the ICTA's teams left the ICTA, the association would experience an over 50% decrease in its annual earnings. The annual earnings would decrease even more significantly if the attrition rate were even greater than 10%.

[49] If the Mixed League were disbanded entirely, the ICTA would run a deficit because the Mixed League is the largest contributor in terms of membership fees. Mr. Karri testified that, at the time of the hearing, the ICTA had approximately \$7,500-\$8,000 in assets.

[50] According to Mr. Karri, if clubs not only pulled their teams from the Mixed League but other ICTA leagues as well, it would increase the deficit that might be caused by the disbanding of the Mixed League. If this were to occur, the ICTA could run for approximately three years before having to declare bankruptcy.

[51] There was no solid evidence of exactly what the attrition rate, if any, likely would be if the ICTA were to equalize playing opportunities for women and men. The evidence of possible attrition came in the form of the evidence of the respondent's witnesses stating that many clubs had difficulties finding "strong" or "competitive" women to play on Mixed League teams. These same witnesses testified that a certain number of clubs might leave the Mixed League or the ICTA altogether, especially if the ICTA were to adopt a 6:6 male to female format. In addition, the ICTA sought to rely upon the votes taken by club members against the adoption of a 6:6 format in 2013, 2015 and 2016 as an indication that clubs might well leave the ICTA if it were to move to a 6:6 format.

OTHER OPTIONS BEYOND 6:6 FORMAT

[52] The applicant's raised options to equalize playing opportunities for women other than a 6:6 format. One of the options raised by the applicants was the option of a 4:4 male to female format. Mr. Katz was asked whether the ICTA has considered this format in the past. He responded that he was not aware of much discussion of a 4:4

male to female format, as all proposals to equalize playing opportunities for women have revolved around a 6:6 male to female split.

[53] Another idea proposed by the applicants was the creation of a daytime men's league similar to the Ladies League. Ms. Miller asked Mr. Crothers whether the ICTA had considered creating a men's league for daytime play. Mr. Crothers replied that some people had made that suggestion in the past but that it was difficult to do because the majority of people playing Mixed League tennis work so playing in the daytime is difficult for them. When it was put to him in cross-examination that it is as difficult for working women to play in the day as working men, Mr. Crothers agreed that it was.

[54] Ms. Mackenzie was asked about the idea of a daytime men's league in cross-examination. She testified that a daytime league for men might work given that a lot of men, like women, may have flexible schedules that would permit daytime play. She testified that someone had suggested a daytime men's league in the past but the idea was dropped as the person suggesting it did not want to take on the responsibility of organizing it.

[55] The applicants also testified that the ICTA has not put in much effort to recruit women to play in the Mixed League. However, Mr. Mowat testified that the ICTA now has someone charged with marketing and communication in regards to all of the ICTA leagues.

ANALYSIS AND FINDINGS

[56] For the reasons set out below, I find that the ICTA discriminates against the applicants and by extension women players on the basis of sex by offering them half the number of playing opportunities in its Mixed League as it provides to men.

[57] The ICTA advanced two preliminary objections that I address before turning to my analysis of the merits of the Applications.

Applicants' Standing

[58] The ICTA took the position that the applicants did not have standing to challenge the ICTA's Mixed League format. The ICTA submitted that the Applications are framed as public interest applications rather than applications that allege discrimination against the applicants personally. According to the ICTA, the applicants did not state in their Applications that they have been turned away or unable to play in an ICTA league, let alone that they have been unable to do so because of their sex. Therefore, according to the ICTA, the applicants do not have standing to challenge the unequal playing opportunities offered to women in the Mixed League.

[59] I do not agree that the Tribunal's approach to standing is, or should be, as narrow as the ICTA has made it out to be. I completely agree with the ICTA that, in bringing an Application under s. 34(1) of the *Code*, an individual is alleging that their own rights have been infringed. The Tribunal has held that, due to the structure of the *Code*, an individual who is not alleging that their own rights under the *Code* have been infringed cannot bring an application to the Tribunal concerning a matter which she or he believes to be in the public interest. Such applicants are sometimes referred to in the case law as "officious bystanders", although the Tribunal has used the term "public interest litigant": See *Carasco v. University of Windsor*, 2012 HRTO 195 at para. 7 ("*Carasco*"); *Freitag v. Penetanguishene (Town) et. al.*, 2015 HRTO 1275 ("*Freitag*"). While I agree with the analysis in *Carasco*, *Freitag* and other similar cases, the applicants in this case cannot be said to be "officious bystanders" or individuals who lack a personal interest in the issues raised in the Applications.

[60] Two of the applicants had recent and ongoing experience playing in the ICTA Mixed League. They testified that, on a very basic level, they are affected by the message that is sent to female players as a result of the unequal playing opportunities for women in the Mixed League. Ms. Miller testified to the injury to dignity she experiences when she is told that women should accept "a back seat" by accepting unequal playing opportunities and that women are not "good enough" to play in the Mixed League. She also spoke to the harm to her self-worth as a woman that was

associated with the implicit assumption that any inequality is made up for by providing women with daytime playing opportunities in the Ladies League.

[61] Meanwhile, Ms. Boyd testified that she faced difficulties in finding a spot on an ICTA Mixed C Team at the Davisville tennis club. According to Ms. Boyd, in 2013 and 2014 similar numbers of men and women were competing for spots on the team, even though there were only half the number of spots available for women as for the men. In 2013, 2014 and 2015, to find a spot so she could play, Boyd joined and tried out at other clubs and thus had to pay membership fees at these other clubs. She testified that, in 2015, her playing opportunities were restricted by her team captain when he recruited four other women who he felt were stronger. She alleged that she would have had more opportunities to play if the ICTA were using a 6:6 male to female format.

[62] Ms. Corness' experience with the ICTA Mixed League occurred several years ago. Nevertheless, she too testified that she had difficulties making an ICTA Mixed league team in 2000-2003. In 2000, she did not make an ICTA Mixed League team despite being one of the Ladies Doubles champions at the Club championships that year. She attributed this to the unequal playing spots for women in the Mixed League. Ms. Corness, on her own, likely would not have standing to advance a timely claim against the ICTA. However, as I note below, Ms. Miller and Ms. Boyd do.

[63] In light of this testimony, especially the testimony from Ms. Miller and Ms. Boyd regarding their experiences in the year preceding the filing of their Applications, I do not agree that the applicants are merely public interest litigants with no personal interest in this case. If the applicants were simply women players who had not played, or demonstrated an interest in playing, in the Mixed League during the relevant time period my determination may have been different. However, that is not the case. Being players who have played, and continue to play in the Mixed League, at the very least Ms. Miller and Ms. Boyd have asserted a sufficient personal interest to have standing to bring these Applications.

Recreational Club Exception in Section 20(3) of the Code

[64] The ICTA sought to rely on the exception for “recreational clubs” contained in s. 20(3) of the *Code* which reads as follows:

The right under section 1 to equal treatment with respect to services and facilities is not infringed where a recreational club restricts or qualifies access to its services or facilities or gives preferences with respect to membership dues and other fees because of age, sex, marital status or family status. [emphasis added]

[65] There exists very little Tribunal case law on the interpretation of “recreational club” in s. 20(3) of the *Code*. In *Leonis v. Metropolitan Toronto Condominium Corp. No. 741*, the Ontario Board of Inquiry (the predecessor to the Tribunal) noted that the term “recreational club” is not defined in the *Code*. It held that s. 20(3) “suggests that one of the indicia that something is a recreational club is the fact that membership dues or fees are payable in respect of its services.” The Board of Inquiry went on to state that it understood the general legal character of clubs to be voluntary associations of persons who have come together for a common purpose.

[66] The ICTA submitted that s. 20(3) applied to an association of clubs, or a “club of clubs”, like itself, and therefore the ICTA was exempt from scrutiny regarding the applicants’ allegations of discrimination on the basis of sex. The ICTA also argued that, within the tennis community, the identifiers “association” and “club” are often used interchangeably.

[67] It is well-established that the *Code*’s protections against discrimination are to be read broadly and the exceptions contained in the *Code* are to be read narrowly. See *Dickason v. University of Alberta*, [1992] 2 S.C.R. 1103. Although the tennis community may use the terms “association” and “club” interchangeably, what is relevant is the meaning of “recreational club” as that term is used in s. 20(3) of the *Code*. It is implicit in the wording of s. 20(3) that a “recreational club” within the meaning of the *Code* refers to a club that has individuals as members since the provision refers to preferences with respect to membership dues and other fees “because of age, sex, marital status or

family status”. Therefore, it is clear that a recreational club within the meaning of the *Code* must have members who possess one of these human characteristics. As noted above, the members of the ICTA are not the players themselves but tennis clubs. As such, I find that the ICTA is not a recreational club within the meaning of s. 20(3) of the *Code*, even if its members may be recreational clubs.

[68] Even if I were to find that the ICTA is a recreational club, I would find that it cannot avail itself of the exception contained in s. 20(3) of the *Code* in the circumstances of this case. The exception relating to recreational clubs was added to the *Code* in 1981 as then s. 19(3) which contained identical wording to the current s. 20(3). It is well established that Hansard evidence may play a limited role in the interpretation of legislation. See, *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at para. 35. The intent of the clause was discussed in the Legislature by the Minister of Labour, the Honourable Mr. Bob Elgie. Mr. Elgie stated that “a number of recreational clubs give preference with respect to membership dues and other fees to encourage family membership, to encourage wives to join and so forth”. He commented that, without a provision such as s. 19(3) [now s. 20(3)], the *Code* “might abolish that opportunity, which gives improved participation to members of a family, married couples and so forth”. He stated that the government's view was that this amendment (s. 20(3)) was “very necessary to protect those legitimate rights that people have and are exercising now in the area of recreational clubs”. See Ontario, Official Report of Debates of the Legislative Assembly (Hansard), 32nd Parliament, 1st Session, December 1, 1981.

[69] This articulation of the purpose of the recreational club exception is consistent with the Tribunal's finding in *Vandervelde v. Goodlife Fitness Centres Inc.*, 2012 HRTO 1042 (“*Vandervelde*”) that s. 20(3) must be interpreted in light of the *Code*'s purposes of promoting equality and the dignity and worth of every person. In my view, giving s. 20(3) the kind of broad interpretation urged by the ICTA would significantly curtail the *Code*'s protections against discrimination. Under the broad interpretation urged by the ICTA, recreational clubs would be immune from challenge if they put in place blanket

restrictions against the access to services by certain groups, such as all women, all parents, or all people over age 65. I do not think that is what the legislature intended when it amended the *Code* to add s. 20(3).

[70] In my view, s. 20(3) was added to the *Code* to further the *Code*'s purpose of promoting substantive equality. It does so by permitting recreational clubs to restrict or qualify access to their services or facilities or to give preferences with respect to membership dues and other fees because of age, sex, marital status or family status in such a way as to address systemic inequalities in access for groups on the basis of the grounds listed in the provision.

[71] In my view, the restriction of playing opportunities for women is not a measure that promotes substantive equality or addresses systemic inequalities based on sex. If anything, the ICTA's restriction of playing opportunities perpetuates systemic inequalities for women in sport. Therefore, I cannot agree that the recreational club exception in s. 20(3) applies in this case.

Does the ICTA's Mixed League Format Discriminate Because of Sex?

[72] The determination of whether the Mixed League format discriminates against the applicants or women players more generally depends to a very large extent on two factors. First, it depends on the frame of reference used for the analysis. Second, it depends on how "demand" is treated as a factor in the discrimination analysis.

Appropriate Frame of Reference

[73] The applicants submitted that the appropriate frame of reference is the ICTA Mixed League and that the number of playing opportunities offered by other leagues is not relevant. Meanwhile, the ICTA submitted that the larger context is important and that a decision that restricts itself to the ICTA Mixed League would be unduly narrow and might amount to an overly strict formal equality analysis devoid of context. The ICTA argued that the decision in this case must take into account the greater number of playing opportunities offered by other leagues and organizations for women across the

geographic region served by the ICTA. In addition, the ICTA suggested that the inequalities faced by women tennis players or women in sport generally are systemic in nature and therefore that the only real solutions to these inequalities are systemic in scope.

[74] I agree with many points made by counsel for the ICTA but ultimately I disagree with their position as to the appropriate frame of reference for the *Code* analysis in this case. To begin, I completely agree with the ICTA that human rights and equality analysis must be contextual. Context is always important in law, and in human rights law in particular. I will come back to the issue of context below as I examine the undisputed changes in the social context between today and 1962 when the Mixed League format was adopted.

[75] I also agree with counsel for the ICTA that the inequalities face by women who play tennis or women in sport generally are much larger than the ICTA. Any human rights or even constitutional equality rights litigation will only ever address one small piece of a larger issue. However, that does not mean that human rights claims should be dismissed because the issues raised are systemic in nature and extend far beyond the scope of the claims being raised.

[76] At the end of the day, the *Code* protects against discrimination in the provision of services by particular entities that are named as respondents in an application. The respondent in this case is the ICTA. Therefore, in my view, I must look at services provided by the ICTA, not services provided by other associations or clubs across the greater Toronto area. I do not think it can be a defence to a *Code* claim for a respondent to submit that they do not discriminate in the provision of their services because the applicants have access to similar services elsewhere. For example, a restaurant could not defend a policy of restricting services to racialized groups on the basis that there existed many other restaurants in the neighbourhood where members of these groups could eat. Although I acknowledge that this example is not strictly analogous to the situation in this case, I use it simply to illustrate my point that I do not think it is appropriate to permit a respondent to rationalize its unequal services on the basis that

individuals have access to the services of other similar entities. For these reasons, I think the appropriate frame of reference is the respondent to these Applications -- that is, the ICTA.

[77] The next issue is whether the “service” being challenged should be framed as the Mixed League or all of the ICTA’s leagues taken together. In my view, it is appropriate to consider playing opportunities provided in the ICTA’s Mixed League as a service being offered by the ICTA. It was not disputed that the Mixed League is the ICTA’s main league. It is also a league that purports to be mixed, both in the sense of providing some opportunity to play mixed doubles but also in the sense of incorporating playing opportunities for both men and women. It also provides evening playing opportunities for players. Service providers such as the ICTA may provide different types of services and, therefore, I see no good reason why the Mixed League should not be viewed as one of the services offered by the ICTA.

Demand as a Factor in Human Rights Analysis

[78] One of the ICTA’s main arguments in this case is that there is no discrimination because the fewer playing opportunities offered to women in the Mixed League reflect a lesser demand on the part of women to play in the Mixed League. Therefore, one of the issues on which I sought the parties’ submissions was the role of demand as a factor in the discrimination analysis under the *Code*.

[79] The applicants submitted that demand should only be taken into consideration in the analysis of undue hardship. In other words, they submitted that demand should only be viewed as a relevant factor if the demand by women to play in the Mixed League were so low as to cause the ICTA undue hardship if it were to offer the same number of playing opportunities to men as to women. Meanwhile, the ICTA submitted that the factor of demand should be taken into account at the very outset of the discrimination analysis when determining whether there is differential treatment in this case.

[80] As I will explain below, I do think that the demand as a factor must have some relevance. To use an extreme example, if there were practically no demand by women to play in the Mixed League, it would likely not be appropriate to find the Mixed League's format discriminatory unless it provided the same number of playing opportunities for women as for men. Although I think demand has some relevance as a factor in the discrimination analysis I think that one should guard against an overreliance on this factor as it could be used to undermine the *Code's* protections. Demand can be hard to gauge and it can be significantly affected by a number of external factors. As well, unequal conditions sometimes may persist due to a failure to recognize existing demand or a failure to put in place the conditions that will permit demand to emerge and be recognized. I do not mean to suggest that this is necessarily the situation in this case but I put forward these comments as more general cautionary comments about placing too much of an emphasis on demand as a factor in human rights analysis. For all the reasons set out above, I think that demand is most appropriately factored into the undue hardship analysis.

Discrimination Analysis

[81] Under the *Code*, applicants have the onus of proving their allegations on a balance of probabilities. Applicants must establish the following in order to make out a *prima facie* case of discrimination under the *Code*:

1. That they are members of a group protected by the *Code*;
2. That they were subject to adverse treatment; and
3. That a ground protected under the *Code* was a factor in the alleged adverse treatment.

See for example: *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33 ("*Moore*") and *Stewart v. Elk Valley Coal Corp.*, [2017] 1 SCR 591, 2017 SCC 30 at para. 69.

[82] While the overall onus remains on applicants, once applicants have made out a *prima facie* case of discrimination, respondents bear an evidentiary burden to justify the impugned conduct or practice. See, for example, *Moore* at para. 33.

[83] In this case, it was not disputed that the applicants are members of a group protected by the ground of sex in the *Code*. The ICTA also did not seriously dispute that, if there was adverse treatment in this case, the applicants' sex was a factor in the adverse treatment. The ICTA's main argument in this case is that none of the three applicants, nor women players in general, experienced adverse treatment as a result of the ICTA's provision of half as many playing opportunities for women as for men.

[84] The ICTA submitted that neither the applicants nor women players in general were adversely affected by the Mixed League format because women enjoy a greater number of playing opportunities within the ICTA due to the existence of the daytime Ladies League and within the geographic region served by the ICTA. For the reasons already discussed, I find that the appropriate frame of reference in this case is the ICTA Mixed League. Therefore, I do find that the applicants and women players in general are adversely affected by having access to half the number of playing opportunities provided to men in the Mixed League.

[85] Given that the applicants have made a *prima facie* case of discrimination, the ICTA has the evidentiary burden of justifying its provision of half as many Mixed League playing opportunities to women as to men. As noted above, the ICTA's main argument in this case was that the applicants failed to show adverse treatment. To the extent that the ICTA put forward a justification, it was that the evidence, in its view, showed that the provision of an equal number of playing opportunities for women as compared to men might cause a high enough number of teams and/or clubs to leave the ICTA that the association would experience undue hardship.

[86] Usually, "undue hardship" is a factor considered as part of an accommodation analysis under the *Code*. Human rights law has accepted what has generally been referred to as "*bona fide* occupational requirement" ("BFOR") defence in cases of accommodation in employment. This BFOR defence has been referred to as a *bona fide* justification defence in cases outside the employment context. The Supreme Court of Canada has adopted a three-step test for determining whether a *prima facie*

discriminatory standard or rule is a BFOR in the employment context. A respondent may justify the impugned standard or rule by establishing on the balance of probabilities:

1. that the employer adopted the standard or rule for a purpose rationally connected to the performance of the job;
2. that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
3. that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

See *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3

[87] Adapted to the present service context, the test would require the ICTA to show that the Mixed League rule that limits playing opportunities for women to half of those provided to men was adopted for a purpose rationally connected to the Mixed League's activities or purposes; that the rule was adopted in an honest and good faith belief that it was necessary for the fulfilment of those purposes; and that the rule is reasonably necessary to the accomplishment of the Mixed League's purposes. The last part of the BFOR test is difficult to adapt to the context of this case since the concept of "accommodation" does not fit the circumstances of this case. The best way to translate the last part of the third step to the context of this case would be to find that the ICTA must demonstrate that it is impossible for it to provide the same number of playing opportunities to women as it does to men in its Mixed League without incurring undue hardship. This was substantially the approach taken by both parties in their final arguments.

[88] Even if I were to find that the ICTA made out the two first parts of the BFOR test, I am not persuaded that the ICTA has established, on a balance of probabilities, that it would incur undue hardship if it offered the same number of Mixed League playing opportunities to women as it does to men. The financial data admitted in this case

looked at the possible financial consequences to the ICTA of different potential attrition rates. The evidence of what level of attrition might occur, if any, came from the respondent's witnesses in the case who, on the whole, testified that some clubs have had difficulty finding enough strong women to fill slots on Mixed League teams.

[89] I am not persuaded that the evidence as a whole demonstrates that the demand by women to play in the ICTA Mixed League was so low that the ICTA would experience undue hardship due to the departure of clubs who could not field enough women players. Although some of the ICTA's witnesses testified that a number of clubs had difficulties finding women to play, most of the respondent's witnesses testified that it was difficult to find "competitive" or "strong" women players. This is a significant difference as it suggests that there is demand by women just not women who are perceived by clubs to be "good enough". Secondly, the evidence from the surveys indicated that there is a significant demand on the part of women players to play in the Mixed League. The survey results can be read in different ways but they do show a sizeable interest on the part of women to play in the Mixed League. The player survey discussed above showed that approximately two thirds of the women not currently playing in the Mixed League were very interested or interested in playing in the Mixed League in the future. Given that the 63% of the clubs that responded to the club survey indicated a combined membership of 15,296 people, 45% of whom were women the surveys suggest the existence of a considerable number of female players who are interested in playing in the Mixed League in the future.

[90] As well, the ICTA's President, Mr. Katz, testified that the ICTA's membership is "sticky", in other words it is loyal. Based on the evidence of various witnesses in this case, the ICTA's membership is loyal because the ICTA offers a number of things of significant value to its members. In particular, it offers them the opportunity to play in the evening and to play over the course of a 14 week season which is longer than most other leagues or associations.

[91] I do recognize that there has been resistance on the part of clubs to the idea of equalizing the number of playing opportunities for women as compared to men. I also

recognize that the experiment with a 6:6 format in the C North Division was relatively short lived. However, I am not persuaded that the evidence demonstrates that clubs will have such difficulties finding women players that they will have to leave the ICTA in such numbers as to cause the ICTA undue hardship. To begin, as discussed above, the evidence was that many clubs see themselves as having difficulties finding “strong” women to play on teams. Also, this perception was put forward in the context of proposals for equalizing opportunities through the implementation of a 6:6 male to female format whereas other options exist for equalizing playing opportunities for women and men.

[92] Finally, I am not persuaded that votes by club representatives at AGMs provide persuasive evidence that the equalization of playing opportunities for women and men would cause the kind of attrition rates suggested by the ICTA in this case. First, these votes related to proposals for a 6:6 format specifically. Second, voting against a change to the *status quo* is different from taking the significant step of leaving an association altogether, especially when the survey conducted during this case provide promising results in relation to the level of interest by women to play in the Mixed League in the future. Overall, the evidence put forward by the ICTA fell short of establishing that it would experience undue hardship if it were to equalize playing opportunities for women and men in its Mixed League.

[93] There may have been good reason for clubs to adopt the Mixed League format they chose in 1962. However, much has changed over the last 50 years. Various witnesses in this case testified that more women are participating in sport and this trend is continuing to grow with the younger generations. At the same time, it was not disputed that the rate of women working full-time outside the home in the paid labour force has increased significantly since 1962. Therefore, in my view, it is no longer reasonable to justify inequalities in evening playing opportunities by pointing to the existence of daytime playing opportunities for women. For all the reasons detailed above, I find that the ICTA discriminates against women players by offering women half as many playing opportunities as it does to men in its Mixed League.

REMEDY

[94] The Tribunal's remedial powers are set out in section 45.2 of the *Code*. The applicants in this case did not seek monetary compensation. They sought an order that the ICTA institute a gender equal format in its Mixed League. To ease the transition, the applicants requested that the Tribunal consider ordering the ICTA Mixed League to institute some new practices that might work to encourage acceptance of women, such as requiring a male and female captain for each team.

[95] I have found that the Mixed League format discriminates on the basis of sex by offering women half as many playing opportunities as it does to men. Given that there are many ways in which the ICTA might provide an equal number of playing opportunities to women and men (for example a 6:6 format, a 4:4 format, etc.), I find that it is not appropriate to dictate the specifics of the remedy in this case. In addition, given that it is the members of the ICTA who make decisions on the rules of the ICTA (subject to the law including the *Code*), I find it appropriate to provide a more generally framed remedy. In addition, due to the evidence I heard about the greater demand currently by women to play at the less skilled levels, I consider it appropriate to order the staged remedy set out below.

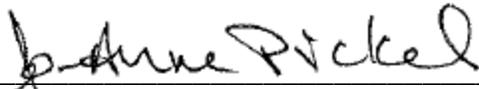
ORDER

[96] For the reasons set out above, the Application is granted and the Tribunal orders as follows:

- a. From the 2019 season onwards, the ICTA must provide the same number of playing opportunities to women and men playing at the C level of its Mixed League;
- b. From the 2020 season onwards the ICTA must provide the same number of playing opportunities to women and men playing at the B level of its Mixed League;
- c. From the 2021 season onwards the ICTA must provide the same number of playing opportunities to women and men playing at the A level of its Mixed League; and

d. From the 2022 season onwards the ICTA must provide the same number of playing opportunities to women and men playing at the Majors level of its Mixed League;

Dated at Toronto, this 12th day of July, 2018.



Jo Anne Pickel
Vice-chair