Introduction

Should female athletes be given the same opportunities to compete in an Olympic Event as their male counterparts? Unfortunately for the Supreme Court of British Columbia, this question was not some rhetorical view to be debated by feminist sports administrators, but rather formed the central argument in Sagen v Vancouver Organizing Committee (VANOC) for the 2010 Olympic & Paralympic Winter Games.1

The athletes in Sagen were 16 highly-ranked (current and retired) female ski-jumpers and at stake was their opportunity to compete in the Vancouver 2010 Olympic Winter Games to be held next year in Vancouver. The athletes argued that while the International Olympic Committee (IOC) planned to stage three male ski-jumping events, they had been excluded from participating in an equivalent female Olympic ski-jumping competition at the Games by virtue of their sex, and this exclusion amounted to a direct violation of the Canadian Charter of Rights and Freedoms. 2

While on first impressions, this might seem a comparatively straightforward question for the Supreme Court to answer, especially given the close similarity with previous American precedents,3 ultimately Fenlon J.’s judgment for the claimants promised much but failed to deliver.4 Indeed, in keeping with the Olympic theme, Fenlon J.’s legal gymnastics ultimately left every party able to claim at least a partial victory, while at the same time balancing the Supreme Court quite squarely on a narrow fence!

This article will examine the controversies surrounding the case, and in particular why the claimants chose not to bring actions against either of the two most powerful international sports organisations involved in the decision—the International Olympic Committee5 and the Federation Internationale de Ski (FIS),6 and instead focussed their action only against a federally incorporated Canadian organisation, the Vancouver Organising Committee (VANOC). Although such a strategy clearly limited the range of remedies available to the claimants, the article will explain how the approach exposed inconsistencies in the “technical merit” argument put forward by the defence, allowing the athletes to claim that gender discrimination had in fact taken place. Given that a number of significant developments in relation to both women’s ski-jumping (now proposed for two future Olympic events) and to female Olympic participation generally (following the announcement of new sports, disciplines and events for inclusion at future Summer Games) have taken place in the weeks immediately following Sagen, the article will analyse whether the case is restricted to the merits of female ski-jumping, or whether it can snowball into setting the blueprint for gender equity across all Olympic sports.

The article will also examine the wider implications that the case has for the future governance of the Olympic Games (Winter and Summer) and indeed of international sport in general. If the ratio of Sagen is that international sporting bodies can discriminate at will, free from the constraints of any respective national laws that might operate in the

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4. The court ruled that the exclusion of women’s ski jumping from the Winter Olympics was discriminatory and was for no other reason than the athlete’s gender, then went on to state that as not every discrimination is actionable, and given the degree of IOC control, VANOC was not in breach of the Charter. [7].
5. The IOC is the supreme authority of the Olympic Movement including the Olympic Games.
6. The international governing body for skiing.
Choosing a defendant

Perhaps the most important decision for the claimant athletes in Sagen was in deciding which sporting bodies to name as defendant(s) in their action. In particular, there were three main options open to them: the International Olympic Committee (IOC) who own the Olympic Games and related trademarks and under whose auspices the Olympic Games Programme Commission (OPC) operates; the Federation Internationale de Ski (FIS) who are the international governing body for ski jumping and the organisation who proposes potential new events to IOC; and the Vancouver Organising Committee (VANOC) who have been delegated the responsibility through contractual agreements with the IOC to act as the host city for the logistical management of the Games.7

The choice of defendant is very important, particularly in relation to their control of an activity and the enforceability of any court judgment or statutory provision. Given these factors, the claimants’ choice to only sue VANOC, while initially surprising, makes sense when considered against their targeted and specifically Canadian nature of their claim.

Claims directly challenging the IOC’s event selection criteria have been unsuccessfully attempted before, most notably in Martin,8 where the claimant athletes argued that the IOC discriminated against female track-athletes by their refusal to include 5,000m and 10,000m women’s races alongside the identical male races already on the Los Angeles 1984 Summer Olympic programme. In Martin however, despite the district judge’s determinations that an athlete’s peak physical capacity was inherently short-lived, that exclusion from the 1984 Games would lead to irreparable harm to the runners9 and that this harm effectively trumped any incremental administrative and logistical difficulties that the Olympic organisations would face,10 ultimately the United States Court of Appeals (Ninth Circuit) denied the runners’ injunction because they failed to demonstrate that they could prove gender discrimination against what the court held to be a facially neutral IOC Event Selection Rule.11

The recommendation as to whether a new event should be included in an Olympic Games falls initially to that sport’s governing body.12 This body would then submit its recommendations to the OPC group at the IOC who would evaluate and then endorse or reject its proposals. The IOC does however retain the ultimate power to decide on whether an event should be included in the Games.13 Indeed, this is what happened in the present case when in May 2006, FIS voted 114:14 to add women’s ski-jumping to the Nordic World Championship event and to recommend the event of women’s ski-jumping “normal hill” for the 2010 Winter Games, only to see this recommendation and five others vetoed by the IOC Executive Board later that November and both men’s and women’s ski-cross added to the freestyle skiing programme instead.

The claimant skiers could have challenged whether this determination had been made appropriately through a judicial review process at the Court of Arbitration for Sport, but given that the IOC have stated that, “the decision not to include women’s ski jumping has been taken purely on technical merit” and that, “any reference to the fact that this is a matter about gender equality is totally inappropriate and misleading”,15 their chances of successfully overturning such a determination were arguably slim. As one of the claimant skiers puts it: “Suing the IOC [in a Swiss court] would be like suing Jello. It just wouldn’t hold up.”16

Once the decision to reject women’s ski-jumping had been made by the IOC and accepted by FIS

7. The host city is sometimes also referred to by the title: Organizing Committee for the Olympic Games (OCOG).
11. Rule 32 of the 1970 Olympic Charter provides that: “The IOC in consultations with the IFs [international federations] concerned shall decide the events which shall be included in each sport, in bearing with the global aspect of the Olympic Programme and statistical data referring to the number of participating countries in each event of the Olympic programme, of the World Championships, of the Regional Games and all other competitions under the patronage of the IOC and the patronage of the IFs for a period of one Olympiad (four years).”
12. In Martin (1984) 740 F.2d 670 and Sagen (2009) BCSC 942, these were the International Amateur Athletics Federation (IAAF) and FIS respectively.
14. Switzerland were the dissenting vote.

[2009] I.S.L.R., ISSUE 4 © 2009 THOMSON REUTERS (LEGAL) LIMITED AND CONTRIBUTORS
(who did not seek to challenge it in relation to the 2010 Games), there were very few options left to try to reverse the decision beyond exerting political pressure behind the scenes and on the front pages of newspapers’ sports sections. To a certain extent, suing VANOC in order to increase this pressure therefore represented very much the claimants’ last throw of the dice.

That said, although it was 2,000km north of Los Angeles, 25 years later, and it concerned different sports and defendants, the Supreme Court of British Columbia reached remarkably similar conclusions to Martin.17 They held that exclusion from the 2010 Winter Games would lead to irreparable harm to the skiers18 and VANOC has the venue, willingness and logistical competence to stage a ski-jumping competition for women during the Games.19 There was however one important difference between the two cases. Unlike the athletes in Martin,20 the claimant skiers in Sagen openly acknowledged that s.15 of the Canadian Charter did not apply to the Swiss-based IOC and FIS therefore the court’s finding could not be enforced against them.

Instead, the skiers’ claim is solely against VANOC for implementing (and thereby endorsing) the IOC’s discriminatory decision not to stage a women’s event.21 The advantage of such an indirect approach is that it solves the inherent jurisdictional problem involved in suing the IOC while avoiding the need to challenge the mechanics of how the IOC and/or FIS reached their decision. The main disadvantage is that VANOC may not actually be culpable in the sense that it did not make the original decision to exclude women’s ski-jumping, and indeed it does not support that decision, or have the power to remedy it.22

In order for the claimant skiers to succeed in their s.15 Canadian Charter claim, they needed to show that VANOC was either controlled by government or carrying out a government function.23 The challenge for the claimants was that although the Canadian, British Columbia, Vancouver and Whistler governments were all represented on VANOC, there was no evidence of any governmental day-to-day governance,24 or control over VANOC finances.25 Instead VANOC reported directly to and received instructions from the IOC Executive Board and its operations were described as being, “more like a franchisee of the IOC, than a purchaser of a product”.26 The Supreme Court did however hold that the actual act of staging the 2010 Winter Games was a governmental activity, even though this activity was delivered through contractual agreements with the private entities who owned the Games (IOC) or who had been created to stage them (VANOC).27 Having reached this conclusion, it therefore followed that any activity or decision that VANOC made while delivering these activities could be a breach of the Charter.28 The problem was that while the exclusion of the claimant skiers was held to be discrimination, ultimately the court held that this was not a breach of the Charter as VANOC had no authority to order either the inclusion of women’s ski-jumping or the exclusion of men’s ski-jumping at the 2010 Games.29 Essentially while the claimant skiers may have won the discrimination battle, they lost the war of inclusivity.

Fenlon J.’s rationale has however been criticised as “a grotesque twist of legal logic”30 by advancing the “ludicrous”31 hypothesis that an organisation performing government activities may be exempt from the reach of the Charter and can discriminate against Canadians so long as the decision to discriminate was made abroad and the entity in Canada is only seen as “implementing” the foreign decision. Indeed, as Fenlon J. herself commented during the defence argument, “does this mean that if the IOC decided it wouldn’t allow black athletes to compete, then Canada should allow it”?”32

While the Court of Appeals in Martin33 had earlier warned against interfering in the mechanics of the Olympic process:

“A court should be wary of applying a state statute to alter the content of the Olympic Games. The Olympic Games are organized and conducted under the terms of an international

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19. Sagen (2009) BCSC 942 at [124]—importantly though, VANOC could not stage an Olympic women’s ski-jumping event without the approval and cooperation of the IOC, FIS and the respective national Olympic committees (NOCs).
22. Sagen (2009) BCSC 942 at [121].
23. Charter s.32(1).
27. Sagen (2009) BCSC 942 at [72]; support for this proposition can also be seen in Martin (1984) 740 F.2d 670.
agreement—the Olympic Charter. We are extremely hesitant to undertake the application of one state’s statute to alter an event that is staged with competitors from the entire world under the terms of that agreement.’’

A view echoed by Michels v United States Olympic Committee:

“There can be few less suitable bodies than the federal courts for determining the eligibility, of athletes to participate in the Olympic Games.”

That is not the case here. Although it is proper that a court should be reluctant to interfere, there is no prohibition on a Canadian Court hearing an Olympic case involving Canadian organisations. Indeed, the Supreme Court has already gone further than District Court in Martin by holding that discrimination has actually been proved. With respect though, the British Columbia Supreme Court cannot have it both ways. If VANOC is subject to the Charter as a governmental activity, once a breach has been made out and discrimination held, the court has an obligation to declare the event incompatible with the Charter. Conversely if VANOC is either not subject to the Charter or if it is subject and no breach or discrimination has occurred, then the case should be dismissed. The defence argues that:

“[T]he tremendous benefit of hosting the games is worth leaving the selection process to an expert body, the OPC, which makes recommendations to the IOC. Any discriminatory aspect of that decision (which VANOC denies, as outlined above) is more than outweighed by the benefit of the process and the avoidance of such matters as the host country subverting the Olympic Programme through the inclusion of events in which athletes from that country excel.”

Such an argument introduces a degree of subjectivity into what should be an objective process. It is irrelevant to the legal analysis that the event is the Olympic Games—if discrimination has occurred, then the claimants are entitled to a remedy. To suggest otherwise would be to argue that some activities and events are worth sacrificing human rights for, and this is very steep and slippery slope to proceed down.

Moving the ski posts

The Olympic Charter of the IOC states that:

“Any form [emphasis added] of discrimination with regard to a country of a person on grounds of race, religion, politics, gender or otherwise is incompatible with belonging in the Olympic movement.”

It also further states that its mission and role is, “to act against any form of discrimination affecting the Olympic Movement”. And indeed in recent years, the IOC has made women’s participation and gender equity at the Olympics one of its major concerns. Women’s participation in ski jumping was, “made strictly on a technical basis and absolutely not on gender grounds”. These positions are however at odds with Fenlon J’s determination that, “the differential treatment of the plaintiffs ... discriminates against the plaintiffs in a substantive sense”. Irrespective, for the moment, of the Charter’s reach into the Olympics, the legal and moral issue is whether the IOC discriminates against women.

As the District Court in Martin held, the selection criteria for Olympic Events is not just facially neutral, it actually positively discriminates for women by applying lower threshold criteria to new events. In 2006 when the IOC rejected the inclusion of women’s ski-jumping, r.47 of the Olympic Charter stated, in part, that:

“3.2 - To be included in the programme of the Olympic Games, events must have a recognized international standing both numerically and geographically, and have been included at least twice in world or continental championships.

3.3 - Only events practised by men in at least fifty countries and on three continents, and by women in at least thirty-five

35. Michels v United States Olympic Committee 741 F.2d 155 (7th Cir.1984).
36. Michels 741 F.2d 155 (7th Cir.1984) at [17], per Posner, circuit judge.
42. Sagen (2009) BCSC 942 at [103].
international competitions and athletes was set too high. The Supreme Court however disagreed. Despite holding that female skiers were at a disadvantage compared to their male counterparts, the court did not agree that the criteria for the inclusion of new events were in themselves discriminatory. On the face of it, this would seem to vindicate the IOC who have always claimed that the decision not to include women’s ski-jumping was made strictly on a technical basis:

“The Olympic tradition exception under Rule 47(4.4) of the Olympic Charter gives an advantage to the comparator group that the plaintiffs do not enjoy; because men’s ski jumping events have historically been part of the Olympic Programme, the IOC did not subject men’s ski jumping events to its inclusion criteria. The women do not have the advantage of the Olympic tradition exception because historical stereotyping and prejudice prevented women from participating in ski jumping in countries and on three continents, may be included in the programme of the Olympic Games.”43

Given these varying thresholds, it is difficult for female athletes to argue that discrimination has occurred, and indeed this is where the claimant athletes’ case failed in Martin. By contrast, the claimant skiers in Sagen challenged the level of the selection criteria and their application to women’s ski-jumping (technical merits argument). The skiers argued that because women’s ski-jumping lacked the financial and logistic support available to male athletes, the criteria relating to the number of international competitions and athletes was set too high.44 The Supreme Court however disagreed. Despite holding that female skiers were at a disadvantage compared to their male counterparts, the court did not agree that the criteria for the inclusion of new events were in themselves discriminatory.45 On the face of it, this would seem to vindicate the IOC who have always claimed that the decision not to include women’s ski-jumping was made strictly on a technical basis:

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Given this policy, it is difficult to argue against women’s ski-jumping not being included on an Olympic Programme.

Honour thy grandfather

Where the claimant skiers were ultimately successful in establishing discrimination was in grounding their discrimination claim not in the universality criteria for the selection of Olympic events, but rather in its inconsistent application. Women’s ski-jumping did not meet the objective criterion laid down in r.47(4.4) but then again, neither did men’s ski-jumping.56 The source of the discrimination claim is therefore the “grandfathering” of men’s ski-jumping59 under r.47(4.4) of the Olympic Charter which states that events which no longer satisfy the criteria may be maintained, “for the sake of the Olympic tradition”.

Fenlon J. in Sagen stated that:

“The Olympic tradition exception under Rule 47(4.4) of the Olympic Charter gives an advantage to the comparator group that the plaintiffs do not enjoy; because men’s ski jumping events have historically been part of the Olympic Programme, the IOC did not subject men’s ski jumping events to its inclusion criteria. The women do not have the advantage of the Olympic tradition exception because historical stereotyping and prejudice prevented women from participating in ski jumping in

43. The rule was subsequently removed when the IOC adopted a new version of their Olympic Charter in 2006, however the IOC does continue to apply them in practice
44. Sagen (2009) BCSC 942 at [92].
45. Sagen (2009) BCSC 942 at [99].
47. 83 athletes competing from 14 nations (source: Women’s Ski Jumping Factsheet (Women’s Ski Jumping USA) http://www.wpsjusa.com [Accessed September 28, 2009]).
48. 30 athletes competing from 11 nations (source: Women’s Ski Jumping Factsheet).
49. 34 athletes competing from 10 nations (source: Women’s Ski Jumping Factsheet).
50. 45 athletes competing from 17 nations (source: Women’s Ski Jumping Factsheet).
51. 26 athletes competing from 13 nations (source: Women’s Ski Jumping Factsheet).
52. 39 athletes competing from 12 nations (source: Women’s Ski Jumping Factsheet).
53. International governing body for wrestling.
54. International governing body for swimming.
55. International governing body for cycling.
57. Competitors registered from 29/53 countries, when all three events are combined (2009 figures) (source: Sagen (2009) BCSC 942 at [87]).
sufficient numbers by 1949 [when the rule was adopted] to be included in the Olympics. Rule 47(4.4) perpetuates the effect of that prejudice and is, therefore, discriminatory.\textsuperscript{60}

The goodwill advanced by the IOC in their affirmative action-styled reduction of the number of women athletes compared to men in r.3.3 in order to compete is thus negatived by r.47(4.4). The effect of this grandfathering rule is, in the circumstances, not only to negate r.3.3 but to codify the perpetuation of prejudice. Fenlon J. notes that the discrimination suffered by the plaintiffs stems not from the criteria governing the addition of new events but rather from the IOC’s application of the “Olympic tradition exception” to men’s ski-jumping.\textsuperscript{61}

While the characterisation by IOC President, Dr Jacques Rogge that the decision to exclude women’s ski-jumping was made “strictly on a technical basis” may be technically correct, a more proper reading of the IOC’s actions is that r.47(4.4) is shorthand for regulated gender discrimination. Fenlon J. stated that:

“[T]he differential treatment of the plaintiffs resulting from the application of the Olympic Charter Rules that grandfather men’s ski jumping, while requiring women’s ski jumping events to meet the criteria for inclusion of new events, discriminates against the plaintiffs in a substantive sense.”\textsuperscript{62}

The effect of r.47(4.4) is to enable gender discrimination to endure. The grandfathering rule intended to maintain marginalised men’s events for the sake of the Olympic tradition but applying a more stringent standard for the same women’s event serves as a sort of perpetuation of prejudice clause.

Notwithstanding the high-minded highfalutin ideals of the Olympics, it is worth remembering that the Olympic movement is rooted in Pierre de Coubertin’s view that, “Olympics with women would be incorrect, unpractical, uninteresting and unesthetic”.\textsuperscript{63} that the IOC did not elect its first woman member until 1981, and that in 2006 the FIS voted 114:1 in favour of recommending the inclusion of women’s ski-jumping in the 2010 Olympics. In this light, it is difficult to not view the IOC’s talk against discrimination as little more than hot air.\textsuperscript{64}

### The dangers of snowballing

So what implications does the judgment in \textit{Sagen} have for the Olympics and for sport in general? Possibly the most obvious impact relates to the current and future Olympic programme. On August 13, 2009, the IOC announced changes to both the 2012 London Olympic Summer Games and proposed two additional sports to be added to the 2016 Olympic Programme:

- inclusion of three women’s boxing events (at expense of removing one men’s event);
- replacement of men’s C2 500m canoe sprint with women’s K1 200m;
- requests for new events in wrestling, swimming and cycling;
- consideration of the inclusion of a mixed-doubles tennis event;
- proposition of sports of golf and rugby to be included in 2016 Olympic Programme.

In a press release, the IOC stated that the, “changes reflect the IOC’s desire to continually refresh the Olympic programme and its commitment to increase participation by women”.\textsuperscript{65} While it is true that an extensive evaluation of the events had been carried out by the OCP since October 2008, there is no denying that the inclusion of these new events (women’s boxing in particular) represents a significant step forward in working towards gender parity in the Games. This decision also served to distract from some of the negative publicity generated by \textit{Sagen}.

Changes have also been announced to the Winter Games programme, in particular when FIS confirmed in September 2009 that women’s ski-jumping has now been added as an event at the inaugural Winter Youth Olympic Games in Innsbruck in 2012. FIS has also re-proposed women’s ski-jumping to the IOC as an Olympic event at the Sochi Winter Games 2014. While both of these initiatives are encouraging steps towards gender parity, many of the current claimants will be ineligible or unable to compete at these events. It is also worth bearing in mind that the submission of the proposal for Sochi 2014 will be viewed in the same light as it was for Vancouver 2010 and that such a recommendation is therefore no guarantee of IOC acceptance.

The ratio from \textit{Sagen} also potentially has surprising implications, particularly in relation to two current Olympic Summer Sports. Just as the claimant skiers in \textit{Sagen} argued that they should be included because their male comparators were, so it is potentially open for male rhythmic gymnasts...
and male synchronised swimmers to similarly argue their case for inclusion on the Olympic programme. Currently both sports are only open to female competitors at a world and Olympic level, however steps are being taken to develop equivalent male disciplines and competitions at other levels of competition.  

If suitable competition rules could be developed and enough international athletes were interested in competing, arguably the principle in Sagen could be used to hold that equivalent male rhythmic and synchronised swimming events should also be held (especially if the existing female events were “grandmothered” due to insufficient female participation). Any changes or additions (male or female) to the Olympic programme will also have consequences for athlete participation. One of the key principles behind Olympic sustainability is that the total number of athletes within each of the existing sports remains unchanged. For example, when trampolining was added as an Olympic discipline in 2000 as part of the gymnastics family, any nation who wished to enter a trampolinist had to do so at the expense of one of their other gymnasts. The inclusion of greater numbers of events in the name of gender parity will therefore lead to greater resource constraints on nations as they try to maximise their medal chances within their allocated quota of athletes. Similarly, while the claimants in Sagen argue that there is excess capacity at the venue in Whistler which could be used to stage a women’s ski-jumping event if the IOC approve it, what is not mentioned in the case is the additional ancillary costs to VANOC that such a decision would entail.  

London 2012  

How worried should London 2012 be that it could face a similar case to Sagen? While Canada has the Charter of Rights and Freedoms, the United Kingdom has the European Convention on Human Rights (ECHR), 66 and the Sex Discrimination Act 1975. In reality though, while both Acts purport to exclude discrimination on the basis of sex, they also both have significant limitations for potential claimant athletes.  

Like the Canadian Charter, a potential claimant under the ECHR would principally need to demonstrate that the event was being staged by a public authority. In the case of London 2012, the equivalent body to VANOC would be the London Organising Committee of the Olympic and Paralympic Games (LOCOG). The problem with art.14 of the ECHR though is that this prohibition of discrimination is a general right and cannot therefore be relied upon on its own. It is also a defence if an organisation, like LOCOG or the IOC, has a legitimate and proportionate aim that justifies the discrimination.  

By contrast, aspects of the Sex Discrimination Act (SDA) 1975 may be too specific to help potential claimant athletes in 2012. The main focus of the SDA is in relation to employment situations, and in particular to claimants employed (wholly or partly) in Great Britain. 67 This clause alone would prevent many potential athletes from bringing an action. With the Equal Treatment in Goods and Services Directive 2004/113 68 now implemented into UK law, 69 it would however be possible to bring an action in relation to the supply of a service (i.e. the provision of sporting facilities).  

Having established that a service has been provided, a potential claimant athlete would then need to overcome s.44:  

(1) Nothing in Parts II to IV shall, in relation to any sport, game or other activity of a competitive nature where the physical strength, stamina or physique of the average woman puts her at a disadvantage to the average man, render unlawful any act related to the participation of a person as a competitor in events involving that activity which are confined to competitors of one sex.  

(2) - Subsection (1) applies to discrimination under sections 29 to 31 which falls within section 2A, only if the discrimination is necessary to secure—  

(a) fair competition, or  

(b) the safety of competitors at such events.  

If Sagen had been held in the United Kingdom though, it would be difficult to argue that s.44 were interested in competing, arguably the principle in Sagen could be used to hold that equivalent male rhythmic and synchronised swimming events should also be held (especially if the existing female events were “grandmothered” due to insufficient female participation). Any changes or additions (male or female) to the Olympic programme will also have consequences for athlete participation. One of the key principles behind Olympic sustainability is that the total number of athletes within each of the existing sports remains unchanged. For example, when trampolining was added as an Olympic discipline in 2000 as part of the gymnastics family, any nation who wished to enter a trampolinist had to do so at the expense of one of their other gymnasts. The inclusion of greater numbers of events in the name of gender parity will therefore lead to greater resource constraints on nations as they try to maximise their medal chances within their allocated quota of athletes. Similarly, while the claimants in Sagen argue that there is excess capacity at the venue in Whistler which could be used to stage a women’s ski-jumping event if the IOC approve it, what is not mentioned in the case is the additional ancillary costs to VANOC that such a decision would entail.  

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67. As well as the costs of staging such a women’s event, VANOC would also need to provide female athletes with accommodation, medical and security services, seats at opening ceremonies so they can be recognised as Olympians, medals and medal ceremonies so they can be recognised as champions, transportation to and from events, distributing tickets for women’s ski-jumping events to provide an audience, and provide an opportunity for female athletes to take part in the 2010 Games more broadly by providing them with tickets to other events: Sagen (2009) BCSC 942 at [33] appeal factum.  
69. Sex Discrimination Act 1975 s.10.  
71. Incorporated into English law through The Sex Discrimination (Amendment of Legislation) Regulations 2008.
applies as ski jumping is an individual sport with no physical contact between competitors. American skier, Lindsey Van, also currently holds the course record for the Whistler 90m ski jump having beaten her male competitors there in an earlier competition at the facility.\textsuperscript{72} The only counter argument to this view would be to suggest that there are risks to the health of the athlete in the performance of the event. In the case of women’s ski-jumping these fears have been largely discredited, but these risks may have more relevance to other sports, particularly the proposed women’s boxing events.

Conclusion

Competitive sport, by its very nature, involves the stratification and celebration of athletic performance based on myriad ways of measuring technical and athletic merit. This article is not therefore suggesting that the IOC should be forced to include specific women’s sports on their programme, neither is it stating that it is inappropriate to evaluate sport on the basis of its technical merit. What is important though is that all sports and activities should be subjected to the same selection rationale. Some athletes are not more equal than others.

In \textit{Sagen}, the discrimination occurred because the grandfathering arrangements of men’s ski-jumping meant that the phrase ‘‘Olympic tradition’’ could just as easily be substituted with ‘‘old boy’s network’’. The fact that this discrimination was not just accepted by one Canadian organisation, on Canadian soil, but was justified by the British Columbia Supreme Court clearly illustrates that women’s rights under the Canadian Charter of Rights and Freedoms do not extend to the Olympics. Indeed, the mental gymnastics required of Fenlon J.’s legal reasoning is on par with the IOC’s contorted rationalisations promoting women in sport whilst all the while excluding women’s ski-jumping from the Vancouver 2010 Olympic Winter Games.

What sport needs is a greater transparency and consistency from both the courts and the IOC in the manner in which they adjudicate and administer sports cases. Hard cases may make bad law, but not making a decision because of a fear of the repercussions makes even worse law.

\textsuperscript{72} \textit{Sagen} (2009) BCSC 942 at [66].
Author: Please take time to read the below queries marked as AQ and mark your corrections and answers to these queries directly onto the proofs at the relevant place. DO NOT mark your corrections on this query sheet:

AQ1: It is unclear what [7] at the end of footnote 4 refers to. Is this para. no. of the Charter? Author to please confirm.
AQ2: Is SI no. available for ref in fn.71? Author to please supply.