CITATION: Intercounty Tennis Association v. Human Rights Tribunal of Ontario, 2020 ONSC 1632
DIVISIONAL COURT FILE NO. 077/19
DATE: 20200407

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Sachs, Backhouse and Mew JJ.

BETWEEN:	
Intercounty Tennis Association Applicant	*Jennifer Zdriluk*, for the Intercounty Tennis Association
– and –	
Human Rights Tribunal of Ontario, Catherine Boyd, Cheryll Corness and Fiona Miller Respondents	*Brian Blumenthal*, for the Human Rights Tribunal of Ontario, *Rebecca Glass* and *Mathieu Belanger*, for the Respondents Catherine Boyd, Cheryll Corness and Fiona Miller
	HEARD at Toronto: February 24, 2020

REASONS FOR DECISION

Sachs J.:

Introduction

[1] The Applicant tennis association ("ICTA") is a non-profit organization whose members are tennis clubs. It runs a number of interclub tennis leagues for its member clubs, including a Mixed League. The Mixed League allows both male and female tennis players to join on the basis of competitive tryouts. In terms of organization, it uses "fixtures," which are a series of matches between doubles pairs. Under the fixture format, the Mixed League offered twice as many playing spots to men as it did to women.

[2] The individual Respondents are women who have either played on teams in the ICTA's Mixed League (Ms. Miller and Ms. Boyd) or tried out for spots and were unable to obtain them (Ms. Corness). All three filed applications with the Tribunal alleging that the ICTA had discriminated against them on the basis of sex.

[3] On July 12, 2018 the Tribunal sustained their complaints and ordered the ICTA to change its fixture format (the "Initial Decision"). The ICTA sought reconsideration of that decision. On January 17, 2019, the Tribunal refused the ICTA's request for reconsideration (the "Reconsideration Decision").

[4] On this application the ICTA seeks to judicially review and set aside the Tribunal's decisions. In doing so it does not seek to challenge the Tribunal's findings that the individual Respondents were discriminated against on the basis of sex. Rather, it asserts that the Tribunal erred when it found that all of the individual Respondents had standing to bring their applications and it erred in its conclusions regarding the timeliness of those applications. The ICTA also argues that the Tribunal breached the duty of procedural fairness and that it failed to apply accepted jurisprudence in its analysis of whether the ICTA would suffer undue hardship if it was ordered to implement a gender-equal fixture format.

[5] The Tribunal submitted that as a result of the Supreme Court's decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1, the appropriate standard of review to apply to the Tribunal's decisions is the one set out in the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19 (the "*Code"*) – patent unreasonableness – and that this phrase must be given a meaning that differs from reasonableness.

[6] For the reasons that follow, I would dismiss the application. I reject the submission that the effect of *Vavilov* is to change the standard by which Ontario courts review the Tribunal's decisions. I also find that the Tribunal's decisions respecting standing, timeliness and undue hardship were rationally supported. Further, the Tribunal did not breach the duty of procedural fairness. As a result, the ICTA's application must fail.

Background

The Respondents

[7] The Respondents, Catherine Boyd, Cheryll Corness and Fiona Miller, are women who have either tried out for or played on teams in the ICTA's Mixed League. Between December 2015 and January 2016, each of them commenced an application to the Tribunal alleging that the ICTA discriminated against them on the basis of sex by offering twice as many playing opportunities to men in its Mixed League as it does to women. The three applications were consolidated and heard together over the course of four days.

[8] In their applications the Respondents did not seek a monetary remedy, but rather an order that the ICTA be required to provide equal playing opportunities for men and women in its Mixed League.

The ICTA

[9] The ICTA is governed by a board of directors, and is comprised of member tennis clubs, each of which vote on the ICTA's internal rules and by-laws. While the ICTA's board can

propose changes to rules and by-laws, these changes are subject to votes by its member clubs. Individuals who play tennis in one of the ICTA's leagues are not members of the ICTA tennis association, but rather members of their local club.

[10] At the relevant time, the ICTA operated four interclub tennis leagues for its member clubs. Each league is divided by skill level from lowest to highest. Individual players are typically selected to play in particular leagues through competitive try-outs.

The Mixed League

[11] The Mixed League is the ICTA's largest league and one of the largest leagues in Ontario. It hosts approximately 160 teams and 480 matches a week. Each playing season runs for 14 weeks. Unlike some of the other leagues run by the ICTA (including the Ladies League) the Mixed League matches are played in the evening.

[12] The Mixed League is organized into "fixtures," which are a series of matches between doubles pairs belonging to two different teams. The team roster is comprised of 12 players in total, divided into six pairs. Of these six pairs, three are men's doubles pairs, two are mixed-gendered doubles pairs, and one is a women's doubles pair. There are eight playing spots available to men and four spots available to women in each team in each fixture. The 8:4 men-to-women format was established when the ICTA was formed in 1962. The rationale for this format appears to have been two-fold: men, unlike women, worked outside the home during the day and needed to play in the evenings, and there were more competitive male players interested in playing than competitive female players. The ICTA put forward a similar version of this rationale in the hearing before the Tribunal.

[13] The uncontroverted evidence before the Tribunal was that during the Mixed League's 14-week playing season in 2016, women were afforded 628 playing opportunities per week and men were afforded 1,256 playing opportunities per week.

[14] During the hearing the ICTA asserted that it provided more playing opportunities for women than for men when all of its leagues (including the daytime Ladies League) were considered. The Tribunal concluded that the scope of the issue before it was whether the playing format of the Mixed League discriminated against women, not whether the format of the ICTA's leagues were discriminatory when considered as a whole.

Previous Attempts to Equalize Playing Opportunities

[15] Prior to the Respondents' applications to the Tribunal, there were previous attempts to change the ICTA's Mixed League format to provide equal playing opportunities for women. These attempts came in the form of a trial 6:6 format in one particular Division, and several unsuccessful motions during Annual General Meetings.

Survey to Gauge Demand from Women to Play in the Mixed League

[16] In order to gauge, among other things, the level of demand from women to play in the Mixed League, the parties, under the Tribunal's direction, formed a survey committee

comprised of two members of the ICTA's Executive Board and two of the individual Respondents (the "Committee").

[17] The response rates to the survey was robust, with a high degree of engagement by member clubs and individual players.

[18] When responding to questions about player satisfaction with the 8:4 format of the Mixed League, female players were less satisfied than their male counterparts. When asked if their satisfaction with the Mixed League would increase or decrease if a gender-equal format were implemented, women generally reported that their satisfaction would increase while men overwhelmingly indicated that their satisfaction levels would decrease

[19] The Committee also surveyed individuals who were not currently playing in the Mixed League. Roughly the same number of men and women expressed interest in playing in the Mixed League in the future. Almost a third of women responded that they would be encouraged to play if the League adopted a gender-equal format.

The Hearing Before the Tribunal

[20] In December of 2016, after the hearing in the matter had been scheduled, the ICTA sought a summary hearing. The Tribunal refused its request, but in the course of doing so issued a Case Assessment Direction that defined the scope of the hearing it was going to hear on the merits. This direction is the focus of the ICTA's procedural fairness argument. Specifically, the ICTA asserts that in its reasons, the Tribunal relied on evidence that went beyond the scope of the hearing as it had defined it in the Case Assessment Direction.

[21] The three applications were consolidated and heard together over several days in the winter of 2017 and the spring of 2018.

[22] The Tribunal heard evidence from all three Respondents and from eight witnesses called on behalf of the ICTA.

[23] At the outset of the hearing the ICTA raised two preliminary objections: (1) whether the Respondents had standing to bring their applications if they had not actually been denied a service and if their applications were untimely, and (2) whether the recreational club exception in section 20(3) of the *Code* applied to preclude the ICTA from being named as a respondent in the applications before the Tribunal. After hearing submissions on these preliminary issues, the Tribunal concluded that the Respondents had standing before it and that two of the three applications before it were timely. It also concluded that the ICTA was not a recreational club within the meaning of the *Code.* The first issue – standing and timeliness – is one of the bases of the application for review before us. The second is not.

[24] In its discrimination analysis, as already noted, the Tribunal clarified that it was confining its analysis to the playing opportunities afforded in the Mixed League only. The Tribunal applied the well-established test to determine whether the Respondents had established *prima facie* discrimination on a protected ground under the *Code* and found that they had.

Once an applicant establishes *prima facie* discrimination, the respondent (here, the ICTA) bears the evidentiary burden to justify the impugned conduct or practice.

[25] While the ICTA disputed that the Respondents had experienced adverse treatment, its main justification for maintaining the status quo was that imposing a gender-equal fixture model may result in attrition that would cause the ICTA undue hardship.

[26] The Tribunal did not accept that the ICTA would incur undue hardship by equalizing playing opportunities for men and women in the Mixed League. According to the Tribunal, the financial evidence presented to the Tribunal of undue hardship was speculative at best. The Tribunal did not accept that demand by female players to participate in the Mixed League was as low as the ICTA suggested.

[27] The Tribunal's analysis on undue hardship is one of the focuses of this application for judicial review.

The Remedy Ordered by the Tribunal

[28] The Tribunal ordered the ICTA to implement a staggered remedy in which the number of playing opportunities in the Mixed League would equalize between men and women beginning with the lowest skill level in the league in the first year of implementation, following which the other three levels would equalize every year thereafter.

Request for Reconsideration

[29] On August 13, 2018, the ICTA filed a request for reconsideration of the Tribunal's decision pursuant to s. 45.7 of the *Code*. The basis for this request was similar to the grounds advanced on this application, namely challenges to the standing and timeliness of the applications and a denial of procedural fairness. On January 17, 2019, the request for reconsideration was denied.

The Applicable Standard of Review

[30] As already noted, the Tribunal asserts that the standard of review to be applied to this application is patent unreasonableness and that this phrase has a meaning that is different from reasonableness. The basis for its submission is the holding in *Vavilov* that the presumption of reasonableness review can be rebutted "where the legislature explicitly provides the applicable standard of review:" *Vavilov*, at para. 17.

[31] Section 45.8 of the *Code* provides that:

> [A] decision of the Tribunal is final and not subject to appeal and shall not be altered or set aside in an application for judicial review or in any other proceeding unless that decision is patently unreasonable.

[32] The history of this provision is summarized in *Shaw v. Phipps*, 2010 ONSC 3884, 325 D.L.R. (4th) 701 (Div. Ct.), upheld 2012 ONCA 155, [2012] O.J. No. 2601. Specifically,

in 2006 the Ontario legislature made significant amendments to the *Code* that allowed parties to apply directly to the Tribunal alleging discrimination. These applications were to be heard by expert adjudicators whose decisions were no longer subject to a right of appeal. As put by the Divisional Court at para. 38 of *Shaw v. Phipps*:

> It is obvious that when the Legislature enacted that standard [s. 45.8] in December 2006, the intent was to have the courts accord the same high degree of deference to the Tribunal that they accorded to other experienced and expert administrative tribunals, such as the Ontario Labour Relations Board.

[33] While these amendments, including s. 45.8, were drafted in 2006, they were not proclaimed to come into force until June 30, 2008.

[34] Meanwhile, in March of 2008, the Supreme Court of Canada decided *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190. The aim of that decision was to develop "a principled framework" for judicial review that was "more coherent and workable" than the one in place at the time: para. 32. In achieving that aim the Supreme Court eliminated the three standards of judicial review that existed – correctness, reasonableness and patent unreasonableness – and concluded that there ought to be two standards of review – correctness and reasonableness.

[35] The Supreme Court examined the standard of patent unreasonableness and how it had been interpreted in the case law. The Court concluded that there was no meaningful distinction to be made between reasonableness and patent unreasonableness. Both standards accepted that there could be more than one valid interpretation of a statutory provision or "answers to a legal dispute and that courts ought not to interfere where the tribunal's decision is rationally supported." The patent unreasonableness standard used wording directed at having the court look either to the magnitude of the defect ("bordering on the absurd") or the immediacy of the defect ("clearly irrational" or "apparent on the face of the decision"). However, as the Supreme Court noted at para. 41 of *Dunsmuir*:

> Looking to either the magnitude or the immediacy of the defect in the tribunal's decision provides no meaningful way in practice of distinguishing between a patently unreasonable and an unreasonable decision. As Mullan has explained:
>
> To maintain a position that it is only "clearly irrational" that will cross the threshold of patent unreasonableness while irrationality *simpliciter* will not is to make a nonsense of the law. Attaching the adjective "clearly" to irrational is surely a tautology. Like "uniqueness," irrationality either exists or it does not. There cannot be shades of irrationality.

[36] The Supreme Court also noted the rule of law concern inherent in requiring "parties to accept an irrational decision simply because, on a deferential standard, the irrationality of the decision is not clear enough. It is also inconsistent with the rule of law to retain an irrational decision:" *Dunsmuir*, at para. 42.

[37] Based on this reasoning, the Divisional Court in *Shaw v. Phipps* concluded that the content of the "patent unreasonableness" standard in s. 45.8 of the *Code* was equivalent to reasonableness. The decisions of the Tribunal must be respected "unless they are not rationally supported." The Court of Appeal accepted the Divisional Court's conclusion on this issue at para. 10 of its decision where the Court states:

> An Adjudicator's decision is not subject to appeal, but only to judicial review: see s. 45.8 of the [*Code*]. All counsel agree that the Divisional Court properly identified "reasonableness" as the appropriately deferential standard of review on an application for judicial review of the Adjudicator's conclusion of discrimination. In recognition that the Adjudicator "has a specialized expertise" in the area, the Divisional Court explained that the reasonableness standard accords "the highest degree of deference…with respect to the [Adjudicator's] determinations of fact and the interpretation and application of human rights law." Deference is maintained unless the decision is not rationally supported. [citations omitted]

[38] All counsel on this application, except for counsel for the Tribunal, agree that "reasonableness" continues to be the appropriate standard of review for the Tribunal's decisions.

[39] The issue I must determine is whether, as the Tribunal asserts, *Vavilov* has overruled this principle.

[40] In *Vavilov* the majority began by identifying the need for further clarification and simplicity in the law surrounding judicial review. As put by the majority at paras. 7- 8:

> [7] […] It has become clear that *Dunsmuir's* promise of simplicity and predictability in this respect has not been fully realized. In *Dunsmuir,* a majority of the Court merged the standards of "patent unreasonableness" and "reasonableness *simpliciter*" into a singe "reasonableness" standard, thus reducing the number of standards of review from three to two. It also sought to simplify the analysis for determining the applicable standard of review… However, uncertainty about when the contextual analysis remains appropriate and debate surrounding the scope of the correctness categories have sometimes caused confusion and made the analysis unwieldy.
>
> [8] In addition, this analysis has in some respects departed from the theoretical foundations underpinning judicial review. While the application of the reasonableness standard is grounded in part in the necessity of avoiding "undue interference" in the face of the legislature's intention to leave certain questions with administrative bodies rather than with the courts, that standard has come to be routinely applied even where the legislature has provided for a different institutional structure through a statutory appeal mechanism. [citations omitted]

[41] From these paragraphs and the ones that follow, it can be discerned that the Supreme Court identified three major issues with the post *Dunsmuir* standard of review era that it sought to address:

(a) A need for clarification about what a reasonableness review entails in response to concerns that this type of review "is sometimes perceived as advancing a two-tiered justice system in which those subject to administrative decisions are entitled only to an outcome between "good enough" and "not quite wrong:" para. 11;

(b) A need to recognize that when the legislature has provided for a right of appeal that direction should be respected and interpreted to mean that the court is to perform an appellate function in relation to the decision at issue; and

(c) A need to clarify the scope of the correctness categories of review.

[42] Nowhere in *Vavilov* does the Court identify the merger of the reasonableness and patent unreasonableness standards as being one of the features of *Dunsmuir* that it is seeking to revise. Furthermore, to reintroduce the distinction would be contrary to the Court's stated purpose in *Vavilov* – to clarify and simplify the law of judicial review. Reintroducing what the Court has already called a "meaningless" distinction that caused confusion would run counter to this aim.

[43] Furthermore, in the section of *Vavilov* that expands on legislated standards of review, the Court ends its discussion with the following statement at para. 35:

> We continue to be of the view that where the legislature has indicated the applicable standard of review, courts are bound to respect that designation, within the limits imposed by the rule of law.

[44] As set out above, returning to an era where "patent unreasonableness" is given a meaning beyond "reasonableness" does raise rule of law concerns – namely, the fact that an irrational decision is allowed to stand because its irrationality is not "clear" or "obvious" enough.

[45] For these reasons I find that the words "patent unreasonableness" in the *Code* are to be given the meaning ascribed to them in *Shaw v. Phipps* – namely, reasonableness.

[46] The issues of standing, timing and undue hardship are to be reviewed on a standard of reasonableness. No standard of review analysis is necessary for the procedural fairness issue. A decision is either procedurally fair or it is not.

Was the Tribunal's Decision with Respect to Standing and Timeliness Reasonable?

[47] Section 34 of the *Code* provides that a person may bring an application before the Tribunal if they believe that "any of his or her rights under Part 1 have been infringed." It does not allow for "public interest" litigation. In other words, to have standing an applicant must show they were personally affected in a way that infringed their rights. According to the

ICTA, the Respondents' applications were disguised "public interest" litigation. The Respondents themselves either were not denied playing opportunities in the Mixed League or their applications were out of time.

[48] Section 34(1) states that an applicant may apply to the Tribunal within one year of the last incident to which the application relates. The Respondents filed their applications between December 29, 2015 and January 6, 2016.

[49] Ms. Corness tried out for the ICTA's Mixed League team through her Club every year between 2000-2003 and was unsuccessful in securing a playing spot. Since 2003 she has not tried out for the Mixed League and, therefore, has not been denied the opportunity to play in the Mixed League. The Tribunal accepted that Ms. Corness' application was out of time, but found that her experiences with the Mixed League did not make her an "officious bystander" or an individual who lacked "a personal interest in the issues raised in the Application."

[50] Ms. Miller tried out for and secured a position in the Mixed League in 2013 and 2014. She did not try out for the Mixed League in 2015. In its Initial Decision the Tribunal noted that:

> 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. As a result, the Tribunal found that Ms. Miller had "recent and ongoing experience playing in the [ICTA's] Mixed League.

[51] In its Reconsideration Decision the Tribunal stated that it had "some difficulty understanding the Vice-Chair's reasoning with respect to the timeliness of Ms. Miller's claim, given that her Application was filed over a year after she attempted to find a playing spot." However, it also found that this would not serve as a basis to set aside the decision since Ms. Boyd's application was timely and she had standing, and the Tribunal had consolidated the applications prior to the hearing.

[52] The ICTA acknowledged that Ms. Boyd's application was timely as she did try out for the Mixed League in 2015. However, it argues that since Ms. Boyd was allowed to play in 2015, she did not experience discrimination. The Tribunal disagreed. At para. 61 of the Initial Decision it found as follows:

> 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.

[53] In other words, while Ms. Boyd did get to play in the Mixed League in 2015, she was only able to do so after joining another club and paying more fees and when she did so her playing opportunities were restricted. On this basis the Tribunal found that Ms. Boyd had suffered discrimination. In doing so, the Tribunal did not accept the ICTA's assertion that discrimination under the *Code* requires that a service be denied in full. The Tribunal's interpretation of human rights protection is consistent with the broad and purposive application required of remedial legislation such as the *Code.*

[54] The Tribunal has broad discretion when it comes to fashioning appropriate remedies. Its mandate includes the power to order public interest remedies such as the remedy ordered in this case. The remedy ordered could have been ordered on the basis of a single application. Therefore, even if only one application before it was timely, the Tribunal's decision was reasonable and any error it may have made with respect to the timeliness of Ms. Miller's application was inconsequential.

Was There a Denial of Procedural Fairness?

[55] After the Respondents filed their applications, they sought to amend them to include allegations of a poisoned environment on match nights and practices. In its Case Assessment Direction dated January 31, 2017, the Tribunal refused to allow this amendment and limited the hearing to the issue of the number of playing opportunities for women and men in the Mixed League.

[56] According to the ICTA, the Tribunal's acknowledgment of Ms. Miller's testimony about the injury to dignity she experienced when she was told that women should take a "back seat" by accepting unequal playing opportunities, and Ms. Boyd's testimony that "she would have had more opportunities to play if the ICTA were using a 6:6 male to female format" expanded the scope of the application to include matters that the ICTA had said it would not hear: Initial Decision, paras. 60-61. This in turn put the ICTA in the position where it did not know the case it had to meet, which constituted a denial of natural justice.

[57] In its Reconsideration Decision the Tribunal rejected the ICTA's submission, finding that the evidence that was accepted did not relate to a poisoned environment on match nights and practices, but rather to how the individual Respondents felt about having to accept unequal playing opportunities. The denial of equal playing opportunities was the central claim before the Tribunal, and the impact of that denial on the Respondents "fell squarely within the allegations made in the Application:" Reconsideration Decision, para. 17.

[58] This conclusion on the part of the Tribunal was a reasonable one. Its reasonableness becomes apparent when the original (as opposed to the proposed amended applications) filed by the individual Respondents are considered. In each of those applications the Respondents remarked on how denying women equal playing opportunities "questions the

value of women and of women's sports and is demeaning to women." Thus, the impact of the alleged discriminatory conduct on them was raised by the individual Respondents in their original applications and the ICTA had notice of it.

Were the Tribunal's Decisions with respect to Undue Hardship Reasonable?

[59] The ICTA argues that the Tribunal's analysis with respect to undue hardship runs contrary to established jurisprudence and held the ICTA to an impossible standard.

[60] In the Initial Decision, once the Tribunal found that the individual Respondents had made out a *prima facie* case of discrimination (a finding that was not challenged on this application), the evidentiary burden switched to the ICTA to establish that the provision of half as many playing spots to women compared to men was justified. To do so, the ICTA argued that providing an equal number of playing spots for women would cause a high enough number of teams and/or clubs to leave the ICTA that it would it cease to be able to operate financially and thus would experience undue hardship.

[61] In conducting its undue hardship analysis, the Tribunal modified the test for making out the "*bona fide* occupational requirement" defence in employment cases. The Tribunal noted that outside of the employment context the test has been referred to as the *bona fide* justification defence. The test is set in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 and, as described by the Tribunal at para. 86 of its Initial Decision, consists of the need to establish three things on a 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 fulfillment 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.

[62] The Tribunal focused its analysis on the third part of the test, which, modified for the case before it, required the ICTA to demonstrate on a balance of probabilities that it is impossible for it to provide equal playing opportunities for women without incurring undue hardship.

[63] The Tribunal reviewed the evidence that the ICTA put forward on this issue. First, the ICTA called a witness to testify as to the possible financial consequences to the ICTA if certain attrition rates occurred. The only evidence as to what the attrition rates might

actually be came from witnesses who testified that some clubs had had difficulty finding enough strong women players to fill all the current slots on the Mixed League teams.

[64] The Tribunal was not persuaded that this difficulty finding strong women players would cause the ICTA to experience undue hardship because clubs would leave the league. First, the witnesses who testified stated it was difficult to find "competitive" or "strong" women players. This suggested that there was a demand by women to play, just not enough women who are perceived by the clubs to be strong enough. Second, the Tribunal noted that the survey results suggested that there was a "sizeable interest" on the part of women to play in the Mixed League. In particular, approximately two thirds of the women who were not currently playing in the Mixed League were interested in playing in that league. Third, the evidence revealed that the membership in the ICTA was "sticky" or loyal. This is because the ICTA offers its members something that other leagues do not – a longer season and the opportunity to play in the evenings.

[65] The Tribunal recognized that there had been resistance on the part of clubs to the idea of equalizing playing opportunities for women. It also acknowledged that one experiment with the 6:6 format was short-lived. However, it was not persuaded by this evidence that if a gender-equal playing opportunity format was put in place, this would cause the clubs to leave the ICTA. Among other things, if the problem was finding enough "strong" women to fill the spots, the format would not have to be a 6:6 format. There are other ways to equalize. In addition, the Tribunal found that a vote to change the *status quo* was different than voting to leave the association altogether, especially when the survey showed that there were so many women who were interested in playing in the ICTA.

[66] The Tribunal ended its analysis as follows:

> [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 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 opportunities for women.

[67] The ICTA alleged that the Tribunal's analysis was unreasonable because the Tribunal refused to accept the ICTA's "unrefuted evidence" and instead "substituted its own assumptions of what 'may' happen in order to find that undue hardship does not exist."

[68] I reject this characterization. The ICTA's evidence on the financial consequences to it of equalizing playing opportunities depended upon accepting certain attrition levels. The evidence as to the amount of attrition there would be went both ways. The Tribunal weighed that evidence and found, as it was entitled to, that the ICTA had not established that the level of attrition the ICTA was asserting would occur. Its findings on this issue were grounded in the evidence and were reasonable.

[69] The ICTA also argued that the Tribunal ignored the Supreme Court's decision in *Hydro-Québec v. Sydicat des employé-e-s de techniques professionnelles et de bareau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43, [2008] S.C.R. 561 and particularly its direction at para. 12:

> What is really required is not proof that it is impossible to integrate an employee who does not meet a standard, but proof of undue hardship, which can take as many forms as there are circumstances.

[70] *Hydro-Québec* is a case about an employee who had been absent for a large number of days due to illness. Her employer accommodated her absences and did not terminate her until her physicians indicated that she should stop working for an indefinite period of time. The Supreme Court held that if an employer's enterprise will be hampered excessively by having an employee who is unable to work for the foreseeable future and the employer has tried to accommodate the employee's illness, the undue hardship test will be satisfied.

[71] The facts of *Hydro-Québec* are in no way analogous to the facts of the case at bar. Further, *Hydro-Québec* did not change the test set out in *BCGSEU*, the test which the Tribunal applied appropriately. There is no merit to the ICTA's assertion that the Tribunal failed to apply established jurisprudence.

Conclusion

[72] For these reasons the application is dismissed. As agreed by the parties the ICTA is to pay the individual Respondents their costs of $5000.00, all inclusive. No costs were sought by or against the Tribunal and none are awarded.

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H. Sachs J.

I agree _____

Backhouse J.

I agree _____

Mew J.

Released: April 07, 2020

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