

The 2017 Wilson Moot Problem

Tara and Tamara Keigh (by their litigation guardian Valerie Keigh) v. Winnipeg School Division

Tara and Tamara Keigh are fraternal twin sisters and elite soccer players. In grade nine they attended school in Toronto, where they tried out and played for the boys' soccer team at their local high school.

The Keigh family relocated to Winnipeg, Manitoba during the summer of 2013, after the sisters completed grade nine. Tara and Tamara enrolled at Hawerchuk Secondary School, a public school with a predominantly Orthodox Jewish population. Hawerchuk's soccer coach would not permit Tara and Tamara to try out for its highly competitive boys' soccer team, citing concerns that such an arrangement would contravene the religious convictions of a number of the male team members.

Public schools in Manitoba are governed by a series of Acts, notably the *Public School Act* (the "PSA").¹ The preamble of the PSA provides:

And whereas public schools should contribute to the development of a fair, compassionate, healthy and prosperous society; [...]

And whereas the public system must take into account the diverse needs and interests and interests of the people of Manitoba; [...]

And whereas democratic local school divisions and districts play an important role in providing public education that is responsive to local needs and conditions; [...]

After considering submissions from the coach, the Keigh family, and members of the boys' soccer team, Hawerchuk's principal decided that Tara and Tamara would not be permitted to play on the Hawerchuk boys' soccer team, but instead would be able to play for the girls' team at a neighbouring school. That decision was affirmed by a vote of the trustees of the Winnipeg School Division. The Keigh sisters subsequently commenced an application for judicial review of the decision on the basis that it discriminated against them on the basis of sex under section 15 of the *Canadian Charter of Rights and Freedoms* (the "Charter").

¹ For the purposes of the Wilson Moot, mooters should ignore the *Religious Exercises in Schools Regulation*, Manitoba Regulation 554/88.

The Keighs' application was heard in March 2015 before Justice Elaine Abbott, who made the following findings of fact:

1. Tara and Tamara were born and raised in Toronto's Riverdale neighborhood. With active parents, the two were encouraged from a young age to participate in various activities and have maintained a passion for sports throughout their lives. While the sisters continue to play most sports on a recreational level, they have a particular acumen for soccer.
2. In the autumn of 2012, when the sisters were in grade nine, they tried out and played for the boys' soccer team at their local high school. They were the only girls to play on the boys' team that season. Their talent was undisputed and both girls had earned starting positions on the team by the end of the season, and enjoyed positive relationships with their male teammates.
3. During the summer of 2013, the Keigh family re-located to Winnipeg, Manitoba. There, Tara and Tamara enrolled at Hawerchuk Secondary School ("Hawerchuk").
4. Hawerchuk is located on the north side of Winnipeg, in a predominantly middle class and Jewish neighbourhood of the city.
5. Approximately 1100 students attend Hawerchuk. 80% of Hawerchuk's student population identifies as Jewish; 75% of those students identify as Orthodox.
6. Approximately 1.1% of Manitobans identify as Jewish.
7. Hawerchuk Secondary is popularly regarded as being a "Jewish school" for individuals who are unable to afford attending private religious schools within the city. The curriculum of Hawerchuk is the same as for other public schools. However, to account for its population, Hawerchuk tailors to certain Orthodox traditions. For example, the school cafeteria is catered to a kosher diet, and as the school is largely vacant on Jewish holidays, teachers generally refrain from teaching substantive lessons on those days.
8. Many Orthodox Jews, including many of the Orthodox students at Hawerchuk, believe that any physical contact between men and women who are not married or related is not permissible.

9. The Keigh family is not religious. Tara and Tamara's parents, Ken and Valerie Keigh, both sporadically attended Protestant churches growing up, but have chosen not to raise their daughters in any particular religious tradition. Tara and Tamara describe themselves as agnostic.

10. The Hawerchuk boys' soccer team has performed very well over the last several years, winning or at least advancing to the city finals in six of the last ten years. There was no dispute among the parties that it is a first-rate high school team.

11. The Hawerchuk girls' soccer program was only in its second year in 2013. Historically, Hawerchuk had not had enough interest in girls' soccer to field a team. Before 2012, female students from Hawerchuk who wished to play soccer were offered the opportunity to join the girls' team at Oakwood High School ("Oakwood"), a neighbouring school with a highly competitive soccer program. Approximately 16 girls from Hawerchuk have played for the Oakwood girls' soccer team over the last ten years. Before the Keigh sisters, no female student at Hawerchuk had asked to try out for the boys' team.

12. Both Tara and Tamara were hoping to be scouted by university soccer programs, with an eye to obtaining athletic scholarships to attend university. Looking to play for a more established and competitive team, the Keigh sisters showed up for the boys' soccer team tryouts in September 2013.

13. There, head coach Jay Bala informed Tara and Tamara that based on religious grounds, many of the male students would not be able to play on the same team as them. Specifically, he stated that many of the Orthodox Jewish boys on the team were not permitted to have physical contact with girls or women outside of their families, for religious reasons. Tara and Tamara protested, but Coach Bala stated that in the circumstances he could not offer them an opportunity to try-out without permission from Hawerchuk's principal.

14. The Manitoba High Schools Athletic Association (the "MHSAA") is an independent, not-for-profit corporation that regulates athletic programs for the province of Manitoba. The MHSAA is the primary organization in Manitoba for coordinating and organizing interschool competition at the high school level. While membership in the MHSAA is voluntary, almost all public high schools in Manitoba—including Hawerchuk—belong to the MHSAA and participate in interschool programs.

15. The MHSAA has rules and regulations which include requirements that schools must meet in order to be eligible for MHSAA competition. Notably, the MHSAA permits girls to play on boys' teams, regardless of whether a school has a girls' team. The MHSAA eligibility rule states:

The MHSAA endeavors to provide equal opportunities for students. Each MHSAA member school is responsible to ensure that female and male students are given equal opportunities and access to sports teams. Girls should generally be permitted to try out for a boys' team and to play for a boys' team following a successful try-out. They may not play on both the boys' and girls' team for the same sport in the same season. Once they have declared a team they cannot switch to the other gendered team during the season. If a school has both a boys' and girls' team, they are encouraged to play for their respective gender.

16. Tara and Tamara took up their complaint to the school's administration. As per school policy, both Coach Bala and the sisters (with the assistance of their parents) provided written positions as to whether the girls could try out for the boys' team to the school's principal, Arthur Vandalay. Principal Vandalay also investigated the matter privately by individually interviewing the Keigh sisters, Coach Bala, and several of the players on the boys' and girls' teams.

17. Principal Vandalay gave his decision by way of a letter dated October 15, 2013, addressed to Coach Bala and to the Keigh family, which stated the following:

Thank you all for your thoughtful submissions and helpful follow-up discussions over the past few weeks. In my 20-year-career in public school administration, rarely has an issue caused me so much consternation. Please be assured, I have given this issue considerable thought.

I am aware of Tara and Tamara's desire to play on the boys' team – both to fulfill their personal sense of competition as well as to be scouted. Manitoba is a province that generally permits girls to play for boys' teams. I have taken into account their desire to play on the boys' team very seriously.

Having discussed with Coach Bala, and speaking to the boys on the team, I understand that at least half of his roster would be unable to participate on a team with female players based on their religious beliefs. I have questioned these boys extensively and am confident they sincerely hold these views. I am also obligated to take these views very seriously.

Hawerchuk is proud to have recently started a girls' soccer program. While this option is available to Tara and Tamara, I understand their desire to join a more well-established program in order to advance their future soccer ambitions. Oakwood High School has permitted Tara and Tamara to join their team, and they have played on Oakwood's roster as I have considered this issue. Oakwood plays in the senior varsity division and has a very competitive team, which would no doubt afford Tara and Tamara opportunities to be scouted. We have previously offered this opportunity to girls at Hawerchuk with great success.

Taking into account all of these considerations, I believe that ultimately this compromise is the best solution for all affected. The religious rights of the boys' players will be respected, while both Tara and Tamara will be able to play soccer this spring knowing they can be scouted by credible university soccer programs.

18. Principal Vandalay's decision and reasons were affirmed by a vote of the Winnipeg School Division (the "School Division") trustees on October 22, 2013.

19. In her affidavit in support of the application, Tamara stated, in part:

Tara and I have been in love with soccer for as long as I can remember. Now, it is practically a full-time activity for us – something we live and breathe throughout the year. We really want to get scholarships together and play for the best university programs possible. Our ultimate goal is to wear the red and white and win a World Cup for Team Canada one day.

We want to play for Hawerchuk's boys' team since it is a more established program which gives us a better opportunity to keep improving our skills and get noticed by university programs.

Oakwood High School is a 15-minute bus ride for us – which means to make to practice we have to rush out of class and often don't get back home until after 7 p.m. The girls on the Oakwood team have been very welcoming, but we do not know them very well and do not have much opportunity to interact with them outside of practice and games. It's hard to feel like we are really part of the team.

Moving to Winnipeg was a big adjustment for us, but we want to be part of the community at Hawerchuk, and playing sports is a big part of that. I want to wear Hawerchuk's colours and help bring a championship home to my own school. Instead, I feel like we have been banished from Hawerchuk's soccer program because we are girls, as though we are somehow dirty or not worthy of being part of the top team.

20. Oakwood's girls' soccer program is well-regarded by university scouts, who regularly attend the team's games. Tara and Tamara have also had their parents film their games and practices in order to send to prospective post-secondary programs in the United States.

21. In his affidavit in support of the School Division, Principal Vandalay stated, in part:

I have a difficult role as an administrator of a public school where a large segment of my school population is observant. I have to take this into account when I make decisions.

I was able to speak with 18 of the 23 students on Coach Bala's roster, nearly all of whom described themselves and their families as religious in some capacity and come from religious households. Twelve of these boys, all of whom said they identified as Orthodox Jewish, stated that they felt that they would be unable to

play on a soccer team with female students. In particular, they expressed concern about coming into physical contact with the girls during a game.

22. On cross-examination, Principal Vandalay agreed that there was “not a doubt in his mind” that both Tamara and Tara would have qualified for the boys’ soccer team at Hawerchuk, from an athletic perspective, and that they would be competitive with any of the team’s current starters. He also acknowledged that he had interviewed one member of the boys’ team (who identifies as Reform Jewish) who stated that he would support Tara and Tamara joining the boys’ team. That student said that he thought having the Keigh sisters on the roster would give Hawerchuk a better chance at competing for a championship.

23. Tim Stern, a member of Hawerchuk’s boys’ team, provided the following affidavit evidence in support of the School Division:

It wasn’t easy for me to come forward and voice my concerns about Tara and Tamara joining the team. I do feel badly for the stress this situation has caused them.

It’s really difficult to identify as a religious person these days – people automatically accuse you of being out of touch with modern times or being intolerant. Religion is something that really is valuable to me and gives me great peace of mind.

I obviously interact with girls during the school day, but when it comes to social activities, particularly those where I could be in close physical contact with girls, that’s a step too far for me. I don’t feel that I could remain on the team if Tara and Tamara joined.

24. Gabriel Leibowitz, another member of the boys’ team, stated in his affidavit:

Everyone knows that the Keigh sisters are great soccer players. But they should play on a girls’ team with other girls. Soccer is a contact sport and my family believes that it is not right for girls and boys to have that kind of contact, even if it is not romantic or affectionate. I have discussed this with my rabbi and my parents. My parents said that they would not allow me to play on the Hawerchuk team if it means playing soccer with girls.

25. The coach of Oakwood’s girls’ soccer team, Teresa Ross, provided a brief affidavit, which stated in part:

Tara and Tamara have blended into our team very well. Their level of skill and focus stands out, even on a roster with a number of very talented players. They appear to get along with the Oakwood players and there is a real spirit of friendly competition among our players this year that is driving everyone to play her very

best game. We have had female players join our team from Hawerchuk in the past, but this arrangement has worked out particularly well for us.

26. An expert affidavit from Dr. Dana Foley, a kinesiologist who studies female sport, was admitted into evidence. Dr. Foley's evidence was that:

- a. Elite female sport can play an important role in providing high profile role models and advocates for women in sport;
- b. Elite female athletes can dispel the notion that sport is not biologically or socially appropriate for females;
- c. A recent study of school aged adolescents throughout Canada found that 61% could not name a female sports idol, and 87% of boys could not mention a single female athlete;
- d. College and university programs are more likely to cut a female program rather than a male program if athletics are underfunded;
- e. High school sports are regulated by provincial and territorial bodies across Canada, similar to the MHSAA. There is little consistency in Canada as to how provincial school associations regulate the eligibility of girls to participate on boys teams;
- f. In Ontario, the Ontario Federation of School Athletic Associations eligibility rules state that "where a sport activity is available for a female on a girls' team, she is eligible to participate on a boys' team if she demonstrates comparable skill and ability during a successful tryout";
- g. Other provincial bodies restrict eligibility for females to try out for male teams. For example, in Nova Scotia, the Nova Scotia School Athletic Federation (the "NSSAF") eligibility policy states that "only students of the designated sex, or students following the Guidelines for Supporting Transgender and Nonconforming Students, may participate in the designated classification. However, if a school elects not to have a female team in a gender-designated sport, a female student-athlete may try out for the male team within the school. The onus is on schools to provide programs consistent with NSSAF-sanctioned activities";

- h. As of 2015-16, the British Columbia School Sports rules stipulated: “Female student-athletes may only play on a team designated as a girls’ sport, and male student-athletes may only play on a team designated as a boys’ sport. Both female and male student-athletes may compete on a team designated as a coed sport, in accordance with the sport-specific roster allocations.” Girls in British Columbia may only play for a boys’ team if a girls’ team is not available at their school and they receive a letter from an administrator confirming that a girls’ team will not be offered for the coming year.

27. An additional expert affidavit from Dr. Marla Chaudry, a sports psychologist, was admitted into evidence. Dr. Chaudry’s evidence was that, unlike boys, girls are often deterred from pursuing sports at an elite level, leading to fewer females having collegiate or professional aspirations. Dr. Chaudry also referred to a March 2014 report for the Canadian Association for the Advancement of Women and Sport and Physical Activity, which noted that 59% of girls between the ages of 3 and 17 participate in sport, with school sport participation dropping by almost 26% when girls enter adolescence.

28. A further expert affidavit of Dr. Matthew Widemeir, a professor of religious studies, was also admitted into evidence. Dr. Widemeir’s evidence was that:

- a. Religious persons are provided with a positive sense of being and self-worth;
- b. Some studies suggest religious individuals live longer and are less prone to drug or alcohol abuse;
- c. The number of Canadians who identify as “religious” has dropped greatly over the past two decades; and
- d. The number of teenagers who identify as religious has diminished even more markedly over the last 25 years.

* * *

Justice Abbott allowed the application in May 2015, holding in part:

This is a case that squarely pits the religious rights of certain male players of the Hawerchuk roster against the equality rights of Tamara and Tara Keigh. The section 15 rights of the Keigh sisters are clearly infringed by a decision that

denies them access to a benefit on the basis of their sex. The School Division was required to assess whether Principal Vandalay adequately balanced their rights against the rights of the players on the boys' team to freely exercise their religious beliefs. I cannot agree with the respondent that the School Division's approval of Principal Vandalay's decision reflects a proportionate balancing of the *Charter* rights in issue.

Two major factors guide my analysis. First, it is not clear from the record that the boys' soccer team would in fact be in peril if the Keigh sisters were allowed to play for the team. I note that some of the boys do in fact interact on occasion with women socially, and as such, it is not evident why they could not make a similar exception strictly for the limited hours in which they play soccer every week.

Second, the MHSAA eligibility requirements strongly suggest that substantive equality mandates that all female athletes be given the opportunity to partake in a sport offered for boys. It is important not to lose sight of the fact that Hawerchuk, whatever its demographics, is a public school. Private school remains an option for families that prefer gender separation. In a publicly-funded school, female students like Tara and Tamara Keigh should not be made to feel as though they are "less than" their male peers or kept in segregation.

The School Division appealed Justice Abbott's order and was granted a stay pending appeal, which prevented the Keigh sisters from trying out for Hawerchuk's boys' team in grade 12. In March 2016, the Manitoba Court of Appeal allowed the School Division's appeal. Justice Jacob Lau, writing for himself and Justice Maya Molineux, held in part:

The MHSAA Rules do not strictly require that girls be permitted to try out for boys' teams. While they require equal opportunities, the school has discretion as to how that goal should be achieved. In this case, the Keigh sisters have not been stopped from playing soccer. They have been offered a very reasonable alternative to play for a competitive soccer program. They have taken up this offer to their benefit.

With the greatest respect to the application judge, she failed to conduct a proper evaluation of the religious *Charter* protected-interests at play, even assuming without deciding that the section 15 rights of the Keigh sisters were infringed by the School Division's decision. The application judge conflated the strength of certain boys' religious beliefs with the sincerity of their beliefs. More seriously, the decision below shows a lack of due regard for the unique circumstances under which Hawerchuk School operates. A pluralistic society requires that a variety of beliefs must be accommodated – even those that may offend or make others uncomfortable. To sanction the School Division's decision is to send a chilling message that only those who can afford to enter private spheres to manifest their religious beliefs may enjoy the constitutionally protected religious freedoms that are supposed to be possessed by all.

On a practical level, the application judge's decision would have forced the worst-case outcome. There is sufficient evidence to conclude that if the Keigh sisters were permitted to try out for the boys' team, a number of players on Hawerchuk's

boys' team would have been unable to play. In other words, to accommodate the request of two individuals, the entire team may have been in jeopardy.

In dissent, Justice Lindsay Enright stated in part:

The record is clear that female participation in sport continues to lag behind male participation in adolescence. Young women have been forced to litigate for decades now simply to have equal opportunities in athletics at publicly-funded education institutions. I am concerned that my colleagues are sending an unfortunate and dangerous message to the Keigh sisters, as well as to other aspiring female athletes across Canada, that to be "equal" in 2016 is simply to have the ability to participate, and not to strive to excel or to be the very best at any sport.

The Keighs have been granted leave to appeal the Manitoba Court of Appeal's judgment to the High Court of the Dominion of Canada. In October 2016, the High Court granted a motion (unopposed by the School Division) by the Keighs to admit fresh evidence that:

1. Tara and Tamara graduated from Hawerchuk in June 2016. They played soccer as starters for the Oakwood girls' soccer team the entire time they were enrolled in Hawerchuk.
2. Both girls were admitted to the University of California at Los Angeles (UCLA) on partial athletic scholarships to play soccer.

With the consent of all parties, the High Court has ruled that it will hear the Keighs' appeal notwithstanding its mootness. The High Court has stated the following constitutional questions:²

- 1) Did the School Division's decision infringe Tara and Tamara's rights under section 15 of the *Charter*?
- 2) If the answer to question 1 is yes, did the decision properly balance Tara and Tamara's rights under section 15 of the *Charter* with the boys' rights under subsection 2(a) of the *Charter*?
- 3) If the answer to question 2 is no, should Tara and Tamara be awarded damages under subsection 24(1) of the *Charter* for the breach of their rights under section 15?

The High Court has not given the parties leave to address any other issues on the appeal, including the applicable standard of review or any challenges to the procedure used to make the decision.

² Note that the High Court will not consider any legislative or adjudicative facts other than those found by Justice Abbott or admitted on the Keighs' fresh evidence application.