TD 2/84
Decision rendered on January 12, 1984

IN THE MATTER OF THE CANADIAN HUMAN RIGHTS ACT
S.C. 1976-77, c.33, as amended;

AND IN THE MATTER of a Hearing before a Human Rights Tribunal Appointed Under Section 39 of the Canadian Human Rights Act.

BETWEEN:
JEAN WOOD AND LYNNE SULLIVAN
complainants,
- AND -
CANADIAN SOCCER ASSOCIATION
Respondent

BEFORE: Robert W. Kerr
Susan Ashley
Sheila Pollock

Decision of the Tribunal
Appearances:
C. Christopher Johnston Counsel for the Canadian
J. Aidan O'Neill Human Rights Commission

Lawrence P. Kelly Counsel for the Respondent
Hearing Date: August 29, 1983 - Toronto, Ontario
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IN THE MATTER OF THE CANADIAN HUMAN RIGHTS ACT
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AND IN THE MATTER of a Hearing before a Human Rights Tribunal Appointed Under Section 39 of The Canadian Human Rights Act.

BETWEEN:
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Complainants,

- AND -
CANADIAN SOCCER ASSOCIATION
Respondent

The Complainants in this case are officers of the National Action Committee on the Status of Women and have filed this complaint in their personal capacities and on behalf of the Committee as a group of individuals
pursuant to section 32(1) of the Canadian Human Rights Act. Appearances were
entered at the hearing on behalf of the Canadian Human Rights Commission and
the Respondent. One of the Complainants, Lynne Sullivan, was present at

the
hearing. She was asked by the Tribunal if she wished to enter an appearance
on her own behalf, but she elected not to do so.

The Respondent is a body corporate originally incorporated without share capital under the Companies Act, 1917 of Canada. The Respondent was
established to be the governing body of soccer in Canada and through affiliation with the Fédération Internationale de Football Association is
accepted as the body in Canada with authority to sanction soccer competitions
in Canada involving foreign teams. The Respondent's regulations, which bind

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- 2 its
members, require that any such competition be sanctioned by the Respondent unless the competition involves only Canadian and American teams.
The principle members of the Respondent are provincial soccer associations,
although there is also provision for membership by certain soccer leagues.
The provincial associations are made up of district associations, leagues and
clubs within each province and territory, and presumably individuals interested in soccer become members of one of these organizations within a
province. The authority of the Respondent over soccer in Canada is exercised
by virtue of the voluntary submission and resulting contractual obligations
of those involved through this structural hierarchy, for there is no indication that the Respondent enjoys any legislative authority to regulate
soccer in Canada.

The complaint arises out of events which occurred in relation to the 1981 Robbie International Tournament. The Robbie Tournament is a competition involving teams from several countries organized by the Scarborough Youth Soccer Association. This Tournament is an ongoing annual
event which is sanctioned by the Respondent since it involves international
competition.

The Robbie Tournament is segregated by sex and age into a number of competition sectors. The girls' and boys' competitions were scheduled on
different dates in 1981, although currently they are being scheduled for the
same dates. There are 6 age sectors within each of the boys' and girls' competitions. These age sectors are different as between the girls'

competitions and the boys' competitions. One of the age sectors in the former

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- 3 case
is an open age sector for women, while there is no similar competition for men.

In the 1981 Tournament for Boys, two foreign teams, one from the United States and one from Denmark, each included one girl on their regular team roster. Allegra Milholland from the United States was in the under age 10 sector and Lolita Larsen from Denmark was in the under age 16 sector. After initially deciding that neither girl would be permitted to play, the executive of the organizing Association ultimately allowed Milholland to play, but refused to allow Larsen to play. It appears this decision was based on the view that, in the older age group, physical differences between boys and girls were pronounced and the level of play was vigorous so there was an unacceptable risk to Larsen's safety, while the risk in the case of Milholland was not great because of the less pronounced physical differences between boys and girls and the less vigorous level of play in her age group.

The complaint alleges that these facts constituted a discriminatory practice contrary to section 5(1) of the Canadian Human Rights Act in that there was a denial of access to "the opportunity to compete at the ... tournament" on the grounds of age and sex.

It would appear that, if a discriminatory practice occurred, the party primarily responsible was the Scarborough Youth Soccer Association. The only involvement of the Respondent in the matter shown by the evidence was its sanctioning of the Robbie Tournament. However, since there is a requirement that this sanction be obtained under the regulatory scheme which the

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- 4 Respondent
carries out as the governing body of soccer in Canada, this sanction is a potentially significant involvement.

It is appropriate at this stage to deal with one preliminary matter as to the precise identity of the Respondent. The complaint names the Canadian Youth Soccer Association as the party engaging in a discriminatory practice. At the time this complaint arose the Canadian Youth Soccer Association had the public appearance of being a separate entity which acted as the governing body of youth soccer in Canada. Legally, however, the Canadian Youth Soccer Association was merely a committee established by the Canadian Soccer Association to give special emphasis to youth soccer. The President of the Youth Association, or in effect the Chairperson of the Committee, was a member of the Executive of the Canadian Soccer Association.
The terminology used to describe the structure has since been revised by the Canadian Soccer Association, so as to reflect this reality.

The Canadian Soccer Association's governing role with respect to youth soccer appears to have been delegated to the Youth Association. At the time of the alleged discriminatory practice, the President of the Youth Association was Alan W. Southard who was also, at the time, the Chair of the organizers of the Robbie Tournament. The actual sanction of the Youth Association to the Robbie Tournament was given by Kevin Pipe who held the title of Youth Development Coordinator for the Canadian Soccer Association at the time.

At the Hearing of this matter on August 29, 1983, evidence was led

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- 5 as to the events which occurred in respect of the 1981 Robbie Tournament for Boys, with respect to the structure and role of the Respondent, and concerning the physiological differences between the sexes which might justify segregation for purposes of soccer competition. Counsel then argued as to whether a discriminatory practice had occurred in the light of this evidence and whether, if there was a discriminatory practice, the Canadian Soccer Association was a party to this practice.

In the course of a preliminary meeting to consider our decision at the close of the hearing, we came to the view that a preliminary issue arose as to whether the activities of the Respondent were subject to the Canadian Human Rights Act in view of the division of powers with respect to human

rights under the Canadian Constitution. Since this issue had not been raised in the submissions of either party represented at the hearing, we instructed the Secretary to the Tribunal to contact the parties and invite an application to reopen the hearing for the purpose of such submissions or the making of written submissions. Counsel agreed to proceed by way of written submissions and initial submissions followed by reply submissions were received in due course from counsel for the Canadian Human Rights Commission and the Respondent.

The basis for our concern is that the field of human rights, generally, is primarily a matter of property and civil rights, which comes under provincial jurisdiction. Consequently, its application is limited to matters where, by virtue of some other power, Parliament has the power to affect matters of property and civil rights. This limited scope is recognized

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- 6 in section 2 of the Act which declares Parliament's intent to effect equal opportunity "within the purview of matters coming within the legislative authority of the Parliament of Canada".

There are a number of areas of activity within which such federal legislative authority is well-established, for example, in respect of the operation of banks under section 91(15) of the Constitution Act, 1867-1982, the operation of interprovincial works and undertakings under section 91(29) of the Constitution which incorporates matters listed in section 92(10)(a)-(c), and the operation of undertakings in fields such as aeronautics and broadcasting which fall under federal authority by virtue of the residual power in section 91 of the Constitution. We were unable, however, to readily fit the activities of the Respondent into any such category. Consequently, we invited the submissions of counsel prior to making a decision as to whether the Respondent was subject to the Canadian Human Rights Act.

Counsel for the Canadian Human Rights Commission has suggested several areas of federal jurisdiction which would bring the Respondent under the provisions of the Canadian Human Rights Act. First, the national character of the Respondent would take it outside the classes of subjects assigned to provincial legislative power and bring it under the federal

residual power under section 91 of the Constitution Act, 1867-1982. Second,

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the Respondent has the character of an interprovincial undertaking referred to in section 92(10) of the Constitution and therefore would fall under federal power by virtue of section 91(29) of the Constitution. Third, as a federally incorporated legal entity, the Respondent is subject to federal corporate law

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- 7 and the Canadian Human Rights Act would be relevant to this aspect of the Respondent's existence since its discriminatory practices may impact on the status of the members of the corporation. Fourth, since the Respondent is engaged in international and interprovincial activity, it would come under the federal trade and commerce power. Fifth, under the reconsideration of federal power to implement Canadian treaty obligations proposed by Laskin, C.J.C., in MacDonald v. Vapour Canada Ltd., [1977] 2 S.C.R. 134, 22 C.P.R. (2d) 1, 4 N.R. 477, 66 D.L.R. (3d) 1, at D.L.R. 27-29, and in light of numerous treaty obligations of Canada with respect to human rights, the federal government would have the power to legislate generally on this matter so as to subject the Respondent to the Canadian Human Rights Act.

Whether the Parliament of Canada has the power because of its international treaty obligations to legislate on matters not otherwise within its competence is a matter of considerable doubt. We find it unnecessary to decide this question since there is no indication that Parliament intended to exercise any such power when it enacted the Canadian Human Rights Act. On the contrary, since Parliament has included specific recitals of its purposes in section 2 of the Act, and there is no mention of international obligations, we are persuaded that Parliament had no such intention. We can not believe that, if Parliament had such an important objective, it would have omitted it from these recitals. Thus, there is no basis for interpreting the scope of the Canadian Human Rights Act as extending to matters which do not fall within federal power under the normal division of powers under the Constitution Act.

The other possible bases of federal power raised by the Commission
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- 8 do
involve the normal division of powers. We will proceed to consider whether the activities of the Respondent are made subject to the Canadian
Human Rights Act on any of these bases.

With respect to the corporate law power of the federal government, it is certainly possible that Parliament could legislate with respect to
discrimination in relation to the corporate law aspects of federally incorporated entities. However, it is not clear that the present Canadian
Human Rights Act does so. Certainly its provisions are not expressed in a
form which is readily relatable to what one normally finds in a statute setting out basic provisions of corporate law. It requires giving a somewhat
strained meaning to the language even to say that matters of membership status and corporate structure and finance, which are the usual basics of
corporate law, are facilities customarily available to the public, and it is
difficult to find any other possible relevance of the Canadian Human Rights
Act to such matters. Assuming, however, that these corporate matters are
facilities and thus within the Canadian Human Rights Act, there is no evidence before us of a discriminatory practice involving such matters. It

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is true that the Respondent might suspend a member for failing to observe the
Respondent’s regulations and it appears that the International Federation
expects the Respondent to enforce rules of sexual segregation in soccer competition, but the evidence is that the Respondent has refrained from any
effort to do this. Thus, even if the Canadian Human Rights Act applies on a
corporate law basis, there is no evidence of a violation with respect to any
such application of the Act.

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Counsel for the Commission made a somewhat ingenious argument that, because the Respondent was federally incorporated and the relevant legal
authority for such incorporation referred to "objects to which the legislative authority of the Parliament of Canada extends", we should conclude that the activities of the Respondent were matters within federal
legislative jurisdiction. However, this by no means follows. The

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to objects within federal power in section 154 of the Canada Corporations Act
relates to the federal residual power to incorporate companies with other
than provincial objects. It is sufficient for this purpose that the objects
of the corporation extend beyond any province, even though the actual
activities of the corporation would in every respect be matters purely within
provincial jurisdiction in each province where these activities are pursued:
John Deere Plow Co. v. Wharton, [1915] A.C. 330, 7 W.W.R. 706, 18 D.L.R. 353
(P.C.); Canadian Indemnity Co. v. Attorney-General for British Columbia,
[1977] 2 S.C.R. 504, [1976] 5 W.W.R. 748, 30 C.P.R. (2d) 1, 11 N.R. 466, 73
D.L.R. (3d) 111. While this brings the corporation within federal power for
corporate law matters, it does not make the corporation in other respects
subject to federal laws affecting property and civil rights. The objects of
the corporation referred to in section 154 of the Canada Corporations Act can
lie within federal legislative authority because of the nature of the federal
incorporation power when very little else about the corporation is subject to
federal legislative authority.

The submissions of counsel for the Commission that the Respondent is
engaged in interprovincial and international trade or in an interprovincial
undertaking can conveniently be discussed together since similar factors are

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- 10 involved.
If the activities of the Respondent constitute an interprovincial
undertaking, there is no doubt that the Respondent is subject to the Canadian
Human Rights Act. While no actual precedents for applying the Act to matters
of international and interprovincial trade and commerce were cited to us, the
Canadian Human Rights Act certainly has potential relevance to such activity.
Even under the narrow definition given to trade and commerce on the basis of
what was said in Citizens' Insurance Co. v. Parsons (1881), 7 App. Cas. 96
(P.C.), a flow of goods across provincial and national boundaries certainly
constitutes trade and commerce for the purposes of section 91(2) of the

Constitution Act, 1867-1982. Such trade no doubt usually operates on a scale which will rarely raise the questions of individual access to which the Canadian Human Rights Act is primarily directed. Nonetheless, considering the objectives of an economic union which underlay the Canadian federation, it seems fair to say that access to the objects of international and interprovincial trade is regarded as customarily available to the public in Canada. Thus, denial of access to goods in the course of such trade would fall within a literal interpretation of the words of at least section 5 of

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the Canadian Human Rights Act. Because of the constitutional restraint on provincial interference with such trade, as illustrated by cases such as Attorney General for Manitoba v. Manitoba Egg and Poultry Association, [1971] S.C.R. 689, [1971] 4 W.W.R. 705, 19 D.L.R. (3d) 169, it would also appear that provincial human rights legislation might be unable to effectively deal with denial of human rights in respect of interprovincial and international trade and commerce. This persuades us to the conclusion that matters of interprovincial and international trade are subject to the provisions of the Canadian Human Rights Act.

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The subjection of interprovincial undertakings and interprovincial and international trade and commerce to the Canadian Human Rights Act does not dispose of the case. It is still necessary to consider whether the activities of the Respondent fall under either of these heads of federal power. In our view, they do not. The activities of the Respondent involve various efforts to facilitate and promote competition throughout Canada. However, the mere fact that an activity is conducted throughout Canada does not make it interprovincial, let alone international. The activity which the Respondent is engaged in facilitating and promoting is carried out, in the final analysis, at a local level. While participants in competition may cross provincial or national boundaries for this purpose, this fact is purely incidental to the competition itself. The competition is no more an interprovincial undertaking than was the business of the Empress Hotel

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accommodated guests from all across Canada and around the world: C.P.R. v.
Attorney-General of British Columbia, [1950] A.C. 122, [1950] 1 W.W.R. 220,
64 C.R.T.C. 266, [1950] 1 D.L.R. 721 (P.C.). Even if works or undertakings
referred to in section 92(10)(a) of the Constitution Act, 1867-1982 are not
limited ejusdem generis to mean works or undertakings of transportation and
communication, they must in some sense be works or undertakings connecting
provinces or extending beyond a province. There is nothing in the nature of
an actual interprovincial connection or extraprovincial extension in the
evidence before us as to the soccer competitions encouraged by the
Respondent.

Similarly, to constitute interprovincial or international trade and
commerce, there must be something in the nature of a transactional flow
across provincial or national boundaries. The soccer competition encouraged
by the

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- 12 Respondent
takes place entirely within provincial boundaries. The movement
of participants across such boundaries to engage in such competition does not
make such competition a form of international and interprovincial trade any
more than the shipment of grain into interprovincial and international trade
was sufficient by itself to make a grain elevator involved in such trade, but
operated locally within a province, into a matter of interprovincial and
international trade and commerce: R. v. Eastern Terminal Elevator Co., [1925]
S.C.R. 434, [1925] 3 D.L.R. 1. While it is true that the specific status of
grain elevators in that case has had to be reconsidered in the light of a
declaration that such elevators were works for the general advantage of
Canada and in the light of further justification of such regulation for the
purpose of protecting the grain trade: R. v. Klassen (1959), 29 W.W.R. 369,
31 C.R. 275, 20 D.L.R. (2d) 406 (Man. C.A.), there is no basis for similarly

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bringing the activities of the Respondent under a scheme of international and

interprovincial trade regulation. It was as part of such a scheme for regulating the grain trade that grain elevators ultimately fell under the federal authority, while there is no similar scheme relevant to the activities of the Respondent. We conclude, therefore, that the activities of the Respondent are not within the purview of the legislative authority of Parliament either as an interprovincial undertaking or as interprovincial or international trade and commerce. This brings us finally to the submission that the activities of the Respondent fall under the residual power of Parliament. Residual matters, like interprovincial works and undertakings, are an area where it is undisputed that the provisions of the Canadian Human Rights Act apply. Once

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- 13 again, however, it is necessary to consider if the activities of the Respondent fall into this area.

The courts have experienced some difficulty in formulating any lasting expression of what it is that brings a matter not expressly listed in sections 91 and 92 of the Constitution Act, 1867-1982 under the residual power of the federal government, rather than under the general provincial powers over property and civil rights under section 92(13) of the Constitution or local and private matters under section 92(16) of the Constitution. While the issue has been dealt with most recently in cases dealing with federal and provincial legislation in relation to the use of narcotic drugs, the clearest recent discussion of the matter is that in Re Anti-Inflation Act, [1976] 2 S.C.R. 373, 9 N.R. 541, 68 D.L.R. (3d) 452. According to the decision of Beetz, J., which was supported by the majority of the Court on this issue, it involves matters which are outside of section 92. While effectively this has added new matters to the federal list of powers, "this was done only in cases where a new matter was not an aggregate but had a degree of unity that made it indivisible, an identity which made it distinct from provincial matters and a sufficient consistence to retain the bounds of form. The scale upon which these new matters enabled Parliament to touch on provincial matters had also to be taken into consideration

before
they were recognized as federal matters": at D.L.R. 524.

These comments of Beetz, J. were directed to what has often been called the national concern or national dimensions aspect of the general federal
power of peace, order and good government. In all cases where this

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- 14 concept
has been applied there has been a further factor which must be assumed, even if it is not specifically mentioned, in the judgment of Beetz,
J. National concern or national dimension has invariably been recognized in
the face of some scheme of federal legislative provisions, actual or proposed, regulating the subject matter.

In the present case we are dealing with two subject matters, human rights and the sport of soccer. Although the Candian Human Rights Act constitutes a federal legislative scheme, the subject matter of human rights
lacks the unity and identity required to bring it under the residual power of
Parliament. It is an aggregate of subject matters. Thus, human rights does
not, in itself, come under the federal residual power, although those parts

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of the aggregate which are incidental to other matters otherwise within the
federal general power, such as human rights in relation to aeronautics and
broadcasting, fall under this federal power.

Soccer does have a unity and consistency which could satisfy the requirements of the test set out by Beetz, J. in the Anti-Inflation case. On
the other hand, whether soccer has an identity making it distinct from provincial matters is highly debatable since it is only one of a variety of
sports and recreational activities which are generally local in their operation. In any event, there is no scheme of federal legislation such as
might demonstrate a national concern or national dimension. The international connection in the sport of soccer and the desire to coordinate
the sport throughout Canada might help to justify federal legislation, if it
existed, but they do not bring soccer under federal power in the abstract.

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It is true that some national interest is shown by a substantial expenditure of federal moneys in support of the activities of the Respondent.
However, the federal spending power can be exercised in relation to matters
entirely outside federal legislative power. Federal financial support is no
evidence, therefore, that Parliament regards this as a matter within the
purview of federal legislative authority. As long as it did not thereby
engage in a colourable attempt to legislate on provincial matters, Parliament
could influence matters such as human rights by attaching conditions to its
exercise of financial largesse, but it has no power under the spending power
to impose its will in a purely legislative fashion, which is the approach of
the Canadian Human Rights Act, rather than through contractual arrangements.

We recognize that, by requiring federal legislation with respect to
a subject matter to bring it under the federal residual power, it may seem
that a test is being imposed similar to the national emergency test favoured
by Beetz, J. in the Anti-Inflation case. The requirement proposed by Beetz,
J. that there must be a Parliamentary declaration of national emergency was
rejected by the majority of the Court. However, a requirement of federal
legislation to establish a national concern or national dimension is really
more like the requirement of some evidence that Parliament was acting
pursuant to its emergency power which was accepted by the majority in the
Anti-Inflation case. It is inconceivable that the Court would have declared
inflation to be within federal power in the absence of actual or proposed
federal legislation to deal with the subject matter. It is true that the
question does not normally arise in the abstract, but we think that some such
requirement is a logical part of the test of whether legislation falls under

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- 16 the
residual power. There is no textual difference between the residual
power and the emergency power under section 91 of the Constitution Act,
1867-1982. Thus, evidence of Parliamentary intent to act in exercise of this
power would be as necessary in one case as it is in the other.

It is true that, when dealing with proposed federal legislation, one may not be able to say that there is evidence of an actual intent of Parliament to deal with the subject matter if, as the case may be, Parliament has not yet considered the proposed legislation. However, in dealing with the constitutionality of proposed legislation, a decision is always based on

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the assumption, for the purposes of argument, that the legislation has been adopted. Adoption of the legislation would be evidence of the intent of Parliament and, therefore, on the assumed state of facts on which a decision with respect to proposed legislation is based, the requirement of a showing of Parliamentary intent is met. In the present case, this is entirely lacking.

The case of Re Canadian Football League and the Canadian Human Rights Commission, [1980] 2 F.C. 329, 109 D.L.R. (3d) 397, was brought to our attention by counsel for the Commission. Although that decision does not make a final ruling on the issue, it does hold open the possibility that the operation of an interprovincial or international sport league might constitute an interprovincial undertaking, at least in the case of a major professional league. The Respondent's constitution might allow it to be involved in such an operation, although there was no evidence before us with respect to any such involvement. Even if the Respondent were engaged in such activity and were subject to the Canadian Human Rights Act for that purpose, this would not

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- 17 bring the Respondent's other activities under the same federal power unless such other activities were functionally integrated with the interprovincial or international undertaking. There is certainly no indication of any functional integration of the Respondent's activities with any such undertaking.

There may be some concern that our decision leaves a gap in the coverage of human rights laws with respect to the Respondent because of its national operation. We believe that no such situation arises. In so far as the activities of the Respondent involve sanctioning and promoting soccer,

this activity would be subject to the human rights laws of the respective provinces in which it takes place. In so far as the Respondent carries out support and coordinating services at its head office in Ottawa, or elsewhere in Canada, it would similarly be subject to the human rights laws of the provinces in which such services are located. Admittedly under Ontario law, where the Robbie Tournament took place and where the Respondent's head office is located, there is a gap because sports activity is not subject to the Ontario Human Rights Code, S.O. 1981, c.53, s.19(2). However, this is a deliberate gap adopted as a matter of legislative policy in Ontario, and not a constitutional gap in legislative power. This is not the sort of gap which the residual power of Parliament serves to fill.

We conclude that, except with respect to corporate law aspects of the Respondent's activities and in so far as its activities are in evidence before us, the Respondent is not within the purview of the legislative authority of Parliament and is not, therefore, subject to the provisions of the Canadian Human Rights Act. Assuming the Act does have a corporate law

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- 18 application, there is no evidence that the Respondent is engaged in any discriminatory practice in corporate law matters and to that extent we would find the complaint is not substantiated. With respect to the other activities in evidence before us, and in particular with respect to the sanction of the Robbie Tournament by the Respondent, we make no finding

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whether the Respondent engaged in a discriminatory practice. Since any such practice is not subject to the Canadian Human Rights Act, it is not a matter within the jurisdiction of this Tribunal.

Dated the 12 day of January, 1984.

Robert W. Kerr, Tribunal Chairperson
Susan Ashley, Tribunal Member
Sheila Pollock, Tribunal Member