No. S083619
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

ANETTE SAGEN, DANIELA IRASCHKO, JENNA MOHR, LINDSEY VAN, JESSICA JEROME, ULRIKE GRASSLER, MONIKA PLANINC, MARIE-PIERRE MORIN, KARLA KECK, NATHALIE DE LEEUW, KATHERINE WILLIS by her Litigation Guardian JAN WILLIS, JADE EDWARDS, ZOYA LYNCH by her Litigation Guardian SARAH LYNCH, CHARLOTTE MITCHELL by her Litigation Guardian MIRIAM MITCHELL and MEAGHAN REID by her Litigation Guardian NINA HOOPER-REID

PLAINTIFFS

AND:

VANCOUVER ORGANIZING COMMITTEE FOR THE 2010 OLYMPIC AND PARALYMPIC WINTER GAMES

DEFENDANT

DEFENDANT'S ARGUMENT

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PART I - OPENING STATEMENT

1. The Plaintiffs bring this action alleging that the absence of a women's ski jumping event in the 2010 Winter Olympic Games (the "Games" or "2010 Games") is discriminatory and amounts to a breach of section 15 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). The decision not to include women's ski jumping in the Games was made by the International Olympic Committee (the "IOC"), which has the sole authority over which events are included in the Olympic Programme, and thereby included in the Games. The Defendant, the Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games ("VANOC"), organizes the Games, as its name suggests. Its role is to stage the events that the IOC determines will be included in the Games.

2. The IOC – a foreign, non-governmental entity – is clearly not bound by the *Charter*. The Plaintiffs have therefore brought this action against VANOC in an attempt to achieve indirectly what is unavailable directly.

3. Leaving aside for the moment the specific issues under sections 32, 15 and 1 of the *Charter*, the Plaintiffs' action against VANOC is fundamentally misconceived. Only the IOC can include an event in the Olympic Games. VANOC has no right to do so, and further, it has no *power* to do so. Staging an Olympic event necessarily requires the participation of other entities within the Olympic Movement (specifically, International Federations and National Olympic Committees) which, like VANOC, are under the supreme authority of the IOC. VANOC cannot compel them to act contrary to the IOC's directions, and it cannot stage an event at the Olympics without them. Moreover, any event held against the IOC's instructions would not be regarded as *Olympic*; it is solely the IOC that determines what is and what is not Olympic.

4. The fact is that VANOC cannot provide what the Plaintiffs seek.

5. The IOC's close control of the Olympics, and specifically its sole authority over the Olympic Programme, is fatal to the Plaintiffs' claim on every major issue in this case. Other elements of their *Charter* claim also cannot be made out. To succeed in their claim, the Plaintiffs must establish (a) that, pursuant to section 32, the *Charter* applies to VANOC in respect of the facts of this case, and (b) that VANOC has discriminated against the Plaintiffs so as to breach section 15. This Court would also have to find that (c) the breach of section 15 is not justified under section 1 of the *Charter* and (d) the remedy the Plaintiffs seek is appropriate. As will be shown in the argument that follows, however, none of these conclusions can be reached in this case. Specifically, the evidence will show the following:

(a) Section 32: VANOC is neither controlled by government nor is it carrying out a government activity. To the contrary, VANOC is controlled by the IOC. The Olympic Games are an IOC program and the organizing of those Games is plainly not a government activity. Most importantly, the determination of which events will be included in the Olympics is a matter for the IOC alone and is not part of the responsibilities or powers of VANOC or of any government.

(b) Section 15: The inclusion of an event in the Olympics is not a "benefit of the law", and thus section 15 is not engaged. The inclusion of an event in the Olympics is a benefit conferred by the *IOC*, not by any government. Further, there is simply no discrimination in this case. VANOC has not done anything contrary to section 15; to the contrary, it *supported* the inclusion of women's ski jumping. For its part, the IOC is a leader in the promotion of women's access to sport and has adopted special rules and policies to *increase* women's participation in the Olympics. While the IOC considered the gender issue raised by the women's ski jumping application to be a strong factor in favour of its inclusion, ultimately the IOC determined that the sport was insufficiently competitive

internationally. The IOC specifically noted that it would be closely monitoring the sport with a view to including it in future Olympics.

(c) Section 1: VANOC is justified in accepting the IOC's decision not to include women's ski jumping in the Games. The Olympic Games bring a host of public benefits, as evidenced by the degree of competition to host the Games. The Games are the IOC's exclusive property, and VANOC and the contributing governments have solemnly promised to respect the IOC's rights and the Olympic Charter. Pursuant to the Olympic Charter, the IOC alone has the right to determine which events will make up the Olympic Games, and VANOC has no right, nor power, to reverse the IOC's decision.

(d) Remedy: The Plaintiffs seek a declaration which can have no practical effect, and thus it is one that should not be granted. VANOC is unable to remedy what the Plaintiffs claim is discriminatory in this case: only the IOC could include women's ski jumping in the Olympic Games.

6. Each of these arguments will be developed in full below, but first will be reviewed the facts of this case.

PART II - STATEMENT OF FACTS

A. The Olympic Movement

7. The Olympic Movement is the broad descriptor for the group of organizations and individuals engaged in some fashion in the Olympic Games. The Olympic Movement was founded in 1894 by Baron Pierre de Courbertin. Its overall goal is to contribute to building a peaceful and better world by educating youth through sport practised without discrimination of any kind, in a spirit of friendship, solidarity and fair play. It is a not-for-profit enterprise.

Affidavit #1 of Walter Sieber sworn March 17, 2009 ("Sieber Affidavit #1") at paras. 3, 6, 46, 51, Ex. "4"

8. The IOC, an international non-governmental not-for-profit organisation headquartered in Switzerland and also founded by Pierre de Coubertin in 1894, is the ultimate governing body of the Olympic Movement. The Olympic Charter[1] codifies the fundamental principles, rules and by-laws adopted by the IOC and sets out its powers. It governs the organization and running of the Olympic Movement and sets the conditions for the celebration of the Games. The statement of the "Fundamental Principles of Olympism" in the Olympic Charter provides: "Belonging to the Olympic Movement requires compliance with the Olympic Charter and recognition by the IOC".

Sieber Affidavit #1 at paras. 3, 6, 9, 13, Ex. "5"
Olympic Charter, Chapter 2, Rule 15

9. The IOC's members (up to 115 in total) must be natural persons. They swear an oath of fidelity to the Olympic Movement, including in each case "to keep myself free from any political or commercial influence and from any racial or religious consideration" and "to fight against all other forms of discrimination". Exemplifying the non-governmental nature of the IOC, its members are prohibited from accepting "from governments, organisations, or other parties, any mandate or instructions liable to interfere with the freedom of their action and vote".

Sieber Affidavit #1 at paras. 10-12
Olympic Charter, Chapter 2, Rule 16

10. The Olympic Movement also includes a number of national and international sporting bodies, as well as athletes, judges and referees, coaches, and other sports technicians. The national and international sporting bodies central to the Olympic Movement are:

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[1] The Olympic Charter was in force in November 2006 (the date on which the IOC determined not to include women's ski jumping as an event in the 2010 Olympic Games). That version of the Olympic Charter came into force on September 1, 2004 ("2004 Olympic Charter"). The current version of the Olympic Charter came into force on July 7, 2007. Below, when referring to a chapter or rule of the "Olympic Charter" without specifying the year, we mean the current version (Sieber Affidavit #1 at para. 4, Exs. "1"-"2").

(a) the International Sports Federations (IFs), which are non-governmental organizations which administer one or more sports at the world level. IFs must conform to the Olympic Charter, but otherwise each IF maintains its autonomy in the administration of its sport. They are responsible for overseeing the technical aspects and management of their sport at the Olympic Games. That means that they, and not the IOC or Organizing Committees for the Olympic Games ("OCOGs"), such as VANOC, actually run each competition for each event at the Games, including such things as timekeeping and officiating, once the IOC has determined that an event will be part of the Olympic Programme;

(b) the National Olympic Committees (NOCs), which are non-profit, non-governmental ambassadors of the Olympic Movement responsible for representing the Olympic Movement and the IOC in their respective countries. There are currently 205 NOCs within the Olympic Movement. The NOCs are responsible for sending participants from their respective countries to the Games and have exclusive authority to control the participation of their national delegations at the Olympic Games. The NOCs are the bodies that actually select which athletes will compete in the Games as part of a particular country's team. Rule 28.6 of the Olympic Charter states that "[t]he NOCs must preserve their autonomy and resist all pressures of any kind, including but not limited to political, legal, religious or economic pressures which may prevent them from complying with the Olympic Charter". An NOC that is unable to maintain autonomy from government interference may be barred from participating in the Games, as occurred to Iraq for the 2008 Beijing Summer Olympics. Canada's NOC is the Canadian Olympic Committee (the "COC"), a private, not-for-profit corporation which, in order to be recognized by the IOC, must comply with the Olympic Charter. Its membership is composed primarily of representatives of Canadian national sport federations (who are required by the Olympic Charter to maintain voting control), Canadian

IOC members, athlete representatives, elected at-large members, and representatives of other sport-related organisations in Canada. "Government" and "public authorities" are barred from appointing representatives to the COC by Rule 29(4) of the Olympic Charter. NOCs have exclusive authority to select and designate the city within their respective countries which may apply to the IOC to organize and host the Games. It also falls to the NOC and the host city to effect the organization of the Games by establishing the OCOG for those Games if the NOC's candidate is selected.

(c) the OCOGs, which plan, organize, finance and stage the Games. A standard contract (called the "Host City Contract") among the IOC, the NOC and the host city initially, to which the OCOG later attorns, sets out each party's responsibilities and forms the basis of the relationship between the IOC and the organizing entities in respect of each Games. OCOGs must enter into the Host City Contract and they never negotiate its terms. An OCOG, from the time it is constituted, reports directly to and receives instructions from the IOC Executive Board and its executive body must include the IOC member(s) in that country, the President and Secretary General of the NOC, and at least one member designated by the host city. The OCOG "shall conduct all its activities in accordance with the Olympic Charter, with the [Host City Contract] and with any other regulations or instructions of the IOC Executive Board".

Sieber Affidavit #1 at paras. 7, 18-32, Ex. "6";
Olympic Charter, Chapter 3, Rules 26-27; Chapter 4, Rules 28-32 and By-law 1 to Rules 28 and 29; Olympic Charter, Chapter 5, Rules 34, 36 and 37 and By-law 3.3 to Rule 34; Rule 47 and By-law to Rule 47;
Affidavit #1 of John Furlong sworn March 17, 2009 ("Furlong Affidavit") at paras. 5, 14, 32-34

B. The Vancouver Bid

11. After an unsuccessful bid for the 1976 Winter Games, the most recent push to bid for the Olympics arose in 1996, initially led by three key people: Arthur Griffiths, a local businessman and then Vice Chairman of Orca Bay (which then owned the Vancouver Grizzlies basketball team, the Vancouver Canucks hockey club and General Motors Place); Philip Owen, then mayor of Vancouver; and Ian Waddell, then provincial Minister of Small Business, Tourism and Culture. They formed the Vancouver Whistler 2010 Bid Society (the "Bid Society") for the purposes of pursuing a bid to the COC to win the right to present a bid to the IOC to host the 2010 Games.

Furlong Affidavit at paras. 2-4

12. Under the Olympic Charter, only one city within a country may bid for any one Olympic Games. As noted in paragraph 10(b) above, the selection of which city within a country may bid for the Olympic Games is made by the NOC, which in Canada is the COC. In October 1998, the Bid Society submitted its domestic bid book to the COC (then called the Canadian Olympic Association or "COA"), emphasizing the broad community support that the 2010 Winter Games bid was receiving. The Bid Society's board of directors included "a broad cross section of business, government, community and sport leaders" and it included in the bid book guarantees and expressions of support from government leaders, sports associations, tourism associations, chambers of commerce and trade groups, First Nations, and hotels.

Furlong Affidavit at paras. 5-6, Ex. "1"

13. On November 12, 1998, the Province and the City of Vancouver entered into a "Participation Agreement" in which the Province agreed, among other things, to indemnify the City for costs or liabilities in certain defined circumstances that may arise through or as a result of the bid. As returned to below, various levels of government have had some association with the bid and the Games falling far short of what would be required to attract the application of the *Charter*.

Furlong Affidavit at para. 7, Ex. "2"

14. On December 1, 1998, the COC selected the Vancouver/Whistler bid for the 2010 Winter Games (both Calgary and Quebec City had also submitted domestic bids to the COC). Subsequently, the COC, the City of Vancouver and Vancouver Whistler 2010 Bid Corporation (later known as Vancouver 2010 Bid Corporation) ("BidCorp") signed the Bid City Agreement, dated as of December 1, 1998, in which the COC (COA) "approves the candidature City of Vancouver authorized by COA to present the Bid, on behalf of COA". The agreement also called for the formation of a corporation to actually develop and present the bid.

Furlong Affidavit at paras. 1, 8, Ex. "3"

15. On June 11, 1999, Mr. Griffiths, Mr. Owen and Mr. Waddell incorporated BidCorp as a corporation under Part II of the *Canada Corporations Act* for the purpose of preparing and submitting the international bid to the IOC for the 2010 Winter Games. Under BidCorp's Letters Patent, the COC, as a member of BidCorp, appointed a third of BidCorp's directors, and the other members of BidCorp (the City of Vancouver, the Resort Municipality of Whistler, the Province of British Columbia and, as of November 2001, the Government of Canada) appointed the balance of the directors. The COC held an effective veto over BidCorp's key activities, as the Bid City Agreement required that BidCorp's board pass 75% resolutions for the appointment of a President and Chair, the adoption of the budget, the adoption of the strategic plan, and the delegation of powers to the executive.

Furlong Affidavit at para. 9, Ex. "3"- "4"

16. The next steps in a bid occur at the international level. In its capacity as the exclusive owner of the Olympic Games, the IOC determines where each Games will be held. The host city election procedure begins with an interested NOC for a particular country identifying to the IOC the name of the "applicant city" which the NOC has endorsed to make a bid. The IOC draws up a shortlist of "candidate cities" which submit a number of further documents in support of their bid, including a "Bid Book" and a "Guarantee File" responsive to the specific criteria against which the IOC evaluates the bids: (i) government support and public opinion, (ii) general infrastructure, (iii) sports venues, (iv) Olympic village, (v) environmental conditions and impact, (vi)

accommodation, (vii) transport, (viii) security, (ix) experience from past sports events, (x) finance and (xi) general concept. BidCorp's Guarantee File contains such things as expressions of support from sports organizations and First Nations, letters of commitment from transportation providers and hotel owners, key venue agreements, option agreements for advertising space, and agreements with international federations regarding the use of competition venues. The Guarantee File also contains letters of support and covenants from the federal government, the Province, the City of Vancouver, and the Resort Municipality of Whistler. Immediately following the selection of the host city, the city, its NOC and the IOC sign the "Host City Contract" described above in paragraph 10(c).

Sieber Affidavit #1 at para. 47;
Furlong Affidavit at paras. 14, 16-17, Ex. "9"

17. The bid process for the 2010 Winter Games was extremely competitive. Applicant cites other than Vancouver were Andorra la Vella, Andorra; Bern, Switzerland; Harbin, China; Jaca, Spain; Pyeongchang, South Korea; Salzburg, Austria; and Sarajevo, Bosnia. The shortlist of candidate cities was announced on August 29, 2002 and along with Vancouver comprised Bern, Salzburg and Pyeongchang, although in September 2002 Bern withdrew its bid. Vancouver was elected by the IOC Session, the IOC's supreme organ, as the host city on July 2, 2003.

Furlong Affidavit at para. 15, Ex. "8";
Sieber Affidavit #1 at para. 13-15;
Olympic Charter, Chapter 2, Rule 18

18. As part of the bid effort, and to ensure the rights and obligations of the parties were established and mutually agreed in advance of BidCorp submitting the bid to the IOC, on November 14, 2002, BidCorp, Canada, the Province, Vancouver, Whistler, the COC and the Canadian Paralympic Committee ("CPC") had entered into a Multiparty Agreement in order to set out their contributions and responsibilities to VANOC (which would be established upon a successful bid), to each other, and to the Games, should BidCorp's bid to host the Games succeed. After Vancouver was selected as the host city and VANOC was incorporated, VANOC became a party to the Multiparty Agreement.

Furlong Affidavit at paras. 18-19, 46-47, Ex. "18", "19"

C. VANOC

19. VANOC is established under Part II of the *Canada Corporations Act* as a non-profit corporation. VANOC is composed of 20 members and each member is automatically a director. The COC appoints 7 of the member directors, Canada appoints 3, the Province appoints 3, Vancouver and Whistler each appoint 2, 1 is appointed by the Lil'Wat and Squamish First Nations, acting together, and 1 is appointed by the Canadian Paralympic Committee. The 20th member director is appointed by the other member directors. The Chair is selected by the member directors each year immediately following the annual general meeting.

Affidavit #1 of Kenneth Bagshaw sworn March 17, 2009 ("Bagshaw Affidavit") at para. 7;
Furlong Affidavit at paras. 20-21, Ex. "10"

20. VANOC is a continually growing organization. By the commencement of the Winter Games, its workforce could reach up to 55,000, comprising 1,400 full-time paid staff, 3,500 temporary staff, 25,000 volunteers, 10,000 contractors, and 15,000 ceremony participants.

Furlong Affidavit at para. 24

21. VANOC has extensive relationships with a wide range of groups. It is in constant communication with members of the Olympic Movement, including the NOCs (and particularly the COC), IFs and, most particularly, the IOC. It has deep relationships with its sponsors, who make the largest contribution to VANOC's operating budget. And it has important relationships with various governments, who contribute to and support the Games, and with whom VANOC interacts in their regulatory capacities.

Furlong Affidavit at para. 26, Ex. "12"

22. Among the provisions of the Host City Contract in respect of the 2010 Games relevant to the relationship between the IOC and VANOC and the other domestic parties, and addressed in additional detail later in this argument, are:

(a) Clause 1: The IOC entrusts the organization of the Games to the City and the NOC, "which undertake to fulfil their obligations in full compliance with the provisions of the Olympic Charter and of this Contract".

(b) Clause 2: The City and the NOC must form an OCOG, the constating documents of which "shall be submitted to the IOC Executive Board for its prior written approval".

(c) Clause 12: In consideration of the City, NOC and OCOG performing their obligations, the IOC provides the OCOG with various sources of revenue, allows it to retain shares of other sources of revenue, and provides other assistance.

(d) Clause 14: The OCOG must submit to the IOC Executive Board for prior written approval a general organization plan and the master plan of the OCOG and of the Games, and must provide updates and other information thereafter.

(e) Clause 15: All agreements entered into by the City, the COC and the OCOG which directly or indirectly concern the Games or the IOC's moral or material rights are subject to the prior written approval of the IOC Executive Board. Furthermore, the OCOG will submit to the IOC Executive Board for approval standard form agreements to be used for contracts between the OCOG and third parties, including, for example, for sponsorship, suppliership, licensing, sale of Olympic coins, and ticket agents.

(f) Clause 24: The OCOG must provide to the IOC Executive Board semi-annual reports on the progress of the preparation of the Games. Four years before the opening of the Games it must provide quarterly reports. The OCOG must also provide reports "whenever the IOC Executive Board requests it to do so" and "[d]ecisions taken by the IOC Executive Board or

the IOC Session following such reports shall be acted upon immediately by the OCOG".

(g) Clause 25: A Coordination Commission is to be established to manage the relationship between the OCOG, the IOC, the IFs and the NOCs. The Commission is to "monitor on behalf of the IOC, the decisions, activities and progress of the OCOG, provide assistance to the OCOG and exercise any additional authority conferred upon it by the IOC Executive Board".

(h) Clause 26: The IOC will share with the OCOG its knowledge on how to organize the Games, and the OCOG undertakes to do the same for other OCOGs after the Games.

(i) Clause 32: At least three years before the Games, the OCOG will submit the schedule of the events to the IOC Executive Board for its prior written approval. The reference in this clause to the "specific daily programme (i.e. events)" is to the schedule of the specific times when the events will be held and not whether the events are included in the Games. To be clear, it is not a reference to the Olympic Programme, which concerns which sports, disciplines and events will be held during the Games. What VANOC is to submit under this clause deals with *when* the events will be held, rather than *which* events will be held.

(j) Clause 40: The Games are the exclusive property of the IOC and "the IOC owns all rights and data relating to their organization, exploitation, broadcasting, recording, representation, marketing, reproduction, access and dissemination by any means or mechanism whatsoever". The Executive Board may assign or license to the OCOG part of the IOC's intellectual property in the Games, which must take action to provide legal protection for that intellectual property within the host country.

(k) Clause 41: The IOC owns all the rights in the intellectual property created by the bid committee, the City, the NOC and the OCOG in relation to the Games.

(l) Clause 44: Any surplus from the Games is to be distributed as follows: 20% to the NOC; 60% "for the general benefit of sport in the Host Country as may be determined by the OCOG in consultation with the NOC"; and 20% to the IOC.

(m) Clause 45: Sets out the OCOG's further responsibilities to report its finances to the IOC, and the IOC's rights to audit the OCOG at any time.

(n) Clause 66: The parties are not in a partnership or joint venture.

(o) Clause 67: Any disputes between the OCOG, the City or the NOC with any member of the Olympic Family will be submitted to the IOC Executive Board for final approval.

(p) Clause 68: The contract is governed by Swiss law.

Furlong Affidavit at para. 35, Ex. "16"

23. As a consequence of these provisions and the Olympic Charter, VANOC has a very intensive relationship with the IOC, marked by detailed control of VANOC by the IOC. VANOC is in frequent communication with the IOC, reporting on its activities and receiving approval, and there are a variety of structures in place to allow for the IOC to oversee VANOC's activities. The Coordination Commission, to which VANOC submits regular reports, is the institution by which the IOC exercises the most direct oversight of VANOC. The Commission also has working groups that focus in on VANOC's functions to monitor its progress in more detail. Project Reviews occur between full visits of the Coordination Commission, and allow various members of the Commission and IOC staff to visit VANOC and be updated on its progress and give instructions. John Furlong, VANOC's Chief Executive Officer, also participates in the IOC Executive Board's quarterly meetings to update the IOC on VANOC's progress and receive instructions. In previous years Mr. Furlong participated in the Executive Board's meetings twice a year.

Another means by which IOC and VANOC work together on various unique issues as they arise, and VANOC can take guidance and instructions from the IOC, is through a joint process of tracking issues. The Master Schedule is a detailed planning tool that coordinates the core activities that VANOC must carry out as part of the planning, organizing, financing and staging of the Games. As required by the Host City Contract, and consistent with the IOC's general oversight of VANOC, VANOC regularly sends the IOC updates and obtains its approval for changes to the Master Schedule.

Furlong Affidavit at paras. 1, 36-41, Ex. "17"

24. The result of this IOC oversight is that VANOC must obtain IOC approval for a huge range of its activities. The sorts of actions which require IOC approval include all agreements, including venue agreements, marketing agreements and sponsorship agreements; the design of the torch and cauldrons and VANOC's uniforms; the general design principles for the Games – what is referred to as the "Look of the Games"; VANOC's logo, the inukshuk; VANOC's mascots; and the Opening and Closing Ceremonies programs.

Furlong Affidavit at para. 42

25. VANOC has extensive relationships with various governments in Canada, particularly (but not exclusively) the governments of Canada, British Columbia, the City of Vancouver, the Resort Municipality of Whistler and the City of Richmond. Unlike ordinary cases in which application of the *Charter* is an issue, there is no single "government" to which control could be attributed. Correspondingly, the Plaintiffs' argument is dominated by references to "Governments" in the plural.

Furlong Affidavit at para. 45

26. The relationships between VANOC and various governments arise in two main ways. First, the governments are partners in the 2010 Games, not in the legal sense, but in the more colloquial sense that they provide funding and/or make other contributions. The contributions from each of the governments referenced in the preceding paragraph (except the City of Richmond) are set out in the Multiparty Agreement. Briefly, both Canada and the Province agreed to provide $255 million each

for the capital costs of developing the venues (including $20 million towards staging the Paralympic Games), plus a further $55 million each as contributions to the Legacy Endowment Fund. They also agreed to provide, at their own cost, those services that would ordinarily be provided by them, as they arise out of their respective legislative obligations and prerogatives. Both Vancouver and Whistler agreed to provide, at their cost, the services that would normally be provided by them within their respective jurisdictions and within their normal financial frameworks, as well as to maximize policing. In addition, Vancouver agreed to build the Vancouver Athletes' Village, subject to VANOC's contribution of $30 million.

Furlong Affidavit at paras. 45, 50

27. In exchange for their financial and other contributions, the Multiparty Agreement gives the government partners certain defined rights to monitor VANOC's finances, and the consent of two of the government partners, Canada and the Province, is required for material changes to VANOC's Business Plan. In Mr. Furlong's experience and as makes common sense, these are rights that are commonly given to investors or lenders.

Furlong Affidavit at para. 61

28. The Multiparty Agreement also gives the parties some rights to recognition for their contributions. Under section 12.1, VANOC will ensure that the other parties receive appropriate recognition for their contributions, and at the Games VANOC will treat representatives and guests of the parties and of local First Nations in a manner befitting their offices (section 16.3).

Furlong Affidavit at para. 53

29. Section 51 of the Multiparty Agreement obliges VANOC to comply with all applicable laws and to obtain all necessary licenses and permits required by law to carry out its activities. Section 52 sets out a number of provisions to the effect that the Multiparty Agreement does not create a partnership. Specifically, the Parties are not in the relationship of agents and principal, master and servant, partners or joint venturers;

no party has any right to bind any other; no party is an agent of any other; and no party will hold itself out as the agent of any other.

Furlong Affidavit at para. 55

30. The second way in which relationships between VANOC and various governments arise is in a regulatory sense. The sheer size and complexity of the project of putting on the Winter Games means that VANOC constantly interacts with the governments in their regulatory capacities – on everything from traffic to land use. For instance, that component of VANOC responsible for the process of issuing accreditation to all members of the Olympic Family has frequent communication with and must establish protocols with the Canada Border Service Agency, Citizenship and Immigration Canada, Vancouver 2010 Integrated Security Unit, the RCMP, CSIS and the Privy Council Office. That component of VANOC responsible for facilitating the planning and delivering on all transportation needs for the Games for the Olympic Family, spectators and the public must, in order to fulfil this function, collaborate with the BC Ministry of Transportation, the City of Vancouver, the Resort Municipality of Whistler, Translink, BC Transit, and the Vancouver 2010 Integrated Security Unit, amongst other agencies. In the course of seeking permits, licenses, approvals and the like, VANOC communicates with governments frequently.

Furlong Affidavit at paras. 58, 60

31. The governments have no regular or routine control of VANOC. Mr. Furlong and his staff do not take instructions from any government. Rather, they take instructions from VANOC's board of directors. Mr. Furlong is not aware of any circumstance in which it could be said that the government-appointed directors were acting on behalf of the various governments which appointed them, as opposed to acting in the best interests of VANOC.

Furlong Affidavit at paras. 61-62
Bagshaw Affidavit at para. 7

32. It is the *IOC* – not any government – that exercises regular and routine control over VANOC. Its oversight and control of VANOC is regular and very detailed. A simple analogy to explain VANOC's relationship to the IOC is that VANOC is akin to a

franchisee of the IOC. In Mr. Furlong's experience no government exercises anything close to regular, routine, day-to-day control over VANOC. A comparison of VANOC's relationship with the IOC versus its relationships with the various governments can be made by way of the Master Schedule, which has been described above. The Master Schedule is shared with governmental and other Games partners in order to assist in the coordination of activities. When developing the Master Schedule, VANOC consulted with its federal, provincial and municipal government partners, but, unlike with the IOC (whose approval is required), VANOC has never sought governmental approval of the Master Schedule and is not obliged to do so. VANOC shared the Master Schedule with the various government partners to ensure that it is accurate and useful as a planning and communication tool, just as VANOC shared the Master Schedule with its sponsors to receive their comments. VANOC also gives the government partners monthly updates on the Master Schedule, but again, those updates are provided for information and coordination purposes, not in order to obtain approval.

Furlong Affidavit at paras. 43-44, 63

33. VANOC has two budgets: the Games Operating Budget (the "Operating Budget") and the Venue Development Budget (the "Development Budget"). Substantially all of the Operating Budget is financed by revenue sources from the private sector, including the IOC. The current Operating Budget totals $1,755,850,000. The largest source of this revenue is from corporate domestic sponsorships (such as Bell, Royal Bank of Canada, HBC, Petro Canada, General Motors, and Rona) and totals approximately $757,000,000. That revenue is derived from VANOC granting marketing rights to domestic sponsors, including the use of Olympic symbols and other IOC intellectual property, which the IOC has granted VANOC the right to license. The IOC directly contributes about $447,000,000 from broadcasting revenues,[2] plus an additional

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[2] The IOC distributes approximately 92% of Olympic marketing revenue to Olympic Movement organizations, and retains the remainder for the IOC to cover the costs of governing the Olympic Movement. Among the Olympic Movement organizations, OCOGs, NOCs and IFs receive the most significant funding. The Summer and Winter Games OCOGs of each Olympic quadrennium together receive half of the TOP program revenue and goods and services contributions in that

$196,356,000 from the IOC's international sponsorship program ("TOP"). Ticketing is expected to yield $260,400,000.

Furlong Affidavit at paras. 27-28, Ex. "13"-"14"

34. The Development Budget is $591,800,000,[3] which (except for $11.8 million funded through value-in-kind from some of VANOC's commercial sponsors) is entirely funded by the Governments of Canada and British Columbia in equal shares. The Development Budget covers the cost of constructing new venues and renovating existing facilities. The scope of venue construction includes the planning, construction and delivery of all competition venues required for the Olympic and Paralympic Winter Games on a timely basis. The venues will all leave physical legacies for the use and benefit of the public after the 2010 Games.

Furlong Affidavit at para. 30, Ex. "15"

D. Olympic Programme

(1) Overview

35. The Olympic Programme is the slate of sports, disciplines and events that will be held as part of the Olympic Games.

Affidavit #1 of Cathy Priestner Allinger sworn March 16, 2009 ("Priestner Allinger Affidavit") at para. 5

36. At the Olympic Games, there are three levels of competition: sports, disciplines and events. By illustration, skiing is a sport, ski jumping is a discipline, and women's 90 NH (Normal Hill) ski jumping would be an event. The IOC Session decides, normally at least seven years before an Olympic Games, whether a sport will be included in that

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quadrennium. In the 2001 to 2004 quadrennium, the TOP program generated US$663,000,000. OCOGs also receive a share of the broadcast revenue in respect of the particular Games they organize, with that share determined by the IOC (Sieber Affidavit #1 at para. 45).

[3] The Development Budget was decreased by $40,000,000 when it was determined that Olympic Regional Centres would not be built by VANOC, but was increased in 2006 when Canada and British Columbia agreed to provide a further $55,000,000 each. The result is that Canada and British Columbia together contribute a total of $580,000,000 to the Development Budget (Furlong Affidavit at para. 30).

Olympic Games. The IOC Executive Board decides, at least three years before an Olympic Games, on the inclusion or not of disciplines and events.

Sieber Affidavit #1 at paras. 64-65

37. Much of the work to assist the IOC Session in its selection of sports, and the IOC Executive Board in its selection of disciplines and events, is performed by the Olympic Games Programme Commission (the "OPC"). This is the IOC expert body that reviews and evaluates requests from IFs (such as the International Ski Federation, the "FIS" to use its French acronym) for additions to the Olympic programme of sports, disciplines and events. The OPC is composed of 16 people, each of whom is one or more of the following: an IOC member, a representative of an IF (such as FIS), a member of an NOC (such as the COC) or a member of the Athlete's Commission, a body formed in 1981 which serves as a link between active athletes and the IOC. As well, all continents must be represented on the OPC.

Furlong Affidavit at para. 73;
Sieber Affidavit #1 at para. 66

38. When a new event is included in the Games, the cost of putting on those Games naturally increases. While cost and logistical problems can be factors in some cases, the focus of the OPC's consideration is always on other matters, such as the international competitiveness and appeal of a sport, discipline or event.

Sieber Affidavit #1 at para. 68

39. In the 2004 Olympic Charter – which was the version in force when the decision not to include women's ski jumping was made – the standards for the admission of sports, disciplines and events were set out in Rule 47. That Rule states at the outset: "The IOC establishes the programme of the Olympic Games, which only includes Olympic Sports". Rule 47(7) identifies which IOC body is competent to include sports, disciplines and events, respectively: "The admission or exclusion of a sport falls within the competence of the IOC Session. A decision to include or exclude a discipline or event falls within the competence of the IOC Executive Board".

Sieber Affidavit #1 at para. 70

40. Rule 47(3) sets out criteria for the inclusion of events. Criteria there include:

> 3.2 To be included in the programme of the Olympic Games, events must have a recognised international standing both numerically and geographically, and have been included at least twice in world or continental championships.
>
> 3.3 Only events practised by men in at least fifty countries and on three continents, and by women in at least thirty-five countries and on three continents, may be included in the programme of the Olympic Games.
>
> 3.4 Events are admitted not later than three years before specific Olympic Games in respect of which no change shall thereafter be permitted, subject to paragraph 6 below.

Sieber Affidavit #1 at para. 71

41. The criteria set out in Rule 47 are not necessarily sufficient requirements for the admission of a sport, discipline or event. The overall standard is the established excellence of the level of competition, and further broad standards include global interest and social value. The IOC has always been concerned to ensure that competition at the Olympic Games is at the very highest level, and the OPC has always looked to more than the basic requirements set out in the Olympic Charter in its determination of which disciplines and events are to be admitted. In 2006, when the current version of the Olympic Charter was adopted, the specific criteria in the old Rules 47(1) to (3) were in fact removed. The OPC, however, continues to make its determinations in the same manner as before.

Sieber Affidavit #1 at para. 73

42. The Plaintiffs allege in their pleadings that "...VANOC had meaningful input into what events were included in the programme of, and set the schedule for, the events of the Games" and that "VANOC continues to have the ability to add events to the programme and schedule of the Games, either with the Agreement of other parties or unilaterally" (Further Amended Statement of Claim, paras. 8, 13). In fact, with one exception, discussed below, OCOGs have no role in the determination of the programme of sports, disciplines and events in the Games they organize. The determination of the Programme is for the IOC alone. While Mr. Furlong and some

others at VANOC thought at first that VANOC might be able to have informal influence over the Programme, early on the IOC very clearly instructed them to the contrary. The OCOG's role is limited to staging the sports, disciplines and events that are selected by the IOC. The OCOG's lack of involvement in the Olympic Programme is more than just a simple division of responsibilities. The point is to avoid an OCOG lobbying for the inclusion of an event, in which the country of the OCOG may excel, and thus to dilute the universality of the Olympics.

Sieber Affidavit #1 at paras. 33-35;
Furlong Affidavit at para. 71

43. The only occasion on which an OCOG has any input in determining the Olympic Programme is where the IOC Session or the IOC Executive Board wishes to include a sport, discipline or event *after the applicable deadline* (which, for disciplines and events, is three years before the opening of the relevant Olympic Games); then they can only do so with the OCOG's approval. This exception to the general rule exists because the inclusion of a sport, discipline or event after the deadlines set out in the Olympic Charter may significantly affect the OCOG's schedule and budget. Generally the OCOG negotiates with the IOC over funding for the additional costs of the events, as well as a number of the logistical challenges.

Furlong Affidavit at para. 72;
Sieber Affidavit #1 at para. 33;
Olympic Charter, Rule 46, Bye-law 1.5

44. The present process is somewhat of a departure from the situation existing up to and including the Salt Lake City Games. Up to and including the Salt Lake City Games in 2002, the process for selecting the Olympic Programme did allow for some lobbying by OCOGs. The Organizing Committee for the Salt Lake Games ("SLOC") was very interested in having skeleton and women's bobsleigh added, and lobbied the IOC to have these events included. Ultimately, the IOC did include these events. There was at that time some scope for lobbying by OCOGs (and a perception of abuse of the selection process) because the culture in the IOC with respect to the Olympic Programme was very different. Most tangibly, the OPC did not exist at that point, and the decisions with respect to the Olympic Programme were made much less formally,

resulting in the Olympic Programme expanding too quickly. The absence of an expert body such as the OPC allowed for lobbying by OCOGs to have included in the Programme events in which the home country excelled.

Priestner Allinger Affidavit at paras. 3-5;
Sieber Affidavit #1 at paras. 35-36

45. To address these problems, the OPC was reinstated (it had existed at one point in the past) in 2000, after the decision to include skeleton and women's bobsleigh in the Salt Lake Games had been made. The OPC is a body of impartial experts who make recommendations as to the Olympic Programme based on objective standards. The result is that OCOGs now have absolutely no power to push for the inclusion of events they favour. The most that an OCOG can do is to assure the IOC that it can accommodate – in terms of scheduling and logistics – a new sport, discipline or event. An OCOG has no power to persuade the IOC to include a particular sport, discipline or event. It is now inappropriate for an OCOG to lobby the IOC to include a particular sport, discipline or event and interfere through political pressure in the fair process established by the IOC to determine the Olympic Programme. Not only is it inappropriate, but pressure from an OCOG is simply not a basis on which the OPC would recommend the inclusion of a sport, discipline or event that does not meet Olympic standards.

Sieber Affidavit #1 at paras. 37, 39, 40;
Priestner Allinger Affidavit at paras. 6-7

(2) Women's Participation in the Olympics

46. Particularly since the 1970s, the IOC has made serious efforts to increase women's participation in the Games and in sport throughout the world. The Olympic Movement strives, among other things, to advance women in sport at all levels and in all structures, with a view to achieving equality between men and women.

Sieber Affidavit #1 at paras. 51, 54, Ex. "4"

47. The 1900 Summer Games in Paris marked the first time women competed in the Olympics. Only 19 women competed (just 1.6% of the total number of competitors) in

just 3 events. Since that time, women's participation in the Summer Games has steadily increased. In the 2008 Beijing Olympics, 42% of the athletes were women, and women competed in 45% of the events. Women's participation in the Winter Games has also increased over the years. In the 2006 Torino Winter Games, 38.3% of the athletes were women, and they competed in 47.6% of the events.

Sieber Affidavit #1 at paras. 55-56, 62, Ex. "25"

48. As part of its efforts to increase women's participation, in 1991 the IOC created a policy that new Olympic sports must include both women's and men's events.

Sieber Affidavit #1 at para. 57

49. Recognizing that women's involvement in competition is not enough, the IOC has also taken a host of steps to increase women's involvement in leadership and administration within the Olympic Movement and the wider sporting community. The IOC seeks gender equality within the entire Olympic Movement, and to foster equality in sports in general. IOC commissions and working groups have included an increasing number of women.

Sieber Affidavit #1 at paras. 58-59

50. In 1996, Chapter 2 of the Olympic Charter was amended to reflect that part of the IOC's mission is "to encourage and support the promotion of women in sport at all levels and in all structures with a view to implementing the principle of equality of men and women". In 1995, the IOC created the Women and Sport Working Group to advise the IOC Executive Board on policies to foster women's leadership in sport. In 2004 that working group became a full fledged commission. The Women and Sport Commission is, like all IOC commissions and working groups, a consultative body composed of the three components of the Olympic Movement (the IOC, IFs and NOCs), as well as representatives of athletes, of the International Paralympic Committee and independent members. The Commission meets once a year and makes recommendations from which an action programme is developed and implemented by the IOC through its Department of International Cooperation and Development. Further, in 1997 the IOC established minimum targets for women membership of NOC executives in an effort to

spur greater participation of women amongst the IOC's partners in the Olympic Movement.

Sieber Affidavit #1 at paras. 60-61, Ex. "24"

51. The IOC's approach to broadcasting the Olympic Games also provides an unparalleled platform for the celebration of women's achievement in sport. The television signal for every event at the Games is produced by the Olympic Broadcasting Services. This television signal, called the "World Feed", covers all events impartially and universally, without distinction between men and women or between nationalities. Commercial broadcasters from over 200 countries are then able to pick up the World Feed for their programming.

Sieber Affidavit #1 at para. 63

E. VANOC and Women in Sport

52. As part of the bid for the 2010 Winter Games, a number of initiatives referred to as "2010 Legacies Now" were created by BidCorp to contribute to sport development and to encourage participation in sport and an active lifestyle among all British Columbians. In general terms, the initiatives were aimed at providing a legacy for British Columbians beyond the physical assets of the Games. The notion was to increase British Columbians' participation in sport, to expand training and development programs for young and budding athletes, and to increase access to sport for segments of the populations which at that time were underrepresented in sport, such as women, Aboriginal persons, and the disabled.

Affidavit #1 of Donna Wilson sworn March 16, 2009 ("Wilson Affidavit") at para. 4

53. In 2002, prior to the Games being awarded to Vancouver, 2010 Legacies Now was transferred to a not-for-profit society independent of BidCorp, although Judy Rogers (who until recently was on the VANOC board of directors) is the chair of the board of directors of 2010 Legacies Now, and Ken Dobell (who is a VANOC director) is also on the board. 2010 Legacies Now provides support for women in sport by providing core funding to ProMOTION Plus, which is the British Columbia organization

for girls and women in physical activity and sport. 2010 Legacies Now partnered with the Canadian Association for the Advancement of Women and Sport and Physical Activity ("CAAWS") to fund the research and production of a "Women on Boards" guide aimed at helping women taking on leadership roles on corporate boards. 2010 Legacies Now partnered in the creation of the "In Her Footsteps Gallery", a permanent physical tribute celebrating BC women in sport at the BC Sports Hall of Fame and Museum. VANOC participates at annual events held at the Gallery honouring BC women in sport. Further, 2010 Legacies Now partners with ProMOTION Plus, the BC Centre of Excellence for Women's Health and the University of British Columbia to hold International Women's Day Celebrations, which VANOC also celebrates.

Wilson Affidavit at paras. 5, 7, 9, Ex. "J"

54. In April 2003, BidCorp developed a document entitled the "2010 Women in Sport Strategic Framework: Strengthening the Foundation through Leadership, Access, Participation, Awareness and Research". The document outlines an implementation strategy for the advancement of women in sport in connection with the hosting of the Games and for creating legacies beyond 2010. At its April 30, 2003 meeting, BidCorp's Executive Committee endorsed the general direction outlined in the Strategic Framework, while recognizing that it could not commit to specific actions on behalf of VANOC (which in any event did not yet exist). Following the success of the Bid, VANOC and 2010 Legacies Now together agreed that implementation of the Strategic Framework should be adopted by 2010 Legacies Now, with VANOC supporting those efforts where it could.

Affidavit #1 of Dorothy Byrne sworn March 16, 2009 ("Byrne Affidavit") at paras. 1-4, Ex. "A", "B"

55. VANOC and 2010 Legacies Now collaborate with the Minerva Foundation for BC Women in its "Combining Our Strengths" programs for women. VANOC and 2010 Legacies Now assist in promoting female athlete role models, physical fitness and healthy living. VANOC has participated in a number of conferences concerning women in sport, and has collaborated with ProMOTION Plus to facilitate a girls-only workshop on sport.

Wilson Affidavit at paras. 10-11

56. VANOC has a voting seat on the 6-member committee that governs the Aboriginal Youth Sport Legacy Fund, which provides significant support for aboriginal women. Other initiatives aimed at Aboriginal youth also emphasize female participation, such as the physical Aboriginal Sport Gallery in the BC Sport Hall of Fame (for which VANOC partnered with 2010 Legacies Now) and the 2010 Virtual Aboriginal Sport Hall of Fame (for which VANOC is partnering with the Aboriginal Sport Circle). For the last four years VANOC has collaborated with 2010 Legacies Now to create the Aboriginal Youth Sports Challenge, which brings together Aboriginal youth (half the participants have been female) and includes the chance to meet female athlete role models.

Wilson Affidavit at paras. 12-14

57. VANOC is heavily involved in promoting sports and fitness in the education system, and has a number of poster series toward this end. Hundreds of thousands of posters are sent to schools and youth groups across Canada. Female athletes feature very prominently in these campaigns.

Wilson Affidavit at para. 15

58. Gender balance is also a very significant theme within VANOC. 52% of the paid staff (full-time, part-time, secondee, contractor, term, co-op and interns) are women, as are 57% of the volunteers. VANOC promotes female leadership within its organization and sports in general. Many of the senior positions within VANOC are filled by women.

Furlong Affidavit at para. 25;
Wilson Affidavit at para. 3

F. Women's Ski Jumping

59. On January 25, 2006, VANOC's Chief Executive Officer, Mr. Furlong, received a letter from Ms. Deedee Corradini, the President of Women's Ski Jumping USA and the former Mayor of Salt Lake City. Ms. Corradini asked for Mr. Furlong's support for women ski jumpers competing in 2010, and asked for any guidance Mr. Furlong could give to them to help advance the sport into world championships and into the Olympic Winter Games. Mr. Furlong replied to Ms. Corradini on March 3, 2006, outlining for her

the process by which events are added into the Olympics, observing that it is coordinated by FIS and the IOC and that VANOC has been given clear direction that the Olympic programme is the responsibility of the IOC, not the OCOGs. Mr. Furlong did not receive any letter or other communication from Ms. Corradini in reply.

Furlong Affidavit at para. 70, Exs. "22"-"24"

60. The OPC met in early November 2006 and considered requests to include the events of ski cross and women's ski jumping, along with 5 other events, in the Vancouver Olympics in 2010.

Furlong Affidavit at para. 74;
Sieber Affidavit #1 at para. 74

61. The request for women's ski jumping to be added as an event would involve between 30 and 50 more athletes attending the Olympics, to be qualified through results and rankings in the FIS Continental Cup Series. There had been only a Junior World Championship, held once, in 2006, and the first senior World Championship took place in March 2009. Approximately 8 to 10 national federations organized national women's ski jumping events.

Sieber Affidavit #1 at para. 78, Ex. "26"

62. In its deliberations in November, 2006, the OPC voted against recommending six of the seven events proposed for the 2010 Winter Olympics, including women's ski jumping. The one event it recommended to have included was ski cross, for both men and women, to be added to the freestyle skiing discipline. The OPC's report to the Executive Board of the IOC noted that the recommendation against including women's ski jumping was only for the time being. The OPC "recommended that, <u>at this point</u>, the events of Curling Mixed Doubles and Women's Ski Jumping should not be included in the Programme as their development is still in an early stage thus lacking the international spread of participation and technical standard required for an event to be included in the programme" (underlining added). In this regard it treated women's ski jumping in the same way as *mixed* doubles in curling. Among the principles on which the OPC based its recommendations were that "[e]vents must have a recognised international standing both numerically and geographically, and have been included at

least twice in world or continental championships"; that "[t]he social value of a sport", including "non-discrimination", "should be considered"; and that a "...[s]port should organise world and continental competitions for the youth/junior age categories as well as for men and women". In exercising its judgment whether to recommend the inclusion of women's ski jumping as an event for 2010, the OPC's consideration was thus largely one of timing. At the time the recommendation was made, the OPC simply did not believe that women's ski jumping had developed to the stage where it ought to be included in the 2010 Olympics, but the OPC looks forward to considering women's ski jumping for inclusion in the 2014 Winter Olympics.

Sieber Affidavit #1 at paras. 1, 80-85, Ex. "28"

63. The OPC considered the gender equity aspect of the application to add women's ski jumping. There was a very substantial discussion about the gender issue. It was clear from the discussion that the members of the OPC believed it to be a strong factor in favour of adding the event. For instance, had the international competitiveness of women's ski jumping been closer to the usual standards for inclusion in the Olympic Games, Mr. Walter Sieber (a member of the board of directors of VANOC, vice-president of the Canadian Olympic Committee since 1982 and member of the OPC since 2000), believes, based on that discussion, that it is very possible it would have been included. The members of the OPC, however, were unanimously of the view that women's ski jumping had not yet reached a sufficiently high level of competition and international competitiveness to be included in the Olympic Games.

Affidavit #2 of Walter Sieber sworn April 7, 2009 ("Sieber Affidavit #2") at para. 4

64. Mr. Sieber personally looks forward to women's ski jumping being included in the near future and is impressed by how quickly the international competitiveness of the sport has grown. However, in Mr. Sieber's judgment (and he believes in the judgment of the other members of the OPC), at the time the recommendation was made, the level of competition had not yet developed sufficiently to be included in the Games, although Mr. Sieber expects it will reach that level soon. He believes that women's ski jumping will be included soon. The IOC Executive Board also indicated in its November 2006

press release that it would be closely following the development of women's ski jumping with a view to its inclusion in future Olympic Games.

Sieber Affidavit #1 at para. 88
Sieber Affidavit #2 at para. 5

65. Furthermore, the OPC's recommendation not to include women's ski jumping was not made on the basis of any communication from VANOC or with any consideration of VANOC's position on it. The only VANOC position on this subject of which Mr. Sieber is aware is that VANOC supported the inclusion of women's ski jumping.

Sieber Affidavit #1 at para. 85

66. Mr. Furlong learned of the OPC's recommendations in early November 2006. On November 15, 2006, the VANOC Board discussed the OPC's recommendations. The Board believed that women's ski jumping would pose some financial and logistical impacts creating additional net cost to VANOC, but the Board also recognized the importance of gender equity and the positive contribution to sport that would be made by the addition of women's ski jumping competitions. The minutes of the November 15, 2006 Board meeting show the Board resolved that:

> management explore the logistical challenges and financial impact of adding Women's Ski Jump to the roster of the 2010 Olympic Winter Games competitions and express support to the IOC for the addition of these competitions, subject to there being a workable solution to the logistical challenges and subject to there being an assurance there would [be] no net negative financial impact on the 2010 Games budget from the addition of these competitions.

Furlong Affidavit at para. 75, Ex. "25"

67. On November 20, 2006, Mr. Furlong received a letter from four members of the Women's Canadian Ski Jumping Team, including one of the Plaintiffs, Zoya Lynch. They asked Mr. Furlong to "immediately lobby the IOC to request the inclusion of women's ski jumping in 2010".

Furlong Affidavit at para. 78, Ex. "27"

68. On November 21, 2006, Michael Chambers, the President of the COC, wrote to Jacques Rogge (President of the IOC) to urge that the Executive Board add women's ski jumping to the 2010 programme. The letter was copied to Mr. Furlong and to Gilbert Felli, the IOC's Executive Director of the Olympic Games.

Furlong Affidavit at para. 79, Ex. "28"

69. As directed by the VANOC Board, on November 24, 2006 Mr. Furlong wrote to Mr. Felli to express VANOC's support for the inclusion of women's ski jumping. In addition to being the Executive Director of the Olympic Games, Mr. Felli works with the IOC's Coordination Commission for the 2010 Winter Games in the role of the IOC's "Director in Charge" of the Coordination Commission. Mr. Furlong speaks with Mr. Felli often about various matters, as part of the close relationship between VANOC and the IOC. Mr. Furlong believes that he had already informed Mr. Felli of the VANOC Board's resolution.

Furlong Affidavit at para. 80, Exs. "29"-"30"

70. In Mr. Furlong's letter, he observed that, based on the principle of promoting gender equality and participation at the Games, the Board conditionally supported the inclusion of women's ski jumping. Mr. Furlong stated the following with respect to both women's ski jumping and ski cross:

> VANOC would be prepared to accept both the inclusion of Women's Ski Jumping and Ski Cross, subject however to working with the IOC and all others involved to mitigate any significant cost or logistical impacts. In addition, if the IOC were to approve the addition of these events, we would need to come to an understanding on the overall management of athlete numbers to avoid incremental demands on the Whistler Olympic Village and additional sessions at the Nordic Centre.

Furlong Affidavit at para. 81

71. Mr. Furlong then said the following specifically regarding women's ski jumping:

> Without any detailed formal knowledge of how the IOC views the strength of the Women's Ski Jumping application in particular, our view is that if there were a concerted effort to manage athlete numbers, VANOC, the IOC and FIS could together find a solution to accommodate the addition. While we recognize that these are complex matters, if the IOC were to conclude that

> the very best outcome for the 2010 Olympic Winter Games were to include these additions, we believe that, as a partner, it is our obligation to do the very best we can to achieve an outcome that best serves the interests of sport and of all involved.

Furlong Affidavit at para. 82

72. In writing this letter, Mr. Furlong's intention was not to try to persuade the IOC that they ought to include women's ski jumping; as noted earlier, OCOGs have no role in the determination of the Programme and in Mr. Furlong's view it would be improper for VANOC to be taking sides. Mr. Furlong's intention was more limited: it was to remove any concern in the IOC's mind about VANOC supporting the inclusion of this new event. Mr. Furlong wanted the IOC to know that, if the IOC decided that women's ski jumping ought to be included, VANOC would fully support its inclusion and would work with the IOC to make it happen. All conversations Mr. Furlong had with the IOC over the issue of women's ski jumping contained the same message: that VANOC would support its inclusion.

Furlong Affidavit at para. 83

73. After its consideration of the OPC report on November 28, 2006, the IOC's Executive Board accepted all of the recommendations of the OPC, including the recommendation not to include women's ski jumping as an event for 2010. The VANOC Board accepted that decision. Mr. Felli further wrote to Mr. Furlong confirming the IOC's decision on December 20, 2006. Again, it is the IOC's role to determine the Olympic Programme, and VANOC's role is to stage the events included in that Programme.

Sieber Affidavit #1 at para. 86;
Furlong Affidavit at para. 85, Exs. "31"-"33"

74. The Plaintiffs suggest VANOC's position to be that "it would be inappropriate to question the IOC about a women's jumping event at the 2010 Games" (Argument, para. 4). This is a distortion of VANOC's position and the facts. VANOC approached the IOC, and both Mr. Sieber and certain of the Plaintiffs (as returned to below) regard VANOC's position as being supportive. It would be inappropriate to do more than

VANOC already has and it would in any event be ineffective as the efforts of other organizations, governments and VANOC itself have demonstrated.

75. In this regard, after the IOC Executive Board made its decision, Ski Jumping Canada continued to lobby for the inclusion of women's ski jumping. Brent Morrice, the President of Ski Jumping Canada, wrote to Jacques Rogge on December 10, 2006. He also wrote to VANOC on January 12, 2007 to seek continued lobbying support. Jack Poole, the Chairman of VANOC's Board, replied on April 12, 2007, to explain that VANOC had supported the inclusion of women's ski jumping but that the authority to make decisions concerning the Olympic Programme lies with the IOC. In a news story dated May 21, 2008 Mr. Morrice and the Plaintiff Katherine Willis accepted that VANOC could not set the Programme for the 2010 Winter Games.

Furlong Affidavit at para. 86, Exs. "34"-"37"

76. By a press released on January 8, 2008, the IOC publicly reiterated its position that women's ski jumping would not be included in the 2010 Programme.

Furlong Affidavit at para. 87, Ex. "38"

77. A number of Canadian governments and officials and prominent Canadians in the sporting world have lobbied the IOC to have women's ski jumping included. On January 16, 2008, The Honourable Helena Guergis, Federal Secretary of State for Sport wrote to Jacques Rogge to express her support for the inclusion of women's ski jumping and to request a meeting with him. Dr. Rogge replied to the Honourable Ms. Guergis on April 15, 2008, confirming the IOC's decision not to include women's ski jumping. Ms. Guergis and Dr. Rogge also had a telephone call in early 2008 in which Ms. Guergis urged Dr. Rogge to include women's ski jumping. Ms. Priestner Allinger and John Furlong of VANOC were with Dr. Rogge when he was on the call (he was visiting VANOC at the time). Dr. Rogge repeated to Ms. Guergis that women's ski jumping would not be included in the 2010 Games because it was not yet at an appropriate level of international competitiveness.

Priestner Allinger Affidavit at para. 12;
Furlong Affidavit at para. 88, Exs. "39"-"40"

78. Michael Chambers, President of the COC, wrote to Dr. Rogge on February 4, 2008. In his letter, Mr. Chambers stated that the COC respects the IOC Executive Board's decision regarding women's ski jumping, but he reiterated the COC's position that the event ought to be included. On February 26, 2008, Vancouver City Council passed a resolution calling on women's ski jumping to be included in the 2010 Games. Vancouver City Council considered and unanimously adopted (Councillor Stevenson abstaining) a further motion calling for the inclusion of women's ski jumping on March 3, 2009. Squamish Municipal Council also passed a motion supporting the inclusion of women's ski jumping, and communicated that resolution to the IOC in a letter from the Mayor of Squamish, dated March 18, 2008.

Furlong Affidavit at para. 89, Exs. "41"-"43"
Defendant's Documents, Tab 275; Common Book, Tab 82

79. In February 2009, Penny Ballem, the new City Manager for Vancouver and a member of VANOC's Board, spoke with Jacques Rogge and criticized him for the IOC having not included women's ski jumping in the 2010 Games. Dr. Ballem asked Mr. Furlong to speak with Jacques Rogge to try to persuade him again to include women's ski jumping. Mr. Furlong raised that matter with him on that same date, but was again told that the IOC's decision was final.

Furlong Affidavit at para. 90, Ex. "44"

80. A Vancouver newspaper story reported that local Member of Parliament Dawn Black has also put forward a motion in the House of Commons calling on the federal government to demand that VANOC hold a women's ski jumping event. The article further indicates that Premier Gordon Campbell has told the IOC that the Government of British Columbia supports the inclusion of women's ski jumping.

Furlong Affidavit at para. 91, Ex. "45"

81. The women ski jumpers themselves have not, however, pursued all their avenues in this regard. On January 18, 2008 a meeting was held in Calgary, Alberta between various persons interested in women's ski jumping being included in the 2010 Games. Ms. Priestner Allinger attended on behalf of VANOC. Sarah Lynch, the Litigation Guardian of the Plaintiff Zoya Lynch, also attended the meeting. At the

meeting, Ms. Priestner Allinger was asked to advise the group on what she thought were the best ways for them to have the IOC change its decision with respect to women's ski jumping. Ms. Priestner Allinger told the group that, first, they should meet face-to-face with FIS to ensure it fully supported the inclusion of women's ski jumping and to ask FIS to lobby the IOC on their behalf. IFs are very influential with the IOC, particularly so FIS. Second, Ms. Priestner Allinger advised the group to lobby the IOC directly. Ms. Priestner Allinger did not believe these steps would necessarily be successful, but she believed they had the best chance of success. The Plaintiffs and their supporters have never taken these steps, at least until very recently. In the result, Ms. Priestner Allinger has heard from her contacts at the IOC that, after submitting the initial application, FIS never pushed the IOC to include women's ski jumping in the 2010 Games.

Priestner Allinger Affidavit at paras. 9-10, Ex. "A"

82. The Canadian Snowsports Association ("CSA"), the membership of which includes Ski Jumping Canada and other Canadian national snowsport federations, has suggested the same steps as Ms. Priestner Allinger has. In a press release from the CSA dated October 7, 2008, Chris Robinson, the CSA's President, states that "[w]e must continue to use the FIS channels to lobby the IOC for acceptance of Ladies Ski Jumping into the Olympic Games". He goes to state that "VANOC has been a supporter of the CSA position but their ability to influence this decision has passed". Dave Pym, the CSA's Managing Director, states in the press release that "VANOC were tremendously supportive of the CSA attempts over the past few years to actively lobby the IOC for inclusion of Ladies Ski Jumping, BUT VANOC are not the decision makers as to the inclusion of events" (his emphasis). Brent Morrice, the Chairman of Ski Jumping Canada, who also attended the January 18, 2008 meeting in Calgary, is reported in the press release as stating that "Ski Jumping Canada does not believe that suing VANOC will accomplish our goal to have the women participate in the Olympic games". He says that "[t]he IOC's program commission needs to look at this issue". He goes on to say that VANOC has been hosting the women ski jumpers at the jumps in the Callaghan Valley (the Whistler Olympic Park) and that "they are hosting these

events in part to develop the women's circuit internationally". Part of VANOC's intention in hosting those women's ski jumping events is to assist in the development of the sport.

Priestner Allinger Affidavit at para. 11, Ex. "B"

G. The Whistler Olympic Park

83. The ski jumping venue is within the Whistler Olympic Park. The land in the Whistler Olympic Park is provided by the Province pursuant to a venue agreement and other tenure documents. The construction of that venue, including the ski jumps, was budgeted to be $122,400,000. All of those funds came from equal contributions from the federal and provincial governments. After the Games, VANOC's interest in the venue will be transferred to the Whistler Legacies Society, which will own and manage certain venues in the Whistler region. The cost of managing those venues will be paid for through funds from the Legacy Endowment Fund, to which the federal and provincial governments have each contributed.

Furlong Affidavit at paras. 64-65

84. Prior to and during the Games, VANOC will manage the Whistler Olympic Park with monies from the Operating Budget supplemented by income from the 2010 Games Operating Trust. VANOC will be responsible for maintaining the ski jumps during the pre-Games and Games period, but, in keeping with the provisions of the Olympic Charter, FIS will manage all ski jumping competitive events on the jumps.

Furlong Affidavit at para. 66

85. There are two ski jumps in the Whistler Olympic Park: the K90 and the K120 jumps. These are the jumps that are required in Olympic competition, and which the IOC requires be provided as part of hosting the Games.

Furlong Affidavit at para. 67

86. In Vancouver's bid, it was contemplated that VANOC would build training ski jumps and that all of the jumps would be outfitted for year-round use. That plan, however, would have been much more expensive than building only to the Olympic requirements. Based on data gathered from Ski Jumping Canada (the national sporting

organization responsible for ski jumping in Canada), VANOC determined that the level of interest in ski jumping in Canada did not justify the additional expenditure. VANOC is responsible for ensuring that the funds provided for venue development are spent so as to maximize the value for sport development in the future. As VANOC does with all of their decisions regarding venue development, they considered a host of factors in planning what kind of facilities to build for ski jumping. A strong factor was that ski jumping in Canada has poor participation numbers. On the basis of that analysis, which included information collected from Ski Jumping Canada and FIS, VANOC ultimately determined that there is not enough interest in ski jumping and Nordic Combined (an event which combines ski jumping and cross country skiing) in Canada to merit building the additional jumps and to outfit them for summer use. VANOC decided to build only to the Olympic requirements.

Furlong Affidavit at para. 68, Ex. "20"

87. VANOC has made the Whistler Olympic Park available for training and competition by ski jumpers, both men and women. In the 2007-2008 season, women ski jumpers trained at the Park from December 27 to January 1 and from February 9 to 12. In the 2008-2009 season, they trained there on December 4 through 10, and on January 2 through 6. The North American Junior Championships and Canadian Championships were held at the Whistler Olympic Park in 2007-2008, and the FIS Ladies' Continental Cup was held there in the 2008-2009 season.

Furlong Affidavit at para. 69, Ex. "21"

H. The Difficulties in Holding a Women's Ski Jumping Event During the 2010 Games

88. The Plaintiffs say that "[i]t is their view that if this Court grants the declaration they seek, VANOC will in fact be able to plan, organize, finance and stage a women's ski jumping event as part of the 2010 Games" (Argument, para. 5). This is simply not the case, particularly if what the Plaintiffs seek from this proceeding (as all their evidence suggests) is an "Olympic" event.

89. The fact is that VANOC could not actually hold a new Olympic event without the cooperation of various other entities within the Olympic Movement. In particular, both FIS and the various NOCs would have to decide to participate in an event that has not been sanctioned by the IOC. As described above, the NOCs are responsible for selecting their national team (subject to qualification rules) and bringing them to the Games. For the women's ski jumping event to happen, the NOCs would have to decide to include women ski jumpers in their team, even though the IOC has determined that women's ski jumping is not to be an Olympic event in 2010. It is extremely unlikely that they would do so, since they are the IOC's representatives in their respective countries, are required to comply with the Olympic Charter and are under the IOC's supreme authority. Furthermore, it is the IFs that govern the events during the Games and provide the technical officiating and judging. An Olympic event simply cannot be held without the participation of the relevant IF. Again, despite the fact that the IOC has determined that women's ski jumping is not an Olympic event in 2010, the FIS would have to decide to act contrary to that determination. The FIS has accepted the IOC's decision and Sarah Lewis, the Secretary General of the FIS, has re-confirmed to Mr. Furlong that the FIS is under the authority and instructions of the IOC at the Olympic Winter Games and it is the IOC who determines the event programme. The FIS will not take direction from VANOC in this regard.

Furlong Affidavit at para. 93

90. The fact is that an OCOG cannot stage an Olympic event without the IOC directing it to do so.

Furlong Affidavit at para. 94

91. VANOC would also face another serious difficulty if it is ordered to hold a women's ski jumping event without the IOC's permission. The Games are the IOC's exclusive property, which VANOC is allowed to organize on the basis set out in the Olympic Charter and the Host City Contract. Essentially, if VANOC holds a women's ski jumping event without the IOC's permission it would be appropriating the IOC's property in the Games. Mr. Furlong believes this would create a very serious incident and would deeply impair the relationship between VANOC and the IOC. It would also have long

standing negative ramifications for the COC, who will deal with the IOC on an ongoing basis as the NOC for Canada beyond the 2010 Winter Games.

Furlong Affidavit at para. 95;
Sieber Affidavit #1 at para. 42

92. The appropriation would, in any event, not work to benefit the Plaintiffs. Everyone involved would know that even an event which called itself "Olympic" but which had not been included in the Olympic Programme by the IOC was not, in fact, "Olympic" in any true sense.

PART III - THE ISSUES IN THIS CASE

93. The issues in this case are as follows:

(a) the Plaintiffs' selection of VANOC as the Defendant;

(b) the application of the *Charter* to VANOC (section 32);

(c) whether the Plaintiffs have been denied the "equal benefit of the law" under section 15 of the *Charter* and have been subjected to discrimination; and

(d) whether any infringement of the *Charter* is saved by section 1.

PART IV - THE PLAINTIFFS' SELECTION OF VANOC AS THE DEFENDANT

94. The Plaintiffs allege in this lawsuit that the absence of a women's ski jumping event in the 2010 Games constitutes a breach by VANOC of section 15 of the *Charter*. With respect, they have plainly sued the wrong defendant.

95. As discussed above, the Olympic Programme – the slate of sports, disciplines and events that comprise the Olympic Games – is solely within the control of the IOC. It is the IOC's decision alone as to which events will be included in the Games. VANOC

had no involvement in the decision not to include women's ski jumping, and has no power to reverse it. Specifically, the evidence discloses that:

(a) The IOC Session decides, normally at least seven years before an Olympic Games, whether a sport will be included in that Olympic Games. The IOC Executive Board decides, at least three years before an Olympic Games, on the inclusion or not of disciplines and events. This is on the recommendation of the OPC, the IOC expert body that reviews and evaluates requests from IFs (including the FIS) for additions to the Olympic Programme of sports, disciplines and events.

Sieber Affidavit #1 at paras. 65-66
Furlong Affidavit at para. 73

(b) With one exception (where the IOC wishes to include a sport, discipline or event after the applicable deadline, it must seek OCOG agreement pursuant to the Bye-law – 46.1.5 – which the Plaintiffs cite in their Further Amended Statement of Claim), OCOGs such as VANOC have no role in the determination of the programme of sports, disciplines and events in the Games they organize. The determination of the Programme is for the IOC alone. The OCOG's role is limited to staging the sports, disciplines and events that are selected by the IOC.

Sieber Affidavit #1 at paras. 33-35;
Furlong Affidavit at paras. 71-73
Olympic Charter, By-law 46.1.5

(c) The actual staging of Olympic events not only requires VANOC to organize them, but also requires the participation of the relevant IF and the NOCs. It is the IFs that govern the competitions at the Games, and provide the officiating. The NOCs are responsible for selecting and bringing their national team. IFs and NOCs are each part of the Olympic Movement and are under the supreme authority of the IOC. A women's ski jumping could not take place without the participation of the FIS (the International Ski Federation) and the NOCs. The Secretary General of

FIS has affirmed that the FIS has accepted the IOC's decision not to include women's ski jumping, that it is under the authority and instructions of the IOC, that it is the IOC that determines the Olympic Programme, and that the FIS will not take direction from VANOC in this regard.

Furlong Affidavit at para. 93

(d) The Games are the IOC's exclusive property. It is well-known that the IOC governs the Olympics. If VANOC were to attempt to organize an event contrary to the instructions of the IOC, no one would regard that event as *Olympic*. It is the IOC that confers the imprimatur of "Olympic".

Furlong Affidavit at para. 95;
Sieber Affidavit #1 at para. 42

96. The fact is that VANOC cannot provide what the Plaintiffs seek. It has no power to organize an Olympic event without the IOC's permission – neither legally nor practically. If the absence of a women's ski jumping event entails any discrimination, it is not of VANOC's doing and it is not within VANOC's ability to correct.

97. The Plaintiffs recognize that the root of their immediate complaint is a decision of the IOC, which they have not named as a party to this proceeding nor otherwise pursued in Switzerland. The Plaintiffs say that "[t]he IOC's decision perpetuates the historical prejudices that have to date excluded women from ski jumping in the Olympics". They continue that, "[b]ecause of the basis on which the IOC decided to exclude women ski jumping from the 2010 Games, those stereotypes affect the Plaintiffs today" and note that "the IOC has engaged in an adverse effect discrimination". The Plaintiffs say "the IOC has applied a facially neutral criterion so as to treat women ski jumpers differently".

Plaintiffs' Argument, paras. 6, 7, 136 and 166 (emphasis added)

98. The Plaintiffs' ancillary complaint appears to be against other organizations (again, not VANOC), which they claim to have denied them the opportunity to participate elsewhere. They complain of "the obstinate resistance of other organizations", "the failure of national organizations to establish teams for women or

programs for women until very recently", "the failure of FIS to establish any sort of circuit in which women could participate in ski jumping competitions until 2004" and the "consistent and overtly discriminatory attitude of FIS, the body through which women were required to get their events sanctioned". As with the IOC, the Plaintiffs have not named any of these organizations as defendants in this case.

Plaintiffs' Argument, paras. 121, 137, 160(d), 160(e) and 160(h)

99. In their Argument, the Plaintiffs seek to attribute to VANOC a decision that they themselves clearly (and accurately) identify as having been made by the IOC. They do so by ascribing to VANOC a "blind acceptance of the IOC's decision" (Argument, para. 6), which the Plaintiffs argue "effectively incorporates these historical prejudices into its own organization, staging and financing of the 2010 Games" (Argument, para. 6). They later describe VANOC as "implement[ing] the IOC's assessment" and as "implement[ing] the IOC's failure to take into account the systemic and historic barriers to women ski jumpers" (Plaintiffs' Argument, para. 27). In two of the three claims of what constitutes a VANOC failure which are set out in the Further Amended Statement of Claim, the Plaintiffs allege that VANOC failed to pursue agreement with the IOC – underlining the fact that what the Plaintiffs seek cannot happen except as decided by the IOC. In the Further Amended Statement of Claim, the Plaintiffs plead the following alleged violations of section 15(1) of the *Charter*, the last of which is based on a clearly wrong conception of the process by which events are included in the Olympic Programme and the first two of which show clear dependence on IOC (and, indeed, FIS) action:

> 132. VANOC has not entered into an agreement with the IOC and FIS to include a women's ski jumping event in the 2010 programme under IOC Bylaw 46.1.5....
>
> 133. VANOC has not attempted to enter into an agreement with the IOC and FIS to include a women's ski jumping event in the 2010 programme under IOC Bylaw 46.1.5....
>
> 134. VANOC has not put a women's ski jumping event on the Games schedule....

100. Somehow on this basis the Plaintiffs conclude that "VANOC – *not* the IOC – is providing an under-inclusive benefit for men, and not for women". The Plaintiffs seek that VANOC proceed "by disregarding the IOC instruction...". This is simply not a valid basis for a claim under section 15 of the *Charter* or otherwise.

Plaintiffs' Argument, paras. 28, 136 and 148

101. As discussed, *only* the IOC had the power to make the determination of which the Plaintiffs complain (not to include women's ski jumping) and *only* the IOC has the power to make the determination which the Plaintiffs seek (to include women's ski jumping now). As the Plaintiffs well know, however, the *Charter* applies only to Canadian governments, and so the Plaintiffs seek to use VANOC to achieve *indirectly* what they cannot obtain directly.

102. The IOC's exclusive control of the Olympic Programme – and the Olympic Games more generally – is probably the most central fact in this case. It becomes relevant at every stage of the analysis, as will be seen below. Under section 32 of the *Charter*, it compels the conclusion that the inclusion of events in the Olympics is totally unconnected to government and is in no way governed by the *Charter*. Under section 15, it demonstrates that what the Plaintiffs seek – the inclusion of a women's ski jumping event – is not a "benefit of the law" which section 15 requires be distributed equally. Even if the absence of women's ski jumping event in the 2010 Games were considered to constitute discrimination (which it does not), VANOC's inability to provide such an event surely exonerates it under section 1, if not section 15. Last, as VANOC cannot stage a women's ski jumping event, it is futile to declare it to be discriminatory for VANOC not to do so.

103. All of these and other arguments will be developed further below.

PART V - SECTION 32

A. The Application of the *Charter*

104. In order to prove any breach of section 15, the Plaintiffs must show that VANOC is bound by the provisions of the *Charter*. In very broad terms, the *Charter* only applies to entities that are part of the apparatus of government. That limited application is set out in section 32 of the *Charter* and the cases that have interpreted that provision. Section 32 states:

> **32.**(1) This *Charter* applies
>
> > *a*) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
> >
> > *b*) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

105. The Plaintiffs are correct in stating (as they do at paragraph 185 of their Argument) that there are two relevant bases on which the *Charter* may apply to an entity: (1) the entity is controlled by government (the "control test") or (2), with respect only to some particular activity, the entity can be said to be implementing a specific statutory scheme or a government program (the "ascribed activity" test).

106. VANOC is not "government" under either of these tests. Under the control test, an entity will only fall within the scope of section 32 if government has "routine or regular control" over its day-to-day activities. The contributing governments have nothing like that level of control over VANOC. The IOC, on the other hand, clearly does. Furthermore, the ascribed activity test only renders an entity government in respect of discrete activities that are "truly governmental", such as where the entity implements a specific government policy or program. While the Plaintiffs say that the planning, financing, organizing and staging of the 2010 Games is a "truly governmental" activity, that is plainly not so. To the contrary, the Olympic Games are an *IOC* program. More

particularly, the determination of the Olympic Programme is plainly and obviously not a government activity because neither VANOC nor any government has any power over that decision; it is a matter solely within the IOC's authority.

107. Each of these tests is discussed in detail in the following sections.

B. VANOC Is Not Controlled by the Contributing Governments

108. The Plaintiffs argue that VANOC is "government" within the meaning of section 32 because, they say, it is controlled by government. That is plainly not the case. To the contrary, while the various contributing governments do have some representation on VANOC's Board and have some other limited powers of oversight, their ability to influence VANOC's affairs falls far short of the degree of control required under section 32. Indeed, the governments' limited supervisory powers stand in stark contrast to the detailed and regular control exercised by the IOC over all of VANOC's activities.

109. In a series of cases in the 1990s, the Supreme Court of Canada considered the issue of what degree of government control is required to bring an entity within the scope of section 32. In the most relevant case, *Stoffman*, the Court held that "ultimate or extraordinary control" is not enough to render the entity "government" under section 32. Rather, what is required is "routine or regular control" by a government over the "daily or routine aspects of the [entity's] operation".

***Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483**

110. The facts of *Stoffman* illustrate what is meant by "routine or regular control". That case concerned a challenge by physicians to a Vancouver General Hospital regulation (Regulation 5.04) under which they lost their admitting privileges at age 65. The hospital was incorporated by the *Vancouver General Hospital Act*, which statutorily empowered it to operate a hospital and, subject to the approval of the Minister of Health, carry on a teaching function. The hospital's affairs were governed by a Board of Trustees, on which fourteen of the sixteen Trustees were appointed by the provincial

government. The Court of Appeal summarized other provisions of the Act, in a passage subsequently quoted by La Forest J. in his majority reasons in the Supreme Court:

> Section 2(1) requires the hospital to make room for government representation on its management board in whatever manner the government thinks necessary; to have a board and by-laws thought necessary by the minister and any constitution, by-laws or rules are ineffective without ministerial approval; and to comply with the conditions prescribed by the Lieutenant Governor in Council -- a provision which leaves it open for the Lieutenant Governor to set virtually any requirement deemed appropriate.
>
> Section 2(3) gives government an unassailable right to appoint persons to the hospital management board. Section 32 states that the minister may require that by-laws be revised to his satisfaction and s. 36(1) permits the Lieutenant Governor to make any additional regulations he thinks necessary - regulations which under s. 36(3) may include virtually all aspects of running the hospital. Section 41(1) provides for additional ministerial control where hospitals receive money for building, and s. 44(4) and (6) allows the government to appoint a public administrator to manage the hospital and displace the board. That administrator can be given total control of the hospital (s. 44(5)), governed by conditions set by the Lieutenant Governor in Council.
>
> The effective control of the hospital by the government is affirmed by the *Vancouver General Hospital Act*, which states that by-laws passed by the hospital's board come into force only when approved by the minister: s. 6.
>
> ***Stoffman, supra*, p. 512 (emphasis added)**

111. Overturning the Court of Appeal, the majority of the Supreme Court in *Stoffman* found that the degree of control exercised by the provincial government over the hospital was not enough to bring it within section 32. In short, the Court held that the provincial government only held ultimate or extraordinary control, while the day-to-day operations of the hospital were left to the management of the Board of Trustees (on which fourteen of the sixteen Trustees were appointed by government). After quoting the Court of Appeal's description of the government's powers of control over the hospital, La Forest J., writing for the majority, set out his reasoning this way:

> While I accept this summary as substantially accurate, I respectfully disagree with the view of the Court of Appeal that it reveals governmental control of a character and quality that would justify application of the

Charter. I have already given my opinion as to the limited significance of the requirement that the hospital's by-laws be approved by the Minister of Health. I also think that it is not very significant that the *Hospital Act* provides for ministerial control in respect of the use which the hospital makes of any grant received from the Province toward, in the words of s. 41(1), "the planning, constructing, reconstructing, purchasing and equipping of a hospital . . . or the acquiring of land or buildings for hospital purposes". The fact that the Vancouver General is not autonomous when it comes to the use of money given to it by the government for specific capital investments says little regarding the degree of autonomy it enjoys overall. If anything, it suggests that direct government involvement in hospital decision-making is the exception rather than the rule.

This point can be made with even greater force with respect to s. 36(1), which permits the Lieutenant Governor in Council to make such additional regulations as he thinks necessary, and s. 44, which provides for the appointment of a public administrator and the displacement of the Board. When it is considered that the power of the Minister under s. 36(1) is to make "any regulations deemed necessary for the carrying out of the provisions of this Act to meet any contingency not expressly provided for in it" (emphasis added), it becomes clear that both provisions have nothing to do with the day-to-day operation of the hospitals to which they apply. Instead, they make allowance for those exceptional circumstances where a high degree of direct government involvement in the management of a hospital is deemed to have become necessary. Again, the fact that the Act makes special allowance for ministerial intervention in these situations indicates that it assumes that the management of a hospital would ordinarily be a matter for the judgment of its own Board of Trustees.

In sum, it is crucial in assessing the statutory framework summarized by the Court of Appeal to bear in mind the difference between ultimate or extraordinary, and routine or regular control. While it is indisputable that the fate of the Vancouver General is ultimately in the hands of the Government of British Columbia, I do not think it can be said that the *Hospital Act* makes the daily or routine aspects of the hospital's operation, such as the adoption of policy with respect to the renewal of the admitting privileges of medical staff, subject to government control. On the contrary, it implies that the responsibility for such matters will, barring some extraordinary development, rest with the Vancouver General's Board of Trustees. It could in fact be said to contain an explicit recognition to this effect, in that it defines "board of management" as "the directors, managers, trustees or other body of persons having the control and management of a hospital" (s. 1). To similar effect is s. 5 of the *Vancouver General Hospital Act*, which provides that the "property and affairs of the corporation shall be managed by a Board of Trustees". These two provisions would be meaningless unless the *Hospital*

> *Act* is interpreted in accordance with the distinction between ultimate or extraordinary, and routine or regular control which I have described above.
>
> [Emphasis added; La Forest J. underlined the words in the second paragraph before his notation "(emphasis added)"]

112. Under the control test, routine, regular control over the entity's day-to-day operations would be needed to bring that entity within the apparatus of government for the purposes of section 32. That test is not met in the case of VANOC, as will be shown below. First, the facts clearly show that it is the IOC that exercises routine, detailed, day-to-day control of VANOC. Second, the contributing governments' influence over VANOC is only at a very high level and falls far short of the kind of detailed control required for section 32 to apply. Last, contrary to the Plaintiffs' submission, the fact that VANOC has "public authority" protection for its trademarks under the *Trade-marks Act* does not answer the question of whether it is "government" under section 32. The facts relating to VANOC's relationships with the IOC and with the contributing governments are all before the Court. It remains only to apply them to the control test as developed by the Supreme Court of Canada.

(1) The IOC Exercises Routine Control Over VANOC's Daily Activities

113. VANOC's relationship with the IOC has been described above at paragraphs 19-24 and 32. The facts summarized in those paragraphs demonstrate that the IOC exercises a great deal of control over VANOC. Significantly, the IOC has both broad ultimate authority over VANOC and it routinely exercises detailed and specific oversight of VANOC's day-to-day activities. The IOC's powers and exercise of routine control of VANOC's specific activities stand in sharp contrast to the contributing governments' limited powers of oversight, which will be discussed in the next section.

114. It is well to remember the context of the IOC's powers over VANOC. The IOC is the ultimate governing body of the Olympic Movement, of which VANOC, as an OCOG, is a member and of which the Olympic Games are the celebration. The IOC owns all the intellectual property in the Olympic Games, as Rule 7.1 of the Olympic Charter makes clear:

> The Olympic Games are the exclusive property of the IOC which owns all rights and data relating thereto, in particular, and without limitation, all rights relating to their organisation, exploitation, broadcasting, recording, representation, reproduction, access and dissemination in any form and by any means or mechanism whatsoever, whether now existing or developed in the future. The IOC shall determine the conditions of access to and the conditions of any use of data relating to the Olympic Games and to the competitions and sports performances of the Olympic Games.

Olympic Charter, Sieber Affidavit #1, Ex. "2", p. 130 (emphasis added)

115. The Host City Contract reaffirms the IOC's ownership of the Games and the Olympic brand. Where an OCOG, such as VANOC, holds "any rights relating directly or indirectly to the Games", then it holds such rights "in a fiduciary capacity for the benefit of the IOC".

Furlong Affidavit, Ex. "16", p. 1705

116. Control over the Olympic Movement and the Olympic Games firmly resides in the IOC. As is noted in Rule 1 of the Olympic Charter, the Olympic Movement is "under the supreme authority of the International Olympic Committee". Rule 6, which concerns Olympic Games, states at paragraph 3 that "[t]he authority of last resort on any question concerning the Olympic Games rests with the IOC".

Sieber Affidavit #1, Ex. "2", pp. 123 and 129

117. The Olympic Games are, of course, held all over the world. As described above, the NOCs – which are members of the Olympic Movement and subject to the IOC's authority – select cities within their countries to bid to host the Games. The IOC then chooses the host city. OCOGs, such as VANOC, are also members of the Olympic Movement. Their role is to organize the Olympic Games, which remain the exclusive property of the IOC. The IOC grants the OCOGs specific rights to use the Olympic brand and grants to them a share in the IOC's marketing revenues. In the case of VANOC, the funds from the IOC and revenues generated from the private sector through the use of the Olympic brand together comprise virtually all of VANOC's Operating Budget.

Furlong Affidavit, para. 28

118. Given this context, it is not surprising that the IOC holds, and exercises, very extensive powers of control over the OCOGs. These powers apply both at a general or "ultimate" level and in respect of routine and specific day-to-day activities.

119. The IOC's ultimate and extraordinary powers begin, as just described, with its ownership of the Olympic Games, its supreme authority over the Olympic Movement and the Olympic Games, and its power to select the host city. The IOC also enacts and amends the Olympic Charter, which sets out at Rule 36 various rules with respect to the structure and conduct of OCOGs, and the IOC drafts the Host City Contract, which it requires all host cities and their respective NOCs to sign when granted the right to host the Games. The OCOGs are also parties to the Host City Contract. It is that agreement under which the OCOG is allowed to host the Games. The IOC is entitled, under clause 60 of the Host City Contract, to withdraw the Games from the host city if the OCOG, the relevant NOC or the host city breaches any material obligation pursuant to the Host City Contract, the Olympic Charter or the applicable law.

Host City Contract, Furlong Affidavit, Ex. "16", pp. 1718-1719

120. The forms of the IOC's broad control of and influence in VANOC include:

(a) The OCOG must, from its incorporation until its liquidation, "conduct all its activities in accordance with the Olympic Charter, with the agreement entered into between the IOC, the NOC and the host city and with any other regulations or instructions of the IOC Executive Board". (Olympic Charter, paragraph 3 of the Bye-law to Rule 36 (emphasis added))

(b) The Bye-law to Rule 36 of the Olympic Charter specifies that the OCOG's executive body must include any IOC members in the country, the President and Secretary General of the NOC, and at least one member from the host city, and it may include representatives of the public authorities and other leading figures. In the case of VANOC, 7 of the 20 directors are appointed by the COC and 1 is appointed by the Canadian

Paralymic Committee. That is, a total of 8 directors are appointed by Olympic Movement institutions.

(c) Clause 1 of the Host City Contract states that the parties – of which VANOC is one – must "fulfil their obligations in full compliance with the provisions of the Olympic Charter and of this Contract".

(d) VANOC's incorporating documents were required to be submitted to the IOC Executive Board for its prior written approval, and any changes to those documents are also subject to the IOC Executive Board's prior written approval. (Host City Contract, clause 2)

(e) Clause 44 sets out how a surplus from the Games is to be distributed. 20% of it is to go to the NOC, 20% to the IOC, and 60% is to be used "for the general benefit of sport" in Canada as may be determined by VANOC in consultation with the COC.

(f) VANOC has extensive obligations to report its finances to the IOC, which may audit the OCOG at any time. (Host City Contract, clause 45)

(g) Any disputes between VANOC, the City or the COC with any member of the Olympic Family are to be submitted to the IOC Executive Board for final approval.

Furlong Affidavit, paras. 32-35 and Ex. "16", pp. 1685-1721

121. Together, these provisions grant the IOC general control over VANOC. Other provisions, however, allow the IOC to exercise routine supervision of VANOC's daily activities. Those provisions include:

(a) Rule 36 of the Olympic Charter provides that VANOC, as an OCOG, "reports directly to the IOC Executive Board" (emphasis added). As set out above, paragraph 3 of the Bye-law to that Rule requires VANOC to comply not only with the Olympic Charter and the Host City Contract, but

also with "any other regulations or instructions of the IOC Executive Board" (emphasis added).

(b) VANOC must submit to the IOC Executive Board for its prior written approval a general organization plan and the master plan of VANOC and of the Games, and must provide updates and other information thereafter (Host City Contract, clause 14).

(c) Under clause 15 of the Host City Contract, the legal validity and effectiveness of all of VANOC's agreements "directly or indirectly concerning the Games or the IOC's moral or material rights" (emphasis added) are subject to the prior written approval of the IOC Executive Board. Furthermore, VANOC must submit to the IOC Executive Board for approval standard form agreements to be used for contracts between it and third parties, including, for example, for sponsorship, suppliership, licensing, sale of Olympic coins, and ticket agents.

(d) Under clause 24 of the Host City Contract, VANOC must provide to the IOC Executive Board semi-annual reports on the progress of the preparation of the Games. Four years before the opening of the Games it must provide quarterly reports. VANOC must also provide reports "whenever the IOC Executive Board requests it to do so" and "[d]ecisions taken by the IOC Executive Board or the IOC Session following such reports shall be acted upon immediately by [VANOC]" (emphasis added).

(e) Clause 25 provides for a Coordination Commission to be established to manage the relationship between the OCOG, the IOC, the IFs and the NOCs. The Commission is to "monitor on behalf of the IOC, the decisions, activities and progress of [VANOC], provide assistance to [VANOC] and exercise any additional authority conferred upon it by the IOC Executive Board" (emphasis added). (The Bye-law to Rule 38 of the Olympic Charter sets out the role of the Coordination Commission is further detail.)

(f) Under clause 32, at least three years before the Games, VANOC must submit to the IOC Executive Board for its prior written approval the schedule of the specific times when the Olympic events will be held.

Furlong Affidavit, paras. 32-35 and Ex. "16", pp. 1685-1721
Olympic Charter, Sieber Affidavit, Ex. "2", pp. 186-188

122. The result of these powers is that the IOC has very close, detailed control over VANOC's planning and staging of the Games. As Mr. Furlong describes in his affidavit and has been summarized above at paragraphs 19-24 and 32, the reality of VANOC's relationship with the IOC is that the IOC "exercises regular, routine, day-to-day control over VANOC". VANOC must submit to the IOC regular reports on each of its 52 functions so that the IOC can evaluate its progress. The IOC Co-ordination Commission meets semi-annually to review VANOC, and it has working groups that focus on VANOC's specific functions in more detail. Project Reviews occur between the Co-ordination Commission's semi-annual meetings, and allow various members of the Commission and IOC staff to visit VANOC and be updated on its progress and give instructions. As Chief Executive Officer, Mr. Furlong attends the IOC Executive Board's meeting to update the IOC on VANOC's progress and receive instructions from the IOC.

Furlong Affidavit, paras. 36-38, 43

123. Perhaps the most telling evidence of the IOC's day-to-day control, however, is the Master Schedule. It is a detailed planning tool that coordinates the core activities that VANOC must carry out as part of the planning, organizing, financing and staging of the Games. Essentially, the Master Schedule is a roadmap of all the key tasks that VANOC must complete as part of hosting the Games. It is part of the "general organization plan and the master plan of the OCOG and of the Games" which, under clause 14 of the Host City Contract, VANOC must submit to the IOC Executive Board for its prior written approval. All changes to the Master Schedule must also be approved by the IOC Executive Board and VANOC must provide the IOC with regular updates on the Master Schedule, as well as any information about it requested by the IOC.

Furlong Affidavit, paras. 40-41

124. The reality is that VANOC is under the close control of the IOC. As Mr. Furlong testifies, VANOC must obtain IOC approval for "a huge range of its activities". Mr. Furlong provides some granular examples of the kinds of VANOC's activities that require the IOC's approval. As he says, the list is very far from exhaustive:

(a) All venue agreements;

(b) All marketing agreements;

(c) All sponsorship agreements;

(d) The design of the torch and cauldrons and VANOC's uniforms;

(e) The general design principles for the Games – what is referred to as the "Look of the Games";

(f) VANOC's logo, the inukshuk;

(g) VANOC's mascots; and

(h) The Opening and Closing Ceremonies programs.

Furlong Affidavit, para. 42

125. The Plaintiffs assert that the IOC's powers just described do not amount to routine control, but rather that VANOC's relationship with the IOC "resembles that of a sophisticated customer who purchases a highly complex product, and to this end requires the producer of this product to meet its specifications". While they appear to concede that the IOC has control over the 2010 Games (the "product" that they say VANOC is "producing"), they say that the IOC's control is no more than that which flows from the concept of "customer is king".

Plaintiffs' Argument, paras. 232-233

126. Even assuming for the moment that the Plaintiffs' startling analogy had merit, the point would remain that the IOC controls VANOC in the planning of the 2010 Games. Even the Plaintiffs' "customer-producer" analogy would not undermine the fact that it is

the *IOC* that is in control of VANOC in respect of daily activities in the organization of the Games. Regardless of the reason for the IOC's control, the fact always remains that VANOC's planning of the Games is controlled by the IOC.

127. In any event, the Plaintiffs' "customer-producer" analogy is singularly inapt. The assertion that the IOC is a mere *customer* of VANOC, whatever that is intended to mean precisely, ignores the central facts in their relationship: that, as an OCOG, VANOC is *part of* the Olympic Movement, which is under the supreme authority of the IOC; that, again as an OCOG, VANOC's purpose and role in the Olympic Movement are specified by the IOC in the Olympic Charter; that the Olympic Games – including the 2010 Winter Games – are always the exclusive property of the IOC; that VANOC is able to stage the 2010 Winter Games only because, under the Host City Contract, the IOC has granted it that right and has licensed it to use the Olympic brand for that purpose.

128. The relationship between the IOC and VANOC is entirely unconnected to that of "producer and customer". To the extent that analogies are useful, VANOC is more like a franchisee of the IOC.

Plaintiffs' Argument, paras. 232 and 236(f)
Furlong Affidavit, para. 43

129. At paragraph 236 of their argument, the Plaintiffs set out a number of subparagraphs addressing certain clauses in the Host City Contract in an attempt to downplay the IOC's control of VANOC and confine it to their "producer-customer" analogy. With respect, their submissions on these points are wholly unconvincing and underscore the frailty of their analogy. The Plaintiffs ignore, misstate and gloss over the real substance of those provisions of the Host City Contract. The substance of those provisions is summarized in the Furlong Affidavit at paragraph 35, and is discussed above at paragraphs 22 to 24 of this argument. Responses to the more serious of the Plaintiffs' mischaracterizations are set out below (the clauses referenced in the subparagraphs below match the references in the respective subparagraphs of paragraph 236 of the Plaintiffs' argument):

(a) Clause 1: The Plaintiffs say that the fact of the IOC's "'supreme authority' over all matters related to the Games simply expresses the 'customer is king' concept". This statement is, with respect, nonsensical. The IOC is the "supreme authority" over the Games because the Games are its creation and are its exclusive property. At the end of their subparagraph the Plaintiffs assert the IOC's control over the Programme does not override the limits of what VANOC can lawfully provide because it "cannot lawfully provide benefits in a manner that would amount to adverse discrimination because of its obligations under the *Charter* or under the applicable human rights legislation". This statement assumes that the *Charter* applies to VANOC, which is the very question at issue. The point is that VANOC is not government because it is the *IOC* – not any government – that exercises routine control of VANOC's activities.

(b) Clause 2: The Plaintiffs argue that Mr. Furlong overstated the reach of the IOC's review powers in relation to VANOC's constating documents. They say that "[t]he City of Vancouver and the COC were generally free to organize VANOC as they saw fit" and they could have included the 7 COC members along with 100 members appointed by governments. The real facts are that VANOC's constating documents were subject to the IOC's prior written approval, and so too are any amendments. If the IOC had felt that its representation on VANOC's Board was too diluted, it had the power to withhold its approval and require increased representation. Furthermore, the COC, which was involved in the formation of VANOC's constating documents, is a member of the Olympic Movement and is its ambassador in Canada.

(c) Clauses 14, 24, 25, 26, 32 and 45: These clauses provide some of the sources of the IOC's control over VANOC's planning of the Games. The Plaintiffs dismiss them, saying that they just "allow the IOC to influence the product's design, and to require regular reporting to make sure that it will be created in accordance with that design". To the contrary, these

provisions do not just allow the IOC to *influence* the planning of the Games; they give the IOC detailed oversight and control over every stage of VANOC's planning. The Plaintiffs also say that these provisions "fall far short of establishing the routine or regular control of VANOC itself by VANOC" (emphasis added). That assertion ignores the facts that VANOC is part of the Olympic Movement, which is under the IOC's supreme authority, and that, pursuant to Rule 36 of the Olympic Charter, VANOC reports directly to, and takes instructions from, the IOC Executive Board. In any event, what the provisions make clear beyond doubt is that the IOC exercises routine and regular control over VANOC's planning of the Games.

(d) Clauses 15, 40 and 41: The Plaintiffs say of these provisions that the benefits VANOC is to give the IOC under them are "no different" than the "other things that VANOC will provide to the IOC in exchange for the ability to put on the 2010 Games, such as drivers and luxury accommodation for certain 'Olympic Family' members". With respect, the Plaintiffs have again attempted to hide the actual substance of the provisions. Clause 15 subjects every single VANOC contract which "directly or indirectly concerns the Games" to the IOC's prior written approval. Clause 40 confirms that the Games are the exclusive property of the IOC, and clause 41 states that all the intellectual property created by VANOC in the Games is also the exclusive property of the IOC.

(e) Clause 67: Under this provision, any dispute between VANOC, the City or the COC with any member of the Olympic Family to the IOC Executive Board for final approval. The Plaintiffs say that this provision just again reflects the "customer is king" notion that the IOC included that right "presumably to ensure that its interests are looked after." To the contrary, the IOC has jurisdiction to resolve those disputes because it is the "supreme authority" of the Olympic Movement, of which VANOC is a part;

it is the exclusive owner of the Olympic Games; and "[t]he authority of last resort on any question concerning the Olympic Games rests with the IOC".

Plaintiffs' Argument, para. 236
Olympic Charter, Rules 1, 6 and 7.1, Sieber Affidavit #1, Ex. "2", pp. 123, 129 and 130

130. The fact is that the IOC is the body that exercises routine control of VANOC in respect of its organizing of the Games. The governments that are contributing to the Games do not exercise such control, as will be set out in the next section.

(2) The Contributing Governments Do Not Have Routine Control Over VANOC's Day-to-Day Activities

131. Contrary to the Plaintiffs' assertion, the four governments that are contributing to the Games and which have representation on VANOC's Board – Canada, British Columbia, Vancouver and Whistler – do not have anything like routine or regular control over VANOC's planning of the Games.

132. There is no question that VANOC has very intensive relationships with the four contributing governments, as Mr. Furlong describes at length at pages 19 to 25 of his affidavit. Hosting the 2010 Games is an enormous project, which the governments recognize has many public benefits and which they are therefore supporting. The governments of Canada and the British Columbia, for instance, are contributing almost the entirety of VANOC's Venue Development Budget, and the municipalities have agreed to provide certain municipal services. VANOC also deals extensively with the governments in their regulatory capacities, just as does any private citizen. The size of the Olympic project, however, means that VANOC's needs for permits and other regulatory approvals require it to deal with government very frequently. VANOC deals with the City of Richmond in the same fashion, where, for instance, the Richmond Oval is located.

Furlong Affidavit, paras. 45-63

133. VANOC's relationship with the governments as contributors to the Games is set out in the Multiparty Agreement, to which VANOC, the governments, the COC and the

CPC are all parties. In the Multiparty Agreement the parties "set forth their respective contributions to the OCOG and the Games, and the conditions governing their contributions and the principles of coordination among themselves". It is the key document underpinning the four contributing governments' involvement in the Games.

Furlong Affidavit, paras. 46-47, Ex. "18"

134. In keeping with their contributions to the Games, the four contributing governments participate in VANOC's governance. They all have representation on the Board. Of the 20 directors, 3 are appointed by Canada, 3 by the Province, 2 by Vancouver and 2 by Whistler. The other 10 directors are all appointed by non-government entities: 7 are appointed by the COC, 1 by the CPC, 1 by certain First Nations, and 1 (the Chair) by a vote of all of the directors. The contributing governments also have varying rights to review VANOC's finances. In light of their significant financial support, Canada and British Columbia must approve VANOC's business plan and VANOC must give all the governments quarterly updates on that plan. For budget changes of $5,000,000 or more or that would materially impact a government party's rights, VANOC must obtain the approval of Canada and British Columbia and must give notice to the other parties. VANOC must report its finances to all of the parties (including the COC and the CPC) and all of them may audit VANOC and examine its books and records.

Multiparty Agreement, sections 4, 11, 24-27, Furlong Affidavit, Ex. "18", pp. 1761-1762, 1763, 1768-1769

135. As Mr. Furlong describes in his affidavit, the Multiparty Agreement also imposes various policy requirements on VANOC, gives the parties certain rights of recognition for their contributions to the Games, and specifies what use will be put to VANOC's share (if any) in a surplus from the Games. The agreement obliges VANOC to comply with all applicable laws and obtain all necessary licenses and permits, and it specifies that the parties are not in a partnership, are not agents of one another, and have no right to bind one another.

Furlong Affidavit, paras. 52-55

136. Canada and the Province have each set up a "Secretariat" to manage their rights and responsibilities under the Multiparty Agreement. The CEO of the Province's Secretariat is also co-chair of VANOC's Finance Committee, pursuant to VANOC's Bylaw 5.5. Other than that, the Secretariats do not have any enforceable right to engage in VANOC's governance. VANOC allows senior staff of all of the parties to the Multiparty Agreement (that is, including the COC and the CPC) to attend its committee and board meetings (except for any in camera portions), but they do so at the invitation of the Chair and not as of right. VANOC invites them to attend these meetings in the interests of increased communication with the parties.

Furlong Affidavit, paras. 56-57

137. The facts relating to the contributing governments' involvement in the Games and in VANOC do not disclose anything like "routine or regular control" over VANOC's "day-to-day" activities. To the contrary, the governments' influence is only at a very high level and is removed from day-to-day operations. Each government has representation on the Board and two of the governments – Canada and British Columbia – must approve the business plan and significant amendments to it, given their financial investments in the Games facilities. As Mr. Furlong affirms:

> ...[T]he government partners have no regular or routine control of VANOC. I and my staff do not take instructions from any government. Rather, we take instructions from our board of directors. I am not aware of any circumstance in which it could be said that the government-appointed directors were acting on behalf of the governments which appointed them, as opposed to acting in the best interests of VANOC.

Furlong Affidavit, para. 62

138. The government parties' involvement in VANOC stands in stark contrast to the IOC's power of routine and detailed control. For instance, VANOC reports directly to the IOC Executive Board and takes instructions from it and all of VANOC's agreements that concern the Games at all are subject to the IOC's approval. The Master Schedule illustrates the difference between VANOC relationship with the IOC and its relationship with the governments. As described above, the Master Schedule sets out all the key activities that VANOC must complete in the planning and organizing of the Games.

VANOC developed the original Master Schedule in close consultation with the IOC and the IPC and then, as required under the Host City Contract, submitted it to the IOC for approval. All amendments – of which there have been many – must also be approved by the IOC. In contrast, the Master Schedule is not subject to the approval of any of the governments and VANOC has never sought their approval. VANOC did share the Master Schedule with the governments (and its sponsors) when developing it, but that was "to ensure that it is accurate and useful as a planning and communication tool". VANOC gives the IOC monthly updates on its progress on the Master Schedule, and it shares these with the government, but those updates are provided to the government for information and coordination purposes, not in order to obtain approval.

Furlong Affidavit, paras. 40-41 and 63

139. The governments' powers to influence VANOC are significantly less than the governments' powers in *Stoffman*, which the Supreme Court of Canada found did not amount to "routine or regular control" over the hospital's day-to-day management and therefore did not constitute government control. As described above, in that case, the hospital was incorporated under a special statute, 14 of 16 of its Trustees were appointed by Cabinet, the Minister could compel the Trustees to change the hospital's bylaws, it had control over government grants for the building of hospitals, and it had the ultimate power to appoint an Administrator to exercise total control over the hospital's affairs.

140. Nor are the governments' powers in respect of VANOC as routine and specific as those at issue in *Harrison*, in which the Court found that the University of British Columbia was not controlled by government for the purposes of section 32. In the case of UBC (at that time), the Province appointed a majority of its directors, who sat at its pleasure; the Province paid for approximately 80% of UBC's operating costs; it effectively defined tuition levels and exercised considerable control over new programs; it regulated and monitored the expenditure of the public funds; and it could compel UBC to submit reports and other information to it for the Province's evaluation. UBC was also, by statute, exempt from taxation and had expropriation powers, and it could not dispose of its property without government approval. Despite these powers, the Court

determined that the degree of government control was not sufficiently "routine or regular" and "day-to-day" to meet the test under section 32.

***Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451 at pp. 463 and 466-471**

141. The Plaintiffs assert that the governments exercise routine control over VANOC but that the IOC does not. As a comparison of the governments' and the IOC's respective powers in respect of VANOC demonstrates, that assertion is plainly wrong. But in any event, the Plaintiffs' conclusion that the governments have "routine or regular control" over VANOC's "day-to-day activities" is also clearly incorrect. The Plaintiffs base that conclusion on their assertion that the governments have control over (i) VANOC's governance, (ii) its activities and (iii) its finances. Just as the Plaintiffs downplayed and glossed over the IOC's control of VANOC, here they exaggerate the governments' influence. The true facts regarding their influence have been set out above and in Mr. Furlong's affidavit. Specific responses to the Plaintiffs' assertions are set out under the subheadings below.

Plaintiffs' Argument, paras. 207-228

(i) The Plaintiffs' Assertions About VANOC's Governance

142. The Plaintiffs rely heavily on the fact that VANOC By-laws – including amendments to them – are subject to approval by the governments. Of course, those By-laws (and amendments to them) are also subject to the approval of the IOC. But in any event, that power amounts to very little. In *Stoffman*, for instance, the Court noted "the limited significance of the requirement that the hospital's by-laws be approved by the Minister of Health".

***Stoffman, supra*, p. 512**

143. At paragraph 212, the Plaintiffs say that the governments have "control over the founding and purposes of VANOC and its dissolution once those purposes have been achieved". This assertion, which is repeated in paragraphs 208 and 211, flows from the governments' right of approval over the By-laws. Again, the IOC also has that right, but

more importantly, VANOC's purpose is actually created and defined by the IOC through the Olympic Charter.

144. The Plaintiffs also point to the governments' powers of appointment over directors. While it certainly is a factor that the governments may each appoint two or three directors, it is far from establishing routine control. A number of points are important in this regard.

145. First, while the government-appointed directors add up to half of the directors (10 of 20), these directors are not appointed by one government, but rather by four different governments. The most directors that any of the governments appoint is three, whereas the COC appoints seven and the CPC an additional one. The governments, of course, are separate entities with their own agendas. There is no evidence that they act with one mind; to the contrary, the Multiparty Agreement specifically states, in clause 52, that the parties are not agents or partners of one another. That each government has its own agenda is also strongly suggested by the facts that Canada and the Province have their own Secretariats and that a significant amendment to the business plan cannot be approved if more than one of the governments' Designate Appointees votes against it. While the Plaintiffs characterize the 10 directors as being appointed by "government", in fact they are appointed by separate governments, and the most votes that any one government has on the Board is three of 20.

146. Second, the Plaintiffs say that, because the 20th director (the Chair) is appointed by the other directors, 10 of whom are appointed by the governments, the governments actually appoint a majority of the Board. With respect, that is too far a stretch. Again, the most number of votes any government wields on the Board is three, whereas the COC has seven. The Plaintiffs' characterization of the governments as acting in concert is contrary to the evidence and common sense.

147. Third and in any event, the power of the governments to appoint, in total, 10 of 20 or even 11 of 20 directors is far from sufficient to establish control. In *Harrison*, the

government appointed a majority of the directors and that was not enough, and in *Stoffman*, the government appointed 14 of 16 and that was still not enough. In those cases where the Supreme Court has found an entity to be controlled by government – such as *Douglas* and *Lavigne* – the directors were all appointed by one government.

***Harrison, supra*, p. 463**
***Stoffman, supra*, p. 512**
***Douglas/Kwantlen Faculty Association v. Douglas College*, [1990] 3 S.C.R. 570**
***Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211**

148. In conclusion on this point, the governments' various rights of representation on the Board do not give them anything like control over it. Indeed, that is not the point, as VANOC very clearly is, and is intended to be, in the control of the IOC. Rather, the Board is composed to provide a voice for all of the key stakeholders: Canada, British Columbia, Vancouver, Whistler, the First Nations, the CPC and, most importantly, the COC. No one entity – indeed, not even the governments acting together – can control the Board vote. Further, the appointees of these groups are bound by fiduciary duty to act in VANOC's best interests, which they do. As Mr. Furlong attests: "I am not aware of any circumstance in which it could be said that the government-appointed directors were acting on behalf of the governments which appointed them, as opposed to acting in the best interests of VANOC". The fact is that the Board is not intended to be a means of placing VANOC in the control of any other entity.

149. With respect, the Plaintiffs greatly exaggerate the degree of influence the governments have in respect of VANOC. An example of the Plaintiffs' exaggeration is their paragraph 306(t), in which they state:

> The Governments are constantly monitoring VANOC's performance, as set out at page 179 of the business plan. Presumably, if VANOC's performance dropped below an acceptable standard, the Governments could exercise their right to seize full and actual control of VANOC.

Plaintiffs' Argument, para. 306(t)

150. The first sentence in this paragraph is greatly overstated, but more crucially, the second statement has absolutely no basis in the facts. The contributing governments have no right of any kind to "seize full and actual control of VANOC", unlike the Ministry's right to appoint an Administrator to take over control of the hospital's operations in *Stoffman*. In that case, the Supreme Court of Canada found that was not enough to establish sufficient control to meet the section 32 test. In this case, the governments have no right whatsoever to take over VANOC's operations.

(ii) The Plaintiffs' Assertions About VANOC's Activities

151. At paragraphs 214, the Plaintiffs say that the governments have "overarching control of VANOC's purpose, being the planning, organization, financing and staging of the 2010 Games". That assertion was also made in their submissions in respect of VANOC's governance; it is based on the Multiparty Agreement (to which the COC is also a party) and the governments' approval of VANOC's By-laws. Again, the IOC's approval of those By-laws is also required, but more importantly, VANOC's purpose – as an OCOG and a member of the Olympic Movement – is defined by the IOC through the Olympic Charter.

152. At paragraph 216, the Plaintiffs point out that the Performance and Accountability agreements between VANOC and the Province give the latter "extensive rights to directly participate in the negotiation, vetting and approval of all agreements related to construction and venues". That is true. In consideration of its contribution of almost half of VANOC's Venue Development Budget, the Province required that VANOC give it more significant oversight over how that money is spent. That additional oversight in respect of the Venue Development Budget, however, just underscores that the Province does *not* exercise similar oversight in respect of VANOC's operations (which are paid for out of an entirely separate budget, which is funded by the IOC and private sources). That is, it shows that these powers are the *exception*, rather than the rule. The Supreme Court of Canada addressed that exact point in *Stoffman*, where La Forest J. stated:

> I also think that it is not very significant that the *Hospital Act* provides for ministerial control in respect of the use which the hospital makes of any grant received from the Province toward, in the words of s. 41(1), "the planning, constructing, reconstructing, purchasing and equipping of a hospital . . . or the acquiring of land or buildings for hospital purposes". The fact that the Vancouver General is not autonomous when it comes to the use of money given to it by the government for specific capital investments says little regarding the degree of autonomy it enjoys overall. If anything, it suggests that direct government involvement in hospital decision-making is the exception rather than the rule.
>
> ***Stoffman, supra*, pp. 512-513 (emphasis added)**

153. At paragraph 218, the Plaintiffs quote the Minister of Finance and say that his words demonstrate that the Province controls VANOC's operations through its appointees on the Board. The Minister's own opinion, of course, is utterly irrelevant, not to mention inadmissible. But in any event, the quotation tends to further disprove any suggestion that the Province exercise routine control over VANOC's daily operations: the Minister says that the Province does not "micromanage how VANOC organizes the Games" but rather "make[s] sure that there is a competent team in place that is actually managing the affairs of VANOC" (emphasis added).

154. At paragraph 219, the Plaintiffs say that the "direct involvement of the Governments was illustrated in the preparation of the Master Schedule". What the Master Schedule in fact illustrates is that the governments do not have routine control over VANOC's daily activities, whereas the IOC does. The Master Schedule was subject to the IOC's approval, and all subsequent amendments are likewise subject to its approval. VANOC is also obligated to provide the IOC with regular updates on its progress in completing the Master Schedule. In contrast, the Master Schedule is not subject to any government's approval and VANOC is not obliged to communicate with the governments about it at all. VANOC chose to "workshop" the Master Schedule with the governments for the same reason it sought the comments of its sponsors: "to ensure that it is accurate and useful as a planning and communication tool". Similarly, VANOC chooses to provide them with updates "for information and coordination purposes, not in order to obtain approval". The Master Schedule indeed is clear evidence of the governments' *lack* of routine control over VANOC.

Furlong Affidavit, para. 63

(iii) The Plaintiffs' Assertions About VANOC's Finances

155. It is largely true, as the Plaintiffs appear to say at paragraph 224 of their argument, that VANOC's $591,800,000 Venue Development Budget is entirely funded by governments (specifically, Canada and British Columbia); the only exception is $11.8 million in value-in-kind from commercial sponsors. The Plaintiffs are incorrect, however, when they state in that same paragraph that "[a]ny additional money that VANOC is able to gain from the private sector, including the money it receives from the IOC, amounts to revenue in return for services rendered". To the contrary, the private (including IOC) funding makes up essentially all of the Operating Budget, which covers the costs of actually running the planning, organizing and staging of the Games. For instance, it is from the Operating Budget that the costs of actually holding the competition events (such as ski jumping) during the Games and of managing the venues are paid for. The Operating Budget totals $1,755,850,000. The IOC's direct contribution to it is about $447,000,000 from broadcast revenues and $196,356,000 from its international sponsorship program. The IOC's license to the VANOC to use the Olympic brand, however, provides the largest contribution: VANOC has used that license to generate approximately $757,000,000 in corporate domestic sponsorships. A useful chart setting out the various financial contributions to VANOC is included as Exhibit "15" to the Furlong Affidavit.

Furlong Affidavit, paras. 28-31 and Ex. "15"

156. In paragraph 226, the Plaintiffs say that the governments are directly providing some services and capital projects in relation to the Games. It is true that the governments are providing security (that is, policing) and health services. The City of Vancouver is also building its athletes' village – with a contribution of $30 million. The Plaintiffs say that these contributions "are relevant to the question of control because they demonstrate the extent to which VANOC is simply a vehicle through which the Governments are hosting the 2010 Games". To the contrary, they further evidence the separation between VANOC and the governments.

157. In paragraph 227, the Plaintiffs say that "[i]t is the Governments which have dictated the projects to which any profits shall be put", by which they are referring to any surplus resulting from the Games. The Plaintiffs' statement is untrue. Clause 44 of the Host City Contract specifies that any surplus will go 20% to the COC, 20% to the IOC, and 60% to "the general benefit of sport in [Canada] as may be determined by [VANOC] in consultation with [the COC]". Clause 33 of the Multiparty Agreement, to which the COC is a party, acknowledges the division of the surplus dictated by the Host City Contract, and then specifies that a fund called the "Amateur Sport Legacy Fund" will be created to hold the 60% share of any surplus, which is consistent with the IOC's stipulation that that share be used for the general benefit of sport. Clauses 33.4 and 33.5 of the Multiparty Agreement also acknowledge the IOC's right "to revise the division of a surplus as set out in section 44 of the Host City Contract".

Furlong Affidavit, Ex. "16" (Host City Contract), p. 1709;
Ex. "18" (Multiparty Agreement), p. 1770

(3) The Trade-Marks Act Memorandum Does Not Answer the Question

158. VANOC is obligated, under clause 41(c) of the Host City Contract, to obtain legal protection within Canada for VANOC's emblem and mascots and the "Vancouver 2010" identification. VANOC accordingly applied for and obtained protection under the *Trade-marks Act*, including under section 9(1)(n)(iii) of that Act, which prohibits anyone from adopting:

> in connection with a business, as a trade-mark or otherwise, any mark consisting of, or so nearly resembling as to be likely to be mistaken for, ...
>
> (*n*) any badge, crest, emblem or mark
>
> (i) adopted or used by any of Her Majesty's Forces as defined in the *National Defence Act*,
>
> (ii) of any university, or
>
> (iii) adopted and used by any public authority, in Canada as an official mark for wares or services,

> in respect of which the Registrar has, at the request of Her Majesty or of the university or public authority, as the case may be, given public notice of its adoption and use

Bagshaw Affidavit, para. 2
***Trade-marks Act*, R.S.C. 1985, c. T-13, s. 9(1)(n)(iii)**

159. In support of its many applications for trade-mark protection under this provision, VANOC filed a memorandum that argues that VANOC is a public authority because the contributing governments have "extensive, ongoing supervision of and control over VANOC's governance and decision-making". The memorandum was prepared by VANOC's outside lawyers. Kenneth Bagshaw, the Chief Legal Officer of VANOC, who has held his current position as Chief Legal Officer of VANOC since November 2004, read this memorandum in detail for the first time in March 2009 in preparation for his Examination for Discovery conducted as part of this litigation on March 10, 2009.

Bagshaw Affidavit at para. 3

160. The Plaintiffs seek to characterize the *Trade-Marks Act* memorandum as an admission of sufficient control to bring VANOC within the scope of section 32 of the *Charter*. With respect, it is nothing of the sort.

161. The Plaintiffs admit that "[t]he test under the *Trade-Marks Act* is somewhat different [than under section 32 of the *Charter*]..." (para. 200). Case law under section 9(n)(iii) of the *Trade-Marks Act* makes no reference to the jurisprudence under section 32 of the *Charter*. Likewise, case law under section 32 of the *Charter* makes no reference to the authorities developed under section 9(n)(iii) of the *Trade-Marks Act*. The purposes of these provisions are different and the tests have developed independently.

162. The divergence between the tests is evident from the nature of some of the entities that have obtained section 9(1)(n)(iii) protection as "public authorities" for one or more marks. Those entities include roughly 40 Canadian hospitals, the Canadian Broadcasting Corporation, Hockey Canada, various provincial and national cancer societies, Bible societies, various private initiatives for the public benefit such as the

United Way and Big Brothers and Sisters of Canada, various business associations such as the Black Business Initiative Society, and the Pet Trust. The hospitals recognized as public authorities for the purpose of section 9(1)(n)(iii) of the *Trade-Marks Act* include the Vancouver General Hospital, which did not meet the "control" threshold under section 32 of the *Charter* in *Stoffman.* The entities recognized as "public authorities" under section 9(1)(n)(iii) also include the COC, whose American equivalent (the US Olympic Committee) was held by the US Supreme Court not to be "a governmental actor to whom the prohibitions of the Constitution apply". "Public authorities" for the purpose of s. 9(1)(n)(iii) include as well the Canadian Broadcasting Corporation, to which the *Charter* was held not to apply in *Adbusters Media Foundation v. Canadian Broadcasting Corp.* (1995), 13 B.C.L.R. (3d) 365 (S.C.) (*"Adbusters 1"*). While the BC Court of Appeal has recently held it is not "plain and obvious" that, pursuant to *Eldridge*, the Canadian Broadcasting Corporation falls outside the *Charter* given its alleged implementation of government broadcasting policy, the conclusion in *Adbusters 1* that the entity was not under government control (according to the Court of Appeal, the factor on the basis of which *Adbusters 1* was decided) has not been challenged. Further, more broadly, section 9(1)(n) of the *Trade-Marks Act* refers to "any university", a category of entity falling outside section 32 of the *Charter* given cases like *McKinney*.

Bagshaw Affidavit at paras. 8-9, Exs. "B"-"P";
***See You In – Canadian Athletes Fund Corporation v. Canadian Olympic Committee* (2007), 57 C.P.R. (4th) 287, 2007 FC 406 at paras. 1, 7-8, 52, aff'd 2008 FCA 124;**
***San Francisco Arts & Athletics, Inc. v. United States Olympic Committee* (1987), 483 U.S. 522;**
***Adbusters Media Foundation v. Canadian Broadcasting Corp.* ("Adbusters 1") (1995), 13 B.C.L.R. (3d) 365 at paras. 34, 35, 44, 47-48 (S.C.).;**
***Adbusters Media Foundation v. Canadian Broadcasting Corporation*, 2009 BCCA 148 at paras. 7-9, 17-18;**
***McKinney v. University of Guelph*, [1990] 3 S.C.R. 229**
***Eldridge v. B.C. (A.G.)*, [1997] 3 S.C.R. 624**

163. The Plaintiffs say "the real issue" here is what they describe as "VANOC's conveniently elastic understanding of government control". However, this an understanding of "control" defined other than in accordance with section 32 of the

Charter. Not only is the memorandum directed to compliance with section 9(1)(n)(iii) of the *Trade-Marks Act*, but – correspondingly – it does not address issues that would be central to an analysis of section 32 of the *Charter*, such as *which* particular government of those mentioned in the memorandum has control.

Plaintiffs' Argument, para. 200

164. In any event, VANOC's understanding of whether it is controlled in a legal sense in either context is not determinative. What matters in determining whether the requisite degree of control exists under section 32 of the *Charter* is not VANOC's past expression of its understanding, but the understanding and determination of this Court. For instance, a special prosecutor's opinions as to the constitutionality of legislative provisions and a party's counsel's opinion as to the merits of a defence (together with the reasons for the expressed conclusion) have been found to be irrelevant on applications for production under Rule 26.

***Pacific Press, a Division of Southam Inc. v. British Columbia (Attorney General)* (1997), 45 B.C.L.R. (3d) 235 at 238-239 (S.C.);**
***3464920 Canada Inc. v. Strother*, 2001 BCSC 949**

165. As to the particular matters of fact stated in the memorandum, what bearing they have on the issue of "control" under section 32, to the extent they are accurate, has been addressed by paragraphs 131 to 157 of this argument. Certain of the matters of fact stated in the memorandum are overstated or inaccurate, as carefully addressed by Mr. Bagshaw in this Affidavit in this action. For example, the memorandum inaccurately states in paragraph 5 that the Multiparty Agreement provides the governments with oversight over "all of [VANOC's] activities". To the contrary, the governments' oversight is at a high level and is limited to certain areas, largely concerning finances. Again, the governments' oversight is accurately set out in the Furlong Affidavit. Further, while the memorandum asserts that the governments appoint a majority of the member-directors (paragraphs 14 and 15), since the inaugural board meeting there have been 20 directors with 10 member-directors appointed by the governments. See also the discussion at paragraphs 144 to 147 above.

Bagshaw Affidavit at paras. 4, 6, 7

C. VANOC Is Not Implementing A Specific Government Policy

166. The second means by which the *Charter* might apply to VANOC is if it is implementing a specific government scheme or program. The Plaintiffs rely on this ground in the alternative to their argument that VANOC is controlled by the governments.

167. The "ascribed activity" test was set out by La Forest J. for the Court in *Eldridge*. Like *Stoffman*, that case also considered whether the Vancouver General Hospital is government – not because it was controlled by government, but rather because in some respects it was implementing government policy. Specifically, the Court found that the provision of medically necessary services was a government policy which the hospital was charged to implement, such that the *Charter* applied to its failure to provide sign language services (which was fully within its power) to allow deaf patients to properly receive those services.

168. Under the government activity test, the *Charter* will apply to a particular act of an otherwise private entity if that act is "truly 'governmental' in nature", such as the "implementation of a specific statutory scheme or program" (emphasis added). To render the act "governmental", there must be a "'direct and ... precisely-defined connection" between a specific government policy and the [entity's] impugned conduct". The impugned conduct must not be merely a matter of the entity's internal management, but rather must be "an expression of government policy". That is, whereas the entity may be autonomous in respect of all of its other activities, the *Charter* will apply to the impugned act if, with respect to that specific act, the entity is the agent of the government.

169. Key passages from *Eldridge* are:

> Second, an entity may be found to attract *Charter* scrutiny with respect to a particular activity that can be ascribed to government. This demands an investigation not into the nature of the entity whose activity is impugned but rather into the nature of the activity itself. In such cases, in other words, one must scrutinize the quality of the act at issue, rather than the quality of the

> actor. If the act is truly "governmental" in nature -- for example, the implementation of a specific statutory scheme or a government program -- the entity performing it will be subject to review under the *Charter* only in respect of that act, and not its other, private activities.
>
> ***Eldridge, supra*, para. 44 (emphasis added)**

> Unlike *Stoffman*, then, in the present case there is a "direct and . . . precisely-defined connection" between a specific government policy and the hospital's impugned conduct. The alleged discrimination -- the failure to provide sign language interpretation -- is intimately connected to the medical service delivery system instituted by the legislation. The provision of these services is not simply a matter of internal hospital management; it is an expression of government policy. Thus, while hospitals may be autonomous in their day-to-day operations, they act as agents for the government in providing the specific medical services set out in the Act. The Legislature, upon defining its objective as guaranteeing access to a range of medical services, cannot evade its obligations under s. 15(1) of the *Charter* to provide those services without discrimination by appointing hospitals to carry out that objective. In so far as they do so, hospitals must conform with the *Charter*.
>
> ***Eldridge, supra*, para. 51 (emphasis added)**

170. The point of the ascribed activity test, like the government control test, is to ensure that government cannot evade the *Charter* by delegating government authority or discretion to otherwise non-governmental entities. However, the ascribed activity test must distinguish between truly governmental activities, which are subject to the *Charter,* and activities for a public purpose or function, which are not:

> In order for the *Charter* to apply to a private entity, it must be found to be implementing a specific governmental policy or program. As I stated further on in *McKinney,* at p. 269, "[a] public purpose test is simply inadequate" and "is simply not the test mandated by s. 32".
>
> ***Eldridge, supra*, paras. 42-43 (emphasis in original)**

171. The importance of this distinction arises directly from the language of section 32, which confines the application of the *Charter* to those matters "within the authority" of Parliament or the legislatures.

***Eldridge, supra*, para. 21**

172. The Plaintiffs' argument is that VANOC's "planning, organizing and staging" of the Games is a governmental activity. The Defendant makes two central submissions in response, which will developed fully in the sections that follow.

173. First, the planning, organizing and staging of the Olympic Games is not a government activity. While certainly the Games yield many public benefits and Canadian governments are supporting and have some involvement in VANOC's efforts, the Olympic Games are plainly the creature of the IOC. The Games are not "truly 'governmental' in nature" – to the contrary, they are the creation of, and are in the control of, the IOC. So too with the planning, organizing and staging of the Games. The Olympic Charter calls for that activity to be conducted by an OCOG (VANOC, in this case), whose responsibilities are set out in the Olympic Charter and the Host City Contract. The OCOGs are members of the Olympic Movement, which again is the creation of, and is under the supreme authority of, the IOC. The IOC closely controls VANOC in its planning, organizing and staging of the Games. VANOC is not the creation of government and does not hold any special governmental powers; to the contrary, what makes up VANOC's essential identity are the rights it receives *from the IOC* to stage the Games and use the Olympic brand.

174. Second, and in any event, the impugned activity in this case is simply not one that is conducted by VANOC – or by any government. As an OCOG, VANOC's role is to stage the events that the *IOC* determines will make up the Games. The Plaintiffs have no complaint with how VANOC has planned to stage those events; their complaint is rather that women's ski jumping is not among them. But the evidence is clear beyond any doubt that VANOC plays absolutely no role in the determination of which events will be included in the Olympic Programme. Neither does any government in Canada have any role in or authority over the determination of the Programme. The determination of the Programme is solely a matter for the IOC. The fact is that, even if some of VANOC's activities were considered to be governmental, the determination of which events will be included in the 2010 Games is obviously not one of them.

175. For these reasons, the *Charter* does not apply to the fact that women's ski jumping will not be an event in the 2010 Games. The action ought therefore to be dismissed.

176. The third section below addresses the Plaintiffs' characterization of the ascribed activity test. The Plaintiffs have sought to expand the test from what the Court set out in *Eldridge*. To do so, they rely on lower court decisions dealing with entirely separate issues from section 32, as well as Wilson J.'s dissent in *McKinney*. The Plaintiffs' treatment of the test ought not to be followed. The test is what the unanimous Supreme Court of Canada stated in *Eldridge*.

(1) The Planning, Organizing, Financing and Staging the Games Is Not a Governmental Activity

177. The principal reason VANOC's planning, organizing, financing and staging of the Games is not a government activity is that VANOC's authority and responsibility for doing so stems entirely from the IOC, not from government. In short, VANOC only organizes the Games because the *IOC* has granted it that right. VANOC does not exercise any special powers from government; rather, its powers are derived entirely from the IOC. The Olympic Games are the exclusive property of the IOC and they are governed under the IOC's supreme authority. VANOC is only able to organize the Games because the IOC has granted it the powers to do so.

178. The Plaintiffs say that the organizing of the Games is a government activity because the government "took on" that activity and then "ascribed it to VANOC". In particular, they point to the City's responsibilities under the Host City Contract and the governments' involvement in VANOC's incorporation. They say that, "[a]s these were activities originally taken on by government, they remain infused with Charter obligations when performed by VANOC, even assuming VANOC did not meet the control test". The Plaintiffs also set out a number of points which they say corroborate their argument that the organizing of the Games is a government activity.

Plaintiffs' Argument, paras. 249-250 and 268

179. With respect, the Plaintiffs are mistaken, particularly in two respects.

180. The first point is that the mere facts of the government's involvement in VANOC's incorporation and the City's responsibilities under the Host City Contract do not render VANOC's activities governmental. As La Forest J. stated so clearly for the Court in *Eldridge*, the inquiry under the ascribed activity test goes to the nature of the *activity* – not the nature of the actor. It is the activity that is central, not who performs it:

> This demands an investigation not into the nature of the entity whose activity is impugned but rather into the nature of the activity itself. In such cases, in other words, one must scrutinize the quality of the act at issue, rather than the quality of the actor. If the act is truly "governmental" in nature – for example, the implementation of a specific statutory scheme or a government program – the entity performing it will be subject to review under the *Charter* only in respect of that act, and not its other, private activities.
>
> **_Eldridge_, _supra_, para. 44 (emphasis added)**

181. For instance, the activity in *Eldridge* – the delivery of necessary medical services – was found to be governmental because "it is the government, and not hospitals, that is responsible for defining both the content of the service to be delivered and the persons entitled to receive it".

Eldridge, _supra_, para. 49 (emphasis added)

182. When the nature of VANOC's activities in organizing the Games is scrutinized, it is clear that those activities are not governmental. For one thing, as a general matter, organizing a major sporting event like the Olympic Games is not a traditional government function, as the US Supreme Court observed in a case concerning the US Olympic Committee. In that case, a group organizing the "Gay Olympics" challenged the US Olympic Committee's control of the mark "Olympic" as being discriminatory. One of the issues in the case thus became whether the US Olympic Committee engages in state action, such that the Fifth Amendment applied. The majority found that it did not. Part of the majority's reasoning was:

> Certainly the activities performed by the USOC serve a national interest, as its objects and purposes of incorporation indicate. The fact "that a private entity performs a function which serves the public does not make its acts

> [governmental] action." The Amateur Sports Act was enacted "to correct the disorganization and the serious factional disputes that seemed to plague amateur sports in the United States." The Act merely authorized the USOC to coordinate activities that always have been performed by private entities. Neither the conduct nor the coordination of amateur sports has been a traditional governmental function.
>
> ***San Francisco Arts & Athletics, Inc., supra* (emphasis added; citations and footnote references removed)**

183. More importantly, however, the facts in this case make obvious that the Olympic Games are entirely an *IOC* program. As has been shown many times above, the Olympic Movement and the Games were created by the IOC and are under its supreme authority. Indeed, the Olympic Charter defines the Olympic Movement this way:

> The Olympic Movement is the concerted, organised, universal and permanent action, carried out under the supreme authority of the IOC, of all individuals and entities who are inspired by the values of Olympism. It covers the five continents. It reaches its peak with the bringing together of the world's athletes at the great sports festival, the Olympic Games. Its symbol is five interlaced rings.
>
> **Olympic Charter, "Fundamental Principles of Olympism", para. 3, Sieber Affidavit #1, Ex. "2", p. 121**

184. The celebration of the Olympic Games is a key component of the mission of the IOC, as the Olympic Charter makes clear. Chapter 1, Rule 2.3 states that an aspect of the IOC's role is "to ensure the regular celebration of the Olympic Games". Further aspects of that role are "to act against any form of discrimination affecting the Olympic Movement" and "to encourage and support the promotion of women in sport at all levels and in all structures with a view to implementing the principle of equality of men and women" (Rules 2.6 and 2.7 respectively).

Olympic Charter, Sieber Affidavit #1, Ex. "2", pp. 124-125

185. The fifth and final chapter of the Olympic Charter concerns the Olympic Games. That chapter contains 27 rules, spanning 34 pages. Those rules deal with the following matters:

(a) Celebration of the Olympic Games;

(b) Election of the host city;

(c) Location, sites and venues of the Olympic Games;

(d) Organising Committee;

(e) Liabilities – Withdrawal of the organisation of the Olympic Games;

(f) Olympic Games Coordination Commission – Liaison between the NOCs and the OCOG;

(g) Olympic Village;

(h) Cultural Programme;

(i) Eligibility Code;

(j) Nationality of Competitors;

(k) Age Limit;

(l) World Anti-Doping Code;

(m) Invitations and Entries;

(n) Programme of the Olympic Games;

(o) Technical Responsibilities of the IFs at the Olympic Games;

(p) Youth Camp;

(q) Media Coverage of the Olympic Games;

(r) Publications Relating to the Olypmic Games;

(s) Advertising, Demonstrations, Propaganda;

(t) Protocol;

(u) Olympic Identity and Accreditation Card – Rights Attached Thereto;

(v) Use of the Olympic Flag;

(w) Use of the Olympic Flame;

(x) Opening and Closing Ceremonies;

(y) Victory, Medals and Diplomas Ceremonies;

(z) Roll of Honour; and

(aa) Disputes – Arbitration.

186. The relevance of this list is just that it underscores that the Olympic Games are very definitely an IOC program. They are, to paraphrase *Eldridge*, defined by the IOC. They are its creation, its initiative, its policy, its program.

***Eldridge, supra*, para. 49**

187. The structure the IOC uses to actually organize the Games is an Organizing Committee (OCOG), as Rule 36 (among other things) shows. That Rule and its Bye-law call for the incorporation of the OCOG by the host city and the respective NOC for the purpose of organizing the Games. Upon its incorporation, the OCOG "reports directly to the IOC Executive Board". Further, "[f]rom the time of its constitution to the end of its liquidation, the OCOG shall conduct all its activities in accordance with the Olympic Charter, with the agreement entered into between the IOC, the NOC and the host city and with any other regulations or instructions of the IOC Executive Board". The agreement referenced in this last quoted sentence is, of course, the Host City Contract, which is the standard contract that IOC uses to govern its relationship with the OCOG. There is no negotiation between the parties as to its terms.

Olympic Charter, Sieber Affidavit #1, Ex. "2", pp. 184-185
Furlong Affidavit, para. 34

188. As has been shown above, the Olympic Charter and the Host City Contract give the IOC close, detailed, routine control of the OCOGs in their organization of the

Games. The governments, on the other hand, while they do contribute to the Games and have some participation in VANOC, do not have anything like that kind of control. The reason for this distinction is that the Olympic Games are an *IOC* program, not one that belongs to the governments.

189. The second error inherent in the Plaintiffs' argument is their assertion that the responsibility of organizing the Games actually lies with the governments, who then choose to "delegate" that responsibility to VANOC. They base that assertion on the fact that the City signs the Host City Contract and is required – along with the COC – to incorporate VANOC, as well as generally on the Multiparty Agreement.

190. With respect, this assertion ignores the reality. As the discussion above makes clear, the IOC effects the organization of the Games by way of OCOGs. It is true that, under the Olympic Charter and the Host City Contract, the IOC "entrusts" the organization of the Games to the COC and the City of Vancouver. Those entities, however, are not actually given the right to carry out the organization of the Games. Rather, the Olympic Charter and the Host City Contract require them to immediately incorporate an OCOG, which thereafter will be under the IOC's control. Rule 36 of the Olympic Charter makes this point succinctly:

> The organisation of the Olympic Games is entrusted by the IOC to the NOC of the country of the host city as well as to the host city itself. The NOC shall be responsible for the establishment, for that purpose, of an Organising Committee ("OCOG") which, form the time it is constituted, reports directly to the IOC Executive Board.
>
> **Olympic Charter, Sieber Affidavit #1, Ex. "2", p. 184 (emphasis added)**

191. The Host City Contract sets out the same arrangement. Under clause 1 of that agreement, the IOC entrusts the organization of the Games to the COC and the City, but under clause 2 they are required to incorporate VANOC within 5 months. Clause 2 further requires that all of VANOC's incorporating documents be submitted to the IOC Executive Board for prior written approval. After incorporation, VANOC becomes bound

to the Host City Contract and carries out the responsibilities set out in it under the supervision and control of the IOC.

192. The City's involvement in the formation of VANOC is, from the Supreme Court of Canada jurisprudence, plainly not sufficient to render its activities governmental. Take the Vancouver General Hospital as an example. It is incorporated by special statute and all of its By-laws had to be approved by the government. That was not enough to render its activities governmental, as the Court held in *Stoffman*. Rather, what was found to be a governmental activity in *Eldridge* – the delivery of necessary medical services pursuant to the *Hospital Insurance Act* – was the carrying out of a policy that was *defined* by government. The hospital's activity had a "direct and ... precisely-defined connection" to a policy created and controlled by the government.

Stoffman, supra
***Eldridge, supra*, paras. 49-51**

193. The Multiparty Agreement adds nothing to this analysis. As set out above, that agreement just sets out the relationships between the parties to it in respect of the Games *if* the IOC chooses to have the Games staged in Vancouver.

194. It may be that VANOC does engage in activities that have a "direct and ... precisely-defined connection" to policies of the various governments. For instance, the Multiparty Agreement did set up a number of specific policy requirements for VANOC in carrying out its activities. Section 8, which obligates VANOC to comply with certain of Canada's Official Languages Requirements, is an example. Canada's financial contribution to the Games was subject to its Sport Hosting Policy, referenced above, which requires that "hosts" must comply with federal Official Languages Requirements. Annex A of the Multiparty Agreement sets out these requirements and states, in part:

> **1.** The OCOG agrees to comply with the following requirements and will ensure that:
>
> > **c)** it has sufficient capacity in Canada's Official Languages, among its employees and volunteers, giving due recognition to the magnitude and complexity of the Games;

> **m)** services provided by the OCOG for athletes, coaches technical officials and other delegation members will be available in both official languages; in particular, security, emergency, and medical services will be made available to them in both official languages during operational hours of the Games ...
>
> **Furlong Affidavit, Exhibit 18**

195. It could be that the Government of Canada here has delegated to VANOC the implementation of its Official Languages Policy in respect of the Games, such that that specific activity is subject to the *Charter*. Other examples of this kind can also be found. There is no such policy, however, in respect of the activity at issue in this case: the determination of which events will be included in the Games, and the decision *not* to include a women's ski jumping event. In fact, as will be shown in the next section, that activity *could not ever be* a "governmental activity" because it is solely a matter for the IOC and forms no part of VANOC's role in the organizing of the Olympic Games.

(2) VANOC is Implementing the IOC's Olympic Programme, Not a Government Program

196. The Plaintiffs seek to apply the *Charter* to VANOC by asserting that the planning, organizing and staging of the Games amounts to government activity. On that basis, they then say that the fact that VANOC is organizing ski jumping events for men but not for women constitutes an unjustified breach of section 15 of the *Charter*.

197. The hidden assumption in this argument is that the determination of which events will make up the Olympic Games falls within the "planning, financing, organizing and staging" of the Games, and so can be ascribed to government. In fact, the opposite is the case. The evidence in this case is clear beyond doubt that the determination of the Olympic Programme is solely a matter for the IOC. OCOGs have no role or influence in determining the Olympic Programme. They have no right to interfere in that matter. Rather, an OCOG's role is to stage the events that the IOC determines will be on the Olympic Programme.

198. The facts relating to the determination of the Olympic Programme are set out above at paragraphs 35-45. Rule 47 of the 2004 Olympic Charter (the version that was in force when the women's ski jumping decision was made) provides the IOC with exclusive authority over the Olympic Programme. Rule 46 of the current Olympic Charter is to the same effect. The inclusion of sports falls to the IOC Session, while the inclusion of disciplines and events is decided by the IOC Executive Board, with advice from the Olympic Programme Commission (the OPC). Mr. Sieber, a member of the OPC, and Mr. Furlong, CEO of VANOC, have both attested that OCOGs have no role in the determination of the Olympic Programme. Prior to the formation of the OPC, OCOGs could exert some practical influence because there was no strong institution in place guiding the decision. The Salt Lake Organizing Committee, for instance, lobbied for the inclusion of women's bobsled and that event was indeed included. But the formation of the OPC has removed any vestige of that influence, as both Mr. Sieber and Ms. Priestner Allinger, who in fact was the key representative of SLOC lobbying for women's bobsled, attest. The uncontroverted evidence is that now OCOGs have absolutely no power to force into the Programme events they favour.

Sieber Affidavit #1, paras. 33-40
Furlong Affidavit, para. 71
Priestner Allinger Affidavit, paras. 3-7

199. As Mr. Sieber attests, the sports, disciplines and events that VANOC must stage at the 2010 Winter Games were indeed set by the IOC pursuant to Rule 47 of the Olympic Charter. The Programme was then communicated to VANOC, which is obliged to stage the events included in it. Each of Mr. Furlong, Mr. Sieber and Ms. Priestner Allinger have deposed that VANOC had absolutely no role to play in the IOC's selection of sports, disciplines and events, and, certainly, there is absolutely no evidence that any of the government partners had any authority to play a role. Indeed, representatives of the City of Vancouver, Vancouver City Council as a whole, the Premier of British Columbia, the former federal Secretary of State for Sport, and a Member of Parliament have all in one manner or another expressed their support for the inclusion of women's ski jumping at the 2010 Games, but to no avail.

Furlong Affidavit, paras. 71-72, 83, 88-91

Sieber Affidavit #1, paras. 33-40 and 70
Priestner Allinger Affidavit, paras. 5-7

200. The result is that, regardless of whether VANOC is thought to engage in some governmental activities, there could never be a connection between those activities and the determination of whether or not to include a women's ski jumping event. That decision simply does not fall to VANOC, or to any government. It is solely within the power of the IOC.

201. In terms of section 32 of the *Charter*, the point is that the *Charter* does not apply to the determination of the Olympic Programme because it is simply not a matter "within the authority" of Parliament or a Legislature. And to put the point more directly in terms of the ascribed activity test, no government has any power, right or involvement at all in respect of the determination of the Olympic Programme. Nor, in fact, does VANOC. It simply cannot be a government activity. Even if VANOC does carry out some government activities, they clearly do not relate in any way to the absence of a women's ski jumping event in the 2010 Games. VANOC cannot implement a "specific government policy" in respect in adding (or not) women's ski jumping into the Games, because neither VANOC nor any government in Canada has any right or power in respect of the Olympic Programme.

202. A case that bears some relevance to VANOC's circumstances in respect of the Olympic Programme is *R. v. Hannibal*. In the BC Supreme Court, Smith J. concluded that the RCMP's investigative arm could not be liable for an alleged breach of the accused's (an RCMP officer) section 11(b) rights to be tried within a reasonable time, due to delay by the RCMP's administrative section in determining whether the accused was entitled to legal aid under his employment contract. Smith J. considered section 32 of the *Charter* and held that the "[a]pplication of the *Charter* must necessarily be limited to those actions that fall within an entity's legal sphere of competence" (emphasis added). The Court of Appeal affirmed this principle:

> I am unable to find any error of law in the conclusion reached by the appeal judge. There was no functional connection between the duties of those in

> government, including the administrative branch of the R.C.M.P. and the Minister, and the police investigators of the alleged offence. Nor was there any such connection between the federal government administrative decision-makers and the provincial prosecutor. In the circumstances of a case such as this, I do not subscribe to the argument that for all purposes the Crown is indivisible. Neither the police investigators nor the prosecutor had control or influence, either directly or indirectly, over the administrative decisions made at various levels concerning funding of the appellant's defence. Nor did any of the administrative officials have anything to do with the conduct of the investigation or of the prosecution.
>
> ***R. v. Hannibal,* 2006 BCSC 4, para. 62; aff'd 2007 BCCA 299, para. 13 (emphasis added); leave to appeal refused 2008 CanLII 2985 (SCC)**

203. A further illustration of VANOC's circumstances in respect of the Olympic Programme may be drawn from *Eldridge.* In that case, La Forest J. compared the facts in *Stoffman* and in *Eldridge*. He noted that Vancouver General Hospital was *not* engaged in a governmental activity in *Stoffman* when it set a mandatory retirement provision for its resident physicians, but he found on the facts in *Eldridge* that it was engaged in a governmental activity when it declined to provide sign language services to deaf patients attempting to access medical services pursuant to their rights under the *Hospital Insurance Act,* which guaranteed a list of medical services prescribed by regulation to a class of "beneficiaries" also defined by regulation.

***Hospital Insurance Act,* R.S.B.C. 1979, c. 180, ss. 1, 3 and 5**

204. La Forest J.'s explanation for the distinction is instructive and so is quoted at length:

> [47] [In *Stoffman*] I wrote, at p. 516, that "there can be no question of the Vancouver General's being held subject to the *Charter* on the ground that it performs a governmental function, for . . . the provision of a public service, even if it is one as important as health care, is not the kind of function which qualifies as a governmental function under s. 32". That statement, however, must be read in the context of the entire judgment. I determined only that the fact that an entity performs a "public function" in the broad sense does not render it "government" for the purposes of s. 32 and specifically left open the possibility that the *Charter* could be applied to hospitals in different circumstances. Indeed, later in the same paragraph I qualified my position in the following manner:

> I would also add that this is not a case for the application of the *Charter* to a specific act of an entity which is not generally bound by the *Charter*. The only specific connection between the actions of the Vancouver General in adopting and applying Regulation 5.04 and the actions of the Government of British Columbia was the requirement that Regulation 5.04 receive ministerial approval. In light of what I have said above in regard to this requirement, a "more direct and a more precisely-defined connection", to borrow McIntyre J.'s phrase used in *Dolphin Delivery*, would have to be shown before I would conclude that the *Charter* applied on this ground.

[48] As this passage alludes to, the hospital's mandatory retirement policy, which was embodied in Medical Staff Regulation 5.04, was a matter of internal hospital management. Notwithstanding the requirement of ministerial approval, the Regulation was developed, written and adopted by hospital officials. It was not instigated by the government and did not reflect its mandatory retirement policy ...

[49] The situation in the present appeal [*Eldridge*] is very different. The purpose of the *Hospital Insurance Act* is to provide particular services to the public. Although the benefits of that service are delivered and administered through private institutions -- hospitals -- it is the government, and not hospitals, that is responsible for defining both the content of the service to be delivered and the persons entitled to receive it. As previously noted, s. 3(1) states that every person eligible to receive benefits is "entitled to receive the general hospital services provided under this Act" ...

...

[51] Unlike *Stoffman*, then, in the present case there is a "direct and . . . precisely-defined connection" between a specific government policy and the hospital's impugned conduct. The alleged discrimination -- the failure to provide sign language interpretation -- is intimately connected to the medical service delivery system instituted by the legislation. The provision of these services is not simply a matter of internal hospital management; it is an expression of government policy. Thus, while hospitals may be autonomous in their day-to-day operations, they act as agents for the government in providing the specific medical services set out in the Act. The Legislature, upon defining its objective as guaranteeing access to a range of medical services, cannot evade its obligations under s. 15(1) of the *Charter* to provide those services without discrimination by appointing hospitals to carry out that objective. In so far as they do so, hospitals must conform with the *Charter*.

***Eldridge, supra* (all underlining added)**

205. The application of this analysis to the case at bar is striking. In this case, the only connection the Plaintiffs are really able to point to is the overlap in language of the City's responsibilities in the Host City Contract and the OCOG's responsibilities in the Multiparty Agreement, but VANOC's responsibilities are in fact defined by the IOC in the Host City Contract. The content of the impugned activity in this case – the staging of the Olympic Programme – was entirely developed by the IOC. It was not instigated by any government, and does not reflect any government policy. Government was not responsible for choosing which sports, disciplines and events would form the Olympic Programme. There is no government policy with respect to who will compete at the Games. There is no specific government program or policy with respect to staging the events, and there is no direct and precisely-defined connection between any government program or policy and VANOC's impugned conduct.

206. Lastly, with respect to the Plaintiffs' "corroborative evidence", recited at Paragraphs 268 to 310 of the Plaintiffs' Argument, the facts cited do not speak to the ascribed activity test. Rather, the facts cited either speak to the "government control" test, which VANOC submits has not been made out, or they speak to the notion of a "public purpose" or "public interest" test, which was rejected by the majority in *McKinney* and should be rejected by this Court.

***McKinney, supra* at 269**

(3) Eldridge Properly Remains the Authority on the Ascribed Activity Test

207. The ascribed activity test is as set out by La Forest J. in *Eldridge*. That is, in order for the *Charter* to apply to an activity of an otherwise non-governmental entity, that activity must be "truly governmental in nature". In *Eldridge,* La Forest J. stated that a proper example of a truly governmental activity is the "implementation of a specific government policy or program". He applied that standard in *Eldridge* and found it was met by a direct and precisely-defined connection between a specific government policy and the impugned conduct in that case. Although La Forest J. in *Eldridge* appears to have left open the possibility that the test might be met by something other than the

implementation of a specific government policy or program, it is the only threshold subsequent authorities have contemplated to be applicable.

Eldridge, supra, paras. 42, 44, 46 and 51
R. v. Buhay, [2003] 1 S.C.R. 631, 2003 SCC 30, paras. 28 and 30
Canadian Federation of Students v. Greater Vancouver Transportation Authority (2006), 275 D.L.R. (4th) 221, 2006 BCCA 529, para. 49
College of Optometrists of Ontario v. SHS Optical Ltd., 2008 ONCA 685 (CanLII), para. 91
Adbusters Media Foundation v. Canadian Broadcasting Corporation, 2009 BCCA 148 (CanLII), paras. 16-18.

208. The Plaintiffs appear to suggest in their argument that the test of whether VANOC's impugned conduct is truly governmental in nature may be met on a more relaxed threshold than the implementation of a specific government policy or program. None of the suggested alternatives are supportable, and should be rejected.

209. First, the Plaintiffs quote a series of phrases from La Forest J.'s discussion in *Eldridge* of when the *Charter* will apply to the activities of non-governmental entities, and imply that they could serve as possible thresholds for determining whether an activity is truly governmental in nature. For example, the Plaintiffs quote: "activities ... viewed as the responsibility of government". La Forest J. uses these phrases, however, while tracing the development of the principle in issue, not during his articulation of the ascribed activity test. Later in his reasons in *Eldridge*, La Forest J. clearly states the ascribed activity test, in the form quoted above. That is the test that must be applied.

Plaintiffs' Argument, para. 242 (footnote 17)
Eldridge, supra, paras. 41-44

210. Second, relying on *Desrochers v. Canada (Industry)* and *R v. Broyles*, the Plaintiffs have suggested that the threshold may be met by an activity performed "on behalf of" government, or by an activity that would not have occurred "but for" the participation of government. This is plainly incorrect.

Plaintiffs' Argument, paras. 241, 246 (footnote 18), 264 and 284
Desrochers v. Canada (Industry) (2005), 276 F.T.R. 244, 2005 FC 987; rev'd [2007] 3 F.C. 3, 2006 FCA 374; aff'd 2009 SCC 8
R v. Broyles, [1991] 3 S.C.R. 595

211. *Desrochers* concerned whether a not-for-profit corporation ("North Simcoe") allocating government funding to small businesses in rural Ontario was acting "on [Industry Canada's] behalf" according to the language of section 25 of the *Official Languages Act,* R.S.C. 1985 (4th Supp.), c. 31. Harrington J. of the Federal Court answered the question by, in a very brief passage, applying *Eldridge* and inquiring whether the corporation was implementing a specific policy or program. Harrington J. concluded that it was, and that this sufficed to engage section 25 of the *Official Languages Act*. Neither appellate court addressed this analysis. Harrington J. was satisfied that if North Simcoe met the test in *Eldridge* it also met the test to be acting on behalf of Industry Canada under section 25 of the *Official Languages Act*. He did not conclude the reverse, however, and, contrary to the Plaintiffs' suggestion, *Desrochers* cannot stand for the implication that the *Charter* applies to all activities performed "on behalf of" government. The case simply does not stand for that proposition. Indeed, such a finding would clearly be contrary to *Eldridge*.

***Desrochers, supra*, paras. 35 and 38**
***Eldridge, supra*, para. 43**

212. The decision in *Broyles* is even less relevant. That case concerns the right to silence under section 7 of the *Charter*, and specifically when an informer can be deemed to be a state agent. The decision does not mention section 32. It does not even mention any of the cases that consider section 32. The Court in *Broyles* was dealing with a very different issue, and was not purporting in any way to be setting out a test under section 32. Furthermore, it is apparent in *R. v. Buhay* that the Supreme Court of Canada considers the "stage agent" test and the section 32 test to be separate inquiries.

***Broyles, supra*, at 608**
***R. v. Buhay*, [2003] 1 S.C.R. 631, 2003 SCC 30, paras. 28-29**

213. Third, the Plaintiffs have suggested that the ascribed activity test may be met by inquiring whether government has ever "taken on" the activity because, the Plaintiffs suggest, "once government takes on an activity ... this becomes government activity and is infused with the obligations of the *Charter*".

Plaintiffs' Argument, paras. 247, 261 and 264

214. The Plaintiffs say this principle derives from Wilson J.'s dissenting argument for a "government function" test for the application of the *Charter* in *McKinney*, where she stated:

> A function becomes governmental because a government has decided that it should perform that function ...

Plaintiffs' Argument, para. 244
***McKinney, supra*, at 365**

215. The wide breadth of Wilson J.'s proposed application of the *Charter* was the principal disagreement between the majority and dissent in *McKinney, Harrison, Stoffman* and *Douglas,* and was rejected in each case. This Court should also reject it.

216. In sum, the proper threshold to be applied to determine whether VANOC's impugned conduct is truly governmental in nature is whether VANOC is implementing a specific government policy or program, and, more particularly, is there a direct and precisely-defined connection between a specific government policy or program and VANOC's impugned conduct. There is no support for the Plaintiffs' suggestion that this threshold may be framed alternatively.

PART VI - SECTION 15

A. Overview

217. The Plaintiffs allege that the absence of a women's ski jumping event in the 2010 Games breaches section 15 of the *Charter*, which provides:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. [emphasis added]

218. The test under section 15 has settled into the following three-stage analysis, set out in *Law v. Canada*:

(a) Does the impugned law:

(i) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics; or

(ii) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?

If so, there is differential treatment for the purpose of section 15(1).

(b) Was the claimant subject to differential treatment on the basis of one or more of the enumerated and analogous grounds?

(c) Does the differential treatment discriminate in a substantive sense, bringing into play the purpose of section 15(1) of the *Charter* in remedying such ills as prejudice, stereotyping, and historical disadvantage?

***Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, para. 39 (underlining added)**

219. The second and third inquiries are concerned with whether the differential treatment constitutes discrimination in the substantive sense intended by section 15(1). The onus lies on the Plaintiffs to prove each of these elements.

***Law, supra*, para. 39**

220. There is no question in this case that a distinction has been drawn on the basis of gender, which is an enumerated ground: in the 2010 Games there is a ski jumping event for men, but not for women. But other necessary elements of a claim for breach of section 15 are not present in this case.

221. For one thing – and this point goes to the heart of the case – it is not a *law* that draws the distinction. That is, the distinction that is at the centre of this case is the absence of a women's ski jumping event in the Olympics. As has been shown above, however, it is the *IOC* – not VANOC and or any government in Canada – that determines the events that will be included in the Olympics. The IOC is *not* a government – it is not even a Canadian entity. The Olympic Programme – the slate of events that make up the Olympic Games – is not a "law" within the meaning of section 15 of the *Charter*, and accordingly, the absence of a women's ski jumping event in the Programme does not deny the Plaintiffs a "benefit of the law" and does not engage section 15.

222. In any event, there is no substantive discrimination in this case. For its part, VANOC has carried out its rights and responsibilities entirely in keeping with gender equality. VANOC's role is to stage the events that the IOC determines will make up the 2010 Games, and the Plaintiffs have not raised any complaint about VANOC's fulfillment of that role, and the fact is that there is simply none. Rather, VANOC was asked by the supporters of the Plaintiffs to lobby the IOC to include women's ski jumping, and that is in fact what it did on its initiative: it wrote to the IOC in *support* of the inclusion of women's ski jumping. The Plaintiffs and their supporters have acknowledged that VANOC has supported them. Also, in addition to engaging in a myriad of activities aimed at generally increasing women's participation in sports,

VANOC has helped women's ski jumpers practice and compete on the Callaghan Jumps.

223. The underlying decision not to include a women's ski jumping event is not a matter in which VANOC had any involvement and it is not one that VANOC can change. But anyway, it is also not discriminatory.

224. Rule 47 of the 2004 Olympic Charter (which was in force at the time the IOC made its decision) applies to all new events, whether they involve men or women or both. This is clearly not a case of direct discrimination.

225. Nor is it one of *indirect*, adverse effects discrimination. The IOC, which has the exclusive authority over the decision, has been at the forefront of increasing women's participation in sport. It is part of the IOC's *mission* to increase that participation, and it has helped to effect very significant progress over the years, particularly the last few decades. The Olympics are probably the international sporting event *most* characterized by gender equality. The Olympics, however, properly has standards of universality – international competitiveness – in order to ensure that competition at the Olympics truly is at the highest level of sport. Those standards are expressly lower for women than they are for men, but women's ski jumping simply did not meet them. The OPC also considered the gender equity aspect of the women's ski jumping application to be a strong factor in favour of including the event, but still they felt there was not yet enough international competition. The IOC has observed women's ski jumping's rapid international growth, and, alone among the events the IOC decided not to include, the Executive Board specifically noted that it would be "closely following the development of Women Ski Jumping with a view of its inclusion in future Olympic Games."

226. With respect, the facts do not disclose any indirect discrimination in this case.

B. The Inclusion of an Event in the Olympics Is Not a "Benefit of the Law"

227. The Plaintiffs' section 15 claim must also fail because the benefit they seek is simply not one which the law provides. No law of any government in Canada – or any other country, for that matter – provides for the inclusion of an event in the Olympic Games. That is solely a matter for the IOC. It is the *IOC* that determines the Programme of events, not any government. Similarly, OCOGs have no involvement in determining the Programme. Rather, their role is simply to put on the events that the *IOC* decides will be in the Programme; they have no power to do otherwise.

228. The Olympic Programme is not determined by any "law" within the meaning of section 15. It is not an emanation of a government in Canada, but rather is created and controlled solely by the IOC. That being so, the absence of a women's ski jumping event in the Programme does not constitute the denial of a "benefit of the law" within the meaning of section 15. Consequently, the Plaintiffs' claim cannot succeed.

229. Section 15's limitation to benefits and burdens imposed by law was most clearly stated by McLachlin C.J. for a unanimous Court in *Auton*, a case involving a challenge to the BC Medical Services Commission's alleged failure to fund a ABA/IBI therapy for autism. The lack of funding was said to constitute discrimination on the basis of disability. In her reasons, McLachlin C.J. explained the "benefit of the law" threshold this way:

> 27 In order to succeed, the claimants must show unequal treatment under the law — more specifically that they failed to receive a benefit that the law provided, or was saddled with a burden the law did not impose on someone else. The primary and oft-stated goal of s. 15(1) is to combat discrimination and ameliorate the position of disadvantaged groups within society. Its specific promise, however, is confined to benefits and burdens "of the law". Combatting discrimination and ameliorating the position of members of disadvantaged groups is a formidable task and demands a multi-pronged response. Section 15(1) is part of that response. Section 15(2)'s exemption for affirmative action programs is another prong of the response. Beyond these lie a host of initiatives that governments, organizations and individuals can undertake to ameliorate the position of members of disadvantaged groups.

> 28 The specific role of s. 15(1) in achieving this objective is to ensure that when governments choose to enact benefits or burdens, they do so on a non-discriminatory basis. This confines s. 15(1) claims to benefits and burdens imposed by law. As stated in *R. v. Turpin*, [1989] 1 S.C.R. 1296, at p. 1329:
>
> > The guarantee of equality before the law is designed to advance the value that all persons be subject to the equal demands and burdens *of the law* and not suffer any greater disability in the substance and application *of the law* than others. [Emphasis added.]
>
> 29 Most s. 15(1) claims relate to a clear statutory benefit or burden. Consequently, the need for the benefit claimed or burden imposed to emanate from law has not been much discussed. Nevertheless, the language of s. 15(1) as well as the jurisprudence demand that it be met before a s. 15(1) claim can succeed.
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> ***Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78, [2004] 3 S.C.R. 657, at paras. 27-29 (italicized words emphasized in original; underlining added)**

230. Ultimately, the Court dismissed the section 15 claim on the basis that, because the law did not provide funding for all medically-necessary treatments, there had been no breach of the duty to provide that benefit without discrimination. Again, the key passages from *Auton* are worth quoting at length:

> 35 In summary, the legislative scheme does not promise that any Canadian will receive funding for all medically required treatment. All that is conferred is core funding for services provided by medical practitioners, with funding for non-core services left to the Province's discretion. Thus, the benefit here claimed — funding for all medically required services — was not provided for by the law.
>
> 36 More specifically, the law did not provide funding for ABA/IBI therapy for autistic children. The British Columbia *MPA* authorized partial funding for the services of the following health care practitioners: chiropractors, dentists, optometrists, podiatrists, physical therapists, massage therapists and naturopathic doctors. In addition, provincial regulations authorized funding for the services of physical therapists, massage therapists and nurses. At the time of trial, the Province had not named providers of ABA/IBI therapy as "health care practitioners", whose services could be funded under the plan.
>
> 37 It followed that the Medical Services Commission, charged with administration of the *MPA*, had no power to order funding for ABA/IBI therapy. The Commission, as an administrative body, had no authority to

enlarge the class of "health care practitioners". That could be done only by the government. Since the government had not designated ABA/IBI therapists as "health care practitioners", the Commission was not permitted to list their services for funding. This is how things stood at the time of trial. British Columbia's law governing non-core benefits did not provide the benefit that the petitioners were seeking.

38 The petitioners rely on *Eldridge* in arguing for equal provision of medical benefits. In *Eldridge*, this Court held that the Province was obliged to provide translators to the deaf so that they could have equal access to core benefits accorded to everyone under the British Columbia medicare scheme. The decision proceeded on the basis that the law provided the benefits at issue — physician-delivered consultation and maternity care. However, by failing to provide translation services for the deaf, the Province effectively denied to one group of disabled people the benefit it had granted by law. *Eldridge* was concerned with unequal access to a benefit that the law conferred and with *applying* a benefit-granting law in a non-discriminatory fashion. By contrast, this case is concerned with access to a benefit that the law has not conferred. For this reason, *Eldridge* does not assist the petitioners.

...

45 Had the situation been different, the petitioners might have attempted to frame their legal action as a claim to the benefit of equal application of the law by the Medical Services Commission. This would not have been a substantive claim for funding for particular medical services, but a procedural claim anchored in the assertion that benefits provided by the law were not distributed in an equal fashion. Such a claim, if made out, would be supported by *Eldridge*, *supra.* The argument would be that the Medical Services Commission violated s. 15(1) by approving non-core services for non-disabled people, while denying equivalent services to autistic children and their families.

46 Such a claim depends on a prior showing that there is a benefit provided by law. There can be no administrative duty to distribute non-existent benefits equally. Had the legislature designated ABA/IBI therapists (or a broader group of therapists which included them) as "health care practitioners" under the *MPA* at the time of trial, this would have amounted to a legislated benefit, which the Commission would be charged with implementing. The Commission would then have been obliged to implement that benefit in a non-discriminatory fashion. However, this is not the case. Here, the legislature had not legislated funding for the benefit in question, and the Commission had no power to deal with it.

47 I conclude that the benefit claimed, no matter how it is viewed, is not a benefit provided by law. ...

***Auton, supra*, paras. 35-38 and 45-47 (italicized words emphasized in original; underlining added)**

231. In the case at bar, VANOC is akin to the Medical Services Commission, in that it is charged with staging the events included within the Programme by the IOC. That is, just as the Medical Services Commission had no power to order funding for ABA/IBI therapy, VANOC has no power to order the inclusion of women's ski jumping in the Olympic Programme. VANOC is not under an administrative duty to distribute equally what it has no power to provide.

232. Indeed, it is even clearer in the case at bar than it was in *Auton* that what the Plaintiffs seek is not a "benefit of the law". After all, in *Auton* the scheme that the Medical Services Commission was charged with applying was a legislative scheme, enacted by the British Columbia Legislature. By contrast, the Olympic Programme is specified by the IOC, which (although it need not be said) is plainly not government.

233. The fact is that, while in *Auton* the BC Legislature *could* have provided for ABA/IBI therapy, no government within Canada has the authority – or even the practical power – to include an event in the Olympic Games. The IOC has *exclusive* authority over the Programme, and does not cede any of it to any government or OCOG.

234. In fact, the IOC's control goes even beyond strict legal authority. It is known to pretty well everyone that the *IOC* governs the Olympics. The fact is, that if some entity – including a government – tried to stage the "Olympic Games" without the IOC's permission, no one would actually consider the event to be the Olympics. Similarly, if VANOC attempted (on its own initiative or by court order) to hold events during the 2010 Games contrary to the decision of the IOC, no one would actually consider those events to be *Olympic*, regardless of any court order. Those events would always be regarded as something else. The simple fact is that only the IOC may grant the imprimatur of "Olympic".

235. There is yet one more illustration of the IOC's exclusive control over the Olympic Programme. If VANOC tried to hold a women's ski jumping event without the IOC's

permission, not only would no one consider it to be an *Olympic* event, VANOC could not even make that event happen, regardless of whether it was ordered to do so by a court. The actual staging of Olympic events requires not only the OCOG's efforts, but also participation by IFs and NOCs, all of whom are part of the Olympic Movement and are under the supreme authority of the IOC. It is the IFs who actually govern the events at the Games. The FIS – the IF responsible for ski jumping – has specifically stated that it has accepted the IOC's decision with respect to women's ski jumping, and has reiterated in the context of this litigation that the FIS is under the authority and instructions of the IOC, that it is the IOC which determined the Olympic Programme, and that it will not take instructions from VANOC in this regard. Similarly, it is the NOCs who bring the athletes to the Games that they have selected to be on their national team. The NOCs are the IOC's ambassadors in their respective countries, they receive most of their funding from the IOC, and they are subject to its authority and instructions. If VANOC attempted to hold a women's ski jumping event, it is extremely unlikely they would act contrary to the direction of the IOC. As Mr. Furlong attests, the fact is that VANOC cannot stage an Olympic event without the IOC directing it to do so.

Furlong Affidavit, paras. 93-94

236. Last, the Plaintiffs and their supporters themselves recognize that only the IOC has the power to include women's ski jumping in the Olympics. Hence their focus on having VANOC lobby the IOC for inclusion of women's ski jumping and hence the earlier human rights complaint. That complaint (before the Canadian Human Rights Commission) was brought against the Government of Canada by Jan Willis ("on behalf of the athletes who are members of the Canadian Women's Ski Jumping Team, on behalf of proponents of women's ski jumping and on behalf of Canadians who support gender equality"). The relief sought in that complaint was as follows:

> The Department of Canadian Heritage, in concert with other government officials, must put pressure on the IOC to reverse the decision and remove this shadow from the 2010 Olympics. The IOC's disrespect of Canadian values of gender equity should not go unchallenged by the federal government.
>
> ....

> If the IOC refuses to reverse the situation, the Department of Canadian Heritage, as a major event funder, should be required to offset the negative consequences of the exclusion of women's ski jumping from the 2010 Olympics. This would include measures such as funding an international-level women's competition in 2010 as an alternative to the Olympics and also ensuring federal funding for Canadian women ski jumpers in lieu of funds they would otherwise have been entitled to receive but for the IOC decision. [emphasis added]
>
> **Defendant's Document #274, Common Book, Tab 81**

237. The complainant and the Government of Canada settled in the course of mediation, with the federal government's lobbying effort of the IOC being the agreed result. That lobbying effort was described earlier and has to date been unsuccessful (as have lobbying efforts by other organizations and levels of government). Again, the fact is that the "benefit" the Plaintiffs seek is not within the power of any of those governments to confer whether by "law" or, indeed, by negotiation or diplomacy. The Plaintiffs plead that "[t]he Governments have delegated to VANOC the ability to carry out their policy of hosting the Games, including the ability to ensure gender equality, the ability to enter into agreements with the IOC and FIS to include women's ski jumping events, and in the event that the IOC and FIS are intransigent, the ability to place a women's ski jumping event on the 2010 schedule unilaterally" (Further Amended Statement of Claim at para. 132). The human rights complaint and its result reinforce the fact that governments had no power to delegate, even assuming that a delegation of any sort occurred.

C. There Is No Discrimination in this Case

238. Even if it were thought that the Plaintiffs have somehow been denied a "benefit of the law", that denial is not discriminatory. Neither VANOC nor the IOC has discriminated against the Plaintiffs in any way.

239. It is important to keep the analysis of VANOC's conduct distinct from that of the IOC. VANOC is the only defendant in this case. While in their section 15 argument the Plaintiffs seek to conflate VANOC and the IOC (despite their repeated assertions that

VANOC is controlled by the governments for the purposes of section 32), in fact VANOC has no power over the IOC – rather, the *IOC* controls *VANOC*.

240. As will be set out below, VANOC has done all it can for the Plaintiffs. It supported the inclusion of women's ski jumping, but it has no power to change the IOC's decision. Since that decision was made, it has again raised the women's ski jumping issue with the IOC, but to no avail. VANOC has hosted women's ski jumping training and competition events at the Whistler Olympic Park, and it has undertaken a wide range of other actions to promote women's access to sport. It simply has not done anything to discriminate against the Plaintiffs.

241. The argument below also sets out how the IOC's decision was not discriminatory. The IOC is a leader in promoting women's access to sport. It has adopted rules and policies to allow for more women's participation in the Olympics, and women's participation has indeed grown tremendously over the years and is steadily nearing parity. Further, the IOC was alive to the gender issue raised by the women's ski jumping application, and considered it to be a strong factor in its favour. In its expert opinion, however, the IOC determined that the international competitiveness was not quite at an Olympic stage, although it specifically observed that it would be monitoring the sport closely with a view to including it in future Olympic Games. Again, there is no discrimination here.

(1) VANOC Has Not Discriminated

242. VANOC has not discriminated against the Plaintiffs in any way. As has been set out at length above, VANOC had no control over – or even influence in – the decision not to include women's ski jumping in the Olympic Programme, and it has absolutely no power to reverse that decision. It does not have the right to put on a women's ski jumping event without the IOC's permission; indeed, it does not even have the power to do so.

243. If the absence of a women's ski jumping event is the cause or result of discrimination (and below it will be shown that it is not), that discrimination was not committed by VANOC. Nor could it be said to be *perpetuated* by VANOC, since VANOC has no power to correct it.

244. One of the many ironies in this case is that VANOC in fact has *supported* women's ski jumping in a number of ways. Perhaps the least of these is that it has hosted women's ski jump training and competitions on the Callaghan Jumps in the Whistler Olympic Park. In particular, the North American Junior Championships and Canadian Championships were held there in the 2007-2008 season, and the FIS Ladies' Continental Cup was held there in 2008-2009. Brent Morrice, the Chairman of Ski Jumping Canada, observed in October of 2008 that "VANOC has hosted the women at the new Olympic facility and are planning on hosting the best female Ski Jumping women of the world again this December, and has stated that they are hosting these events in part to develop the women's circuit internationally". Ms. Priestner Allinger, VANOC's Executive Vice President for Sport and Games Operations, has confirmed that that is VANOC's intention in hosting those women's ski jumping events.

Furlong Affidavit, para. 69
Priestner Allinger Affidavit, para. 11 and Ex. "B", p. 17

245. Second, VANOC also did all that it could to support the inclusion of women's ski jumping into the Programme for the 2010 Games. Prior to the IOC Executive Board making its decision, the VANOC Board recognized that women's ski jumping raised gender equity issues. It accordingly directed Mr. Furlong to "express support to the IOC for the addition of these competitions [women's ski jumping and snowboard cross], subject to there being a workable solution to the logistical challenges and subject to there being an assurance there would [be] no net negative financial impact on the 2010 Games budget from the addition of these competitions." Mr. Furlong did write to the IOC on November 24, 2006, stating:

> Without any detailed formal knowledge of how the IOC views the strength of the Women's Ski Jumping application in particular, our view is that if there were a concerted effort to manage athlete numbers, VANOC, the IOC and

> FIS could together find a solution to accommodate the addition. While we recognize that these are complex matters, if the IOC were to conclude that the very best outcome for the 2010 Olympic Winter Games were to include these additions, we believe that, as a partner, it is our obligation to do the very best we can to achieve an outcome that best serves the interests of sport and of all involved.

Furlong Affidavit, paras. 75 and 80-81, Exs. "25" and "29", pp. 1832-1833 and 1840-1841

246. As Mr. Furlong states in his affidavit, his intention in this letter was not to try to persuade the IOC to include women's ski jumping: he did not regard it as proper for VANOC, as an OCOG, to insert itself into that decision. Rather, his goal was just to remove any concern the IOC might have about VANOC not supporting the inclusion of the event. The inclusion of any new event necessarily increases athlete numbers (which has a series of cascading effects) and affects the budget. Mr. Furlong wanted to clear the way for the IOC to make its decision without any concern that VANOC would put up obstacles. As Ms. Priestner Allinger (who was the key lobbyist for the Salt Lake Organizing Committee) attests, that is all an OCOG can now do.

247. Third, VANOC has actually provided some assistance in lobbying the IOC to reverse its decision, in addition to Mr. Furlong's letter to the IOC. At the request of supporters of the Plaintiffs, Ms. Priestner Allinger attended a meeting in January of 2008, which was aimed finding effective ways to convince the IOC to include women's ski jumping in the 2010 Games. Ms. Priestner Allinger was asked to provide advice in this regard, which she did. Recently, in February 2009, Dr. Ballem, a member of VANOC's Board, openly criticized Dr. Rogge for the IOC having not included women's ski jumping in the 2010 Games. At her request, Mr. Furlong raised the issue again with Dr. Rogge.

Priestner Allinger Affidavit, paras. 9-10

248. VANOC's support of women's ski jumpers has been widely acknowledged. Indeed, in selecting the Government of Canada, not VANOC, as the target for an earlier human rights complaint before the Canadian Human Rights Commission, Jan Willis ("on behalf of the athletes who are members of the Canadian Women's Ski Jumping Team,

on behalf of proponents of women's ski jumping and on behalf of Canadians who support gender equality") stated the following:

> In an attempt to ensure inclusion, team members wrote to VANOC (the Vancouver Organizing Committee), the IOC Executive and various members of Parliament and the Prime Minister urging them to let the IOC know that exclusion of women from the ski jump funded with public funds would not be in accord with Canadian principles of gender equity. They received no feedback or reply from the federal government. The inclusion of women's ski jumping was however supported by the Canadian Olympic Committee, the Canadian Snowsports Association and VANOC. [emphasis added]
>
> **Defendant's Document #274, Common Book, Tab 81**

249. The letter to VANOC referenced in that passage was written on November 20, 2006 by four members of the Women's Canadian Ski Jumping Team, three of whom are Plaintiffs in this litigation. The letter is exhibited in Mr. Furlong's affidavit. The purpose of the letter is expressed this way: "We are asking that you immediately lobby the IOC to request the inclusion of women's ski jumping in 2010".

Furlong Affidavit, para. 78, Ex. "27", pp. 1836-1837

250. In January 25, 2006, Mr. Furlong received a letter to somewhat similar effect from Ms. Corradini, who, as has been mentioned, has been a very active supporter of the Plaintiffs' case. She highlighted the achievements of women ski jumpers, and stated:

> Based on the present quality and numbers of international women jumpers, and the momentum these athletes have, we are confident that they too can compete as Olympians in Vancouver 2010. We would very much appreciate your support!
>
> **Furlong Affidavit, para. 70, Ex. "22", p. 1811**

251. As set out above, VANOC *has* given that support and it *has* lobbied the IOC, to the extent appropriate. That fact is acknowledged by the Canadian Snowsports Association ("CSA"), the membership of which includes Ski Jumping Canada and other Canadian national snowsport federations. In an October 7, 2008 press release, Chris Robinson, the CSA's President, stated: "We must continue to use the FIS channels to lobby the IOC for acceptance of Ladies Ski Jumping into the Olympic Games". He continued: "VANOC has been a supporter of the CSA position but their ability to

influence this decision has passed". Dave Pym, the CSA's Managing Director, states in the press release that "VANOC were tremendously supportive of the CSA attempts over the past few years to actively lobby the IOC for inclusion of Ladies Ski Jumping, BUT VANOC are not the decision makers as to the inclusion of events" (his emphasis).

Priestner Allinger Affidavit, para. 11 and Ex. "B", pp. 16-17

252. In short, VANOC has not discriminated against the Plaintiffs in any way.

(2) The IOC's Decision Is Not Discriminatory

253. As set out above, VANOC had no part in the decision not to include women's ski jumping in the 2010 Games. The IOC alone had the power to make that decision, and VANOC has no power to reverse it. If that decision is discriminatory, it is not VANOC that has discriminated.

254. The IOC's decision, however, is not discriminatory. To the contrary, it was made in a manner entirely responsive to the situation of women in ski jumping.

255. The Plaintiffs allege that the IOC's determination not to include women's ski jumping involves both "formal discrimination" (by which is meant *direct* discrimination) and adverse effects discrimination.

Plaintiffs' Argument, para. 136

256. Plainly this is not a case of direct discrimination. That kind of discrimination arises when a law is discriminatory *on its face* and there is nothing of the kind here. Rule 47 of the 2004 Olympic Charter (which was in force when the IOC made its decision) sets out the criteria for admission of sports, disciplines and events into the Olympic Games (that is, their inclusion in the Programme). That Rule clearly applies equally to men and women (with one difference favourable to women, as noted below).

Hogg, *Constitutional Law of Canada*, 5th ed. Supplemented, para. 55.11
2004 Olympic Charter, Sieber Affidavit #1, Ex. "1", pp. 87-92

257. Indeed, a predecessor to Rule 47 was the subject of *Martin v. International Olympic Committee*, the American case concerning the women runners' challenge to the Los Angeles Games, the dissenting opinion in which the Plaintiffs rely on heavily in their argument as to adverse effects discrimination. The majority opinion, however, clearly set out that the Olympic Charter rule is not an instance of direct discrimination:

> Although the pertinent background extends to the beginning of this century, the critical occurrence for this lawsuit occurred in 1949, when the IOC adopted rules to slow the rapid growth in the number of Olympic events within recognized sports. The successor rule of that effort, which is at issue in this litigation, is rule 32 of the 1970 Olympic Charter. It provides:
>
> > The IOC in consultation with the IFs [International Federations] concerned shall decide the events which shall be included in each sport, in bearing with the global aspect of the Olympic programme and statistical data referring to the number of participating countries in each event of the Olympic programme, of the world championships, of Regional Games and all other competitions under the patronage of the IOC and the patronage of the IFs for a period of one olympiad (four years).
>
> Under this rule, an event must be recognized internationally through national championships and international competition during the four years before the time it is first considered for inclusion, and the decision on whether to include an event is made four years before the games in which it will first appear. Thus, the critical qualifying time period for races to be run for the first time in 1984 was from 1976 to 1980.
>
> ***Martin v. International Olympic Committee*, 740 F.2d 670 (9th Cir. 1984) at pp. 673-674**

258. The majority in *Martin* continued:

> Rule 32 is facially gender-neutral. It describes the procedures for determining events to be included in the Olympic Games without referring to the competitors' sex....
>
> ....
>
> Similarly, rule 32 undeniably applies to both men and women athletes as it establishes criteria for adding *all* new events to the Olympic program. Indeed, the women runners' own brief concedes that forty-three new men's events have been added since 1949 -- presumably under the process of rule 32 and its predecessors -- while forty-eight new events have been added for

> women competitors during this same period. Thus, the women runners' argument that rule 32 is not gender-neutral is unpersuasive.
>
> ***Martin, supra*, pp. 678-679 (underlining added; italics in original)**

259. These comments apply equally to Rule 47 of the 2004 Olympic Charter, except that Rule 47 now in fact *accommodates* women, as will be explained below. The Rule plainly involves no direct discrimination. Nor does the IOC's actual decision. Neither in Mr. Sieber's explanation of the OPC's recommendation nor in the IOC's written determination is there any sign of any stereotyping or other discrimination toward women. In fact, the opposite is true, again as will be explained further below. The Plaintiffs insinuate that the IOC's "real motive" for not including a women's ski jumping event was "VANOC's concerns about costs (which Mr. Sieber denies), or perhaps pressure from Mr. Kasper, who had recently opined that ski jumping was not appropriate for ladies". With respect, that is an unworthy argument that is directly contrary to all of the evidence. It deserves to be dismissed out of hand.

Sieber Affidavit #1, paras. 64-88
Furlong Affidavit, para. 85, Ex. "31", pp. 1844-1846
Plaintiffs' Argument, para. 169

260. The Plaintiffs' adverse effects argument, although deserving of more attention, should also be dismissed.

261. The Plaintiffs' argument is constructed on the back of historical stereotypes and barriers to participation. VANOC's primary point in response, as will be explained below, is that the IOC has been a leader in the struggle *against* such stereotypes and barriers, and the IOC's rules for the inclusion of events actually reflect proactive accommodation towards women athletes aimed at increasing their participation.

262. First, though, it needs to be said that some of the evidence on which the Plaintiffs base their adverse effects discrimination claim is very weak. In particular, Professor Vertinsky's affidavit, offered as an expert opinion, is *extremely* flimsy evidence and ought to be given very little, *if any*, weight – if it is admissible at all. The affidavit is offered for the opinion that, "among the reasons" for the exclusion of women from ski

jumping, was a view, "held by the sport's officials, and generally by society at large", that the sport was not suitable for women, which in turn reduced the size and scope of the sport, and further reinforced the stereotype. Those "conclusions and opinions" are in turn based on "research findings" that are attached as Exhibit "B". The ultimate conclusion in those "research findings" is this:

> In [*sic*] final assessment, the historical lack of sanctioned ski jumping events for women is in part the result of a perception that women are medically at risk when ski jumping . This lack of sanctioned competition, combined with societal pressures to avoid the sport, likely added to the effect of reducing the number of women participants in ski jumping until the late 1990's and early 2000's.
>
> **Vertinsky Affidavit, para. 4, Ex. "B", p. 43 (emphasis added)**

263. Professor Vertinsky's conclusion is simply that the lack of ski jumping of events for women is "in part" due to stereotypes – stereotypes are "among the reasons" for that exclusion – and that the lack of events "likely added" the reducing participation in the sport. It could be that Professor Vertinsky is correct, but, with respect, she has told us very little. Fundamentally, she does not say *how much* of a reason the alleged stereotypes are for the lack of women's participation. She gives us no sense of the scale of their influence. We are just told that they "likely added" to the difficulties faced by women. Frankly, this is of no help to this case.

264. More critically, however, Professor Vertinsky bases her opinion on an exceedingly weak factual basis. First, her treatment of the history of women's ski jumping is blatantly unbalanced. She appears to have plucked from history every statement or occurrence she could find that could be seen as demeaning to women ski jumpers, and then she extrapolates between them, asserting a generalized social attitude. She does not give anything like fair treatment to the support women's ski jumping has received along the way. With respect, this is not scholarship and it is not expert evidence. Second, the factual assertions on which she bases her opinion have not been proved. Her opinion is not proof of the "facts" on which it is premised. Indeed, her "research findings" are very far from *any* kind of proof, as the following quotations make all too clear:

> 20. This idea seems to have lingered within ski federations until relatively recently. For example:
>
> (a) in 1975 Canadian skier Anna Fraser Sproule was informed by an Ottawa race official that she could not participate in a weekend event involving ski jumping because it might harm her reproductive organs;
>
> (c) some FIS representatives justified women's exclusion from skip [*sic*] jumping by arguing that one of the spinal bones in the femaile [*sic*] body had a different and more fragile structure than the comparable bone in the male body and could break during landing;
>
> 23. Anecdotal evidence suggests that some race organizers and spectators remain sceptical that women possess the courage, strength and bodily control required to face the risks involved in ski jumping.
>
> **Vertinsky Affidavit, Ex. "B", pp. 39-43 (emphasis added)**

265. It is both commonsensical and supported by authority that an opinion based on unproven facts carries very little weight: *Ter Neuzen v. Korn*. With respect, the Vertinsky Affidavit adds nothing of any value to the evidence in this case and should be disregarded.

***Ter Neuzen v. Korn*, [1996] B.C.J. No. 2246 (S.C.)**

266. More substantively, as alluded to above, the IOC has in fact been a *leader* in promoting women's participation in sport and has introduced a number of policies aimed specifically at accommodating women so as to increase their representation in the Olympic Games, with the goal of reaching parity to men. Three points established by the evidence in this case are particularly relevant here: (i) that an important part of the IOC's efforts is to increase women's access to sport throughout the world; (ii) that the IOC has very actively accommodated women to increase their participation in the Olympics; and (iii) with respect to specific decision not to include women's ski jumping in the 2010 Olympics, the IOC in fact was entirely alive to the gender issue and regarded that as a strong factor in favour of adding the event (one, however, that was nonetheless outweighed the lack of international competitiveness in the sport).

(i) The IOC's Leadership in Promoting Women's Access to Sport

267. The first point is that one of the IOC's central aims is to increase women's access to sport and sport leadership. Two of the six "Fundamental Principles of Olympism" relate to access to sport without discrimination:

> 4. The practice of sport is a human right. Every individual must have the possibility of practising sport, without discrimination of any kind and in the Olympic spirit, which requires mutual understanding with a spirit of friendship, solidarity and fair play. The organisation, administration and management of sport must be controlled by independent sports organisations.
>
> 5. Any form of discrimination with regard to a country or a person on grounds of race, religion, politics, gender or otherwise is incompatible with belonging to the Olympic Movement.
>
> **Olympic Charter, Sieber Affidavit #1, Ex. "2", p. 121**

268. The mission and role of the IOC further explicitly incorporates the eradication of discrimination and the promotion of women in sport. In Chapter 1, Rule 2 of the Olympic Charter, the IOC's role is defined in part as:

> 6. to act against any form of discrimination affecting the Olympic Movement;
>
> 7. to encourage and support the promotion of women at all levels and in all structures with a view to implementing the principle of equality of men and women;
>
> **Olympic Charter, Sieber Affidavit #1, Ex. "2", p. 125**

269. These are not empty words. As is described more fully in Mr. Sieber's first affidavit and in the exhibits to it, the IOC has implemented a wide range of initiatives to increase women's involvement in leadership and administration within the Olympic Movement and the wider sporting community. The Women and Sport Commission was established to foster women's leadership in sport. The IOC has actively promoted increasing the number of women in its membership, and it established minimum targets for women membership of NOC executives in an effort to spur greater participation of women amongst the IOC's partners in the Olympic Movement. But perhaps most fundamentally, the Olympic Games provide probably the greatest exposure for female athletes out of any sporting event in the world. The *vast* majority of sporting events on

television focus on men – picture, for instance, soccer, basketball, baseball, hockey, golf. The coverage of these sports is overwhelmingly *dominated* by the men. In contrast, the Olympics provides equal television coverage to *all* events – male and female. The Olympics are watched by billions of people around the world, and when they watch they see far more attention and recognition given to female athletes than they probably see at any other time on television.

Sieber Affidavit #1, paras. 51-63 and Exs. "19" – "25"

(ii) The IOC's Promotion of Women's Participation in the Olympics

270. The Plaintiffs appear to allege that the IOC has discriminated against them by applying a "facially neutral rule for the inclusion of new events" without accommodating women's particular circumstances.

271. With respect, this submission ignores the actual rule that was applied. That rule was Rule 47(3) of the 2004 Olympic Charter, which states in part:

> 3.2 To be included in the programme of the Olympic Games, events must have a recognised international standing both numerically and geographically, and have been included at least twice in world or continental championships.
>
> 3.3 Only events practised by men in at least fifty countries and on three continents, and by women in at least thirty-five countries and on three continents, may be included in the programme of the Olympic Games.
>
> 3.4 Events are admitted not later than three years before specific Olympic Games in respect of which no change shall thereafter be permitted, subject to paragraph 6 below.

Sieber Affidavit #1, para. 71 and Ex. "1", p. 90 (emphasis added)

272. The rule for women is relaxed precisely in order to accommodate them and encourage their participation in the Olympics. Similarly, in 1991 the IOC has also instituted a policy that all new sports must include both women's and men's events – again in an effort to increase women's participation.

273. The IOC's efforts have had a very significant effect, as the tables at paragraphs 55 and 56 of Mr. Sieber's first affidavit show. Women now compete in approximately 48% of the events at the Winter Olympics, and the percentage of women athletes has steadily increased to just under 40%.

274. With respect, the IOC plainly does not discriminate against women. It is undoubtedly correct that historically women have had significantly less access to sport than men, due to social barriers. But far from having erected those barriers, it is part of the IOC's mission to dismantle them. The IOC is clearly and obviously a worldwide *leader* in promoting women's access to sport at all levels, and that includes by instituting rules that encourage their participation in the Olympic Games.

(iii) The IOC's Did Consider Gender Equity in Making Its Decision

275. Given that part of the IOC's mission is to encourage women in sport, that the IOC has a specific Women and Sport Commission, and that it has instituted more relaxed standards for women's events so as to increase women's participation in the Olympics, it is plain that gender equality issues are central to the IOC and that they factor into their decisions in respect of the Olympic Programme.

276. The Plaintiffs, however, do not hesitate to allege – without *any* factual basis – that the IOC decided not to include women's ski jumping for improper reasons, specifically, "VANOC's concerns about costs (which Mr. Sieber denies), or perhaps pressure from Mr. Kasper, who had recently opined that ski jumping was not appropriate for ladies". As stated above, this argument is unworthy of the important issues in this case. It is also plainly and obviously wrong.

277. Again, the facts outlined above show that the IOC is very much concerned with increasing women's participation in the Olympics in general. But further evidence shows that, in making the specific decision with respect to women's ski jumping, the IOC was alive to the gender issues. As Mr. Sieber states in his second affidavit:

> the OPC did in fact consider the gender equity aspect of the application to add women's ski jumping. There was a very substantial discussion about the gender issue. It was clear from the discussion that the members of the OPC believed it to be a strong factor in favour of adding the event. For instance, had the international competitiveness of women's ski jumping been closer to the usual standards for inclusion in the Olympic Games, I believe, based on that discussion, that it is very possible it would have been included. The members of the OPC, however, were unanimously of the view that women's ski jumping had not yet reached a sufficiently high level of competition and international competitiveness to be included in the Olympic Games.
>
> **Sieber Affidavit #1 #2, para. 4 (emphasis added)**

278. This is consistent with his first affidavit, which indicated that the IOC's decision was largely a matter of timing. He stated in that first affidavit:

> I personally look forward to women's ski jumping being included in the near future. I am impressed by how quickly the international competitiveness of the sport has grown. However, in my judgment (and I believe in the judgment of the other members of the OPC), at the time the recommendation was made, the level of competition had not yet developed sufficiently to be included in the Games, although I expect it will reach that level soon.
>
> **Sieber Affidavit #1, para. 88 (emphasis added)**

279. The IOC Executive Board, which actually made the decision in respect of women's ski jumping, shared this attitude. Its November 28, 2006 Olympic Programme Update stated that the IOC Executive Board had decided:

> **not to include** Curling Mixed Doubles and Women Ski Jumping as their development is still in the early stage thus lacking the international spread of participation and technical standard required for an event to be included in the programme.
>
> The EB noted that it would be closely following the development of Women Ski Jumping with a view of its inclusion in future Olympic Games.
>
> **Furlong Affidavit, Ex. "31", p. 1846 (underlining added; bolding in original)**

280. With respect, there is no discrimination here. The IOC is obviously motivated by a general concern to increase women's participation in the Olympics, and that motivation plainly also informed its specific consideration of the women's ski jumping

application. However, in its expert opinion, the IOC concluded that women's ski jumping is not yet at an Olympic stage of development, although it noted that "it would be closely following [its development] with a view of its inclusion in future Olympic Games". There is nothing discriminatory here.

PART VII - SECTION 1

281. Section 1 provides that "[t]he *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". If VANOC is government for the purpose of section 32 and if there is any violation of section 15, the framework pursuant to which the allegedly discriminatory action or decision arises is a reasonable limit prescribed by law which can be demonstrably justified in a free and democratic society.

282. The Plaintiffs have taken the position, despite expressly relying on and seeking a "benefit of the law" under section 15, that there is no "reasonable limit prescribed by law". Yet in order to have reached the stage of a section 1 inquiry, the Plaintiffs would have had to establish the denial to them of the equal protection and equal benefit "of the law".

283. This is a case where the Plaintiffs cannot de-link the two forms of "law". The benefit they seek under section 15 is the holding of an Olympic event. They point consistently to the IOC decision not to include women's ski jumping as the source of their complaint. That determination was made under Rule 47 of the Olympic Charter. Some of the IOC's rules have the status of customary international law.

James A.R. Nafziger, *International Sports Law* (Dobbs Ferry, New York: Transnational Publishers, Inc.) at 32-34

284. Further, the Plaintiffs argue that "law" for the purpose of section 15 may include contract. The only contract which provides even the context for the holding of an Olympic event (although not the power for VANOC to determine which events can be

held) is the Host City Contract. The Host City Contract is not the arbitrary act of a private individual or government official from which the term "prescribed by law" within the meaning of section 1 should be distinguished. Rather, it is the very framework for the benefit that the Plaintiffs seek: it is what places the 2010 Winter Games in Vancouver for VANOC to stage. The Host City Contract provides the predictability and consistency which permits the Games to proceed.

285. There are pressing and substantial objectives in this case: to preserve the present and future opportunities to hold the Olympic Games in Canada, and to maintain the contractual commitments which permit Canada to keep and attract future Olympic Games together with their attendant benefits. Free and democratic societies around the world compete very hard to host the Olympic Games and have done so on the very same terms. Less free and democratic societies are said to become more so when the Games are hosted there. Vancouver's competitors for the 2010 Winter Games included Switzerland and Austria. Past holders of Games have included Canada (Montreal and Calgary), the United States and Greece. The Plaintiffs note (albeit in very general terms) that this is their fourth attempt at including ski jumping in the Olympics, starting in Nagano in 1998; the intervening Olympics have been held in Salt Lake City and Torino. Each of Japan, the United States and Italy are free and democratic societies.

286. Mr. Furlong believes that Vancouver, Whistler, British Columbia and Canada, as well as other municipalities, all supported the bid because they recognized that hosting the Olympics Games brings a host of benefits – from tourism, to a higher international profile, to an opportunity to fund infrastructure projects. The federal government, the Province and the municipalities have their own particular reasons for wanting the 2010 Winter Games to be hosted here. The support of the various governments was important to the bid. It would have been very difficult, although possible, to win without significant support from all of them.

Furlong Affidavit, para. 12

287. The competition in which free and democratic societies around the world have engaged and continue to engage requires signing onto a process which includes the

Host City Contract pursuant to which the OCOG "shall conduct all its activities in accordance with the Olympic Charter, with the agreement entered into between the IOC, the NOC and the host city and with any other regulations or instructions of the IOC Executive Board". It is a condition of hosting the Games and obtaining all the benefits that entails; a candidate cannot pick and choose the terms on which host city status is awarded. Nor does any OCOG negotiate the terms of the Host City Contract. Had the IOC for a moment considered that a candidate would not respect the terms of the agreement, it would have awarded the Games to another candidate willing to do so. There is no means short of signing the Host City Contract by which the Games may be obtained – there is no other rational means, and no other lesser impairment, than to do so. Further, if VANOC, the COC or the City breaches any material obligation under the Host City Contract or the Olympic Charter, the IOC is entitled to withdraw the Games from Vancouver, pursuant to clause 60 of the Host City Contract.

Host City Contract, Furlong Affidavit, Ex. "16", pp. 1718-1719

288. The Plaintiffs do not say that Vancouver should not be hosting the 2010 Winter Games. Indeed they are seeking to compete in those very Games and have trained and competed at the facilities that they seek be used. Yet it is simply on the basis of willingness to sign the Host City Contract and involve the IOC in its full role prescribed under the Olympic Charter that the award of the 2010 Winter Games was made. In *McKinney*, it was noted that that while such a contract (there with an entity whose membership included the plaintiffs) would usually require justification as a reasonable limit under section 1, "[i]t may be that the acceptance of a contractual obligation could, in some circumstances, constitute a waiver of a *Charter* right especially in a case like mandatory retirement, which not only imposes burdens, but benefits on employees".

289. The tremendous benefit of hosting the Games is worth leaving the selection process to an expert body, the OPC, which makes recommendations to the IOC. Any discriminatory aspect of that decision (which VANOC denies, as outlined above) is more than outweighed by the benefit of the process and the avoidance of such matters as the host country subverting the Olympic Programme through the inclusion of events in which athletes from that country excel. The decision is then left with a body with unique

expertise to determine when a sport or event has reached an Olympic level of competition. By contrast, "there can be few less suitable bodies than the federal courts for determining the eligibility, or the procedures for determining the eligibility, of athletes to participate in the Olympic Games" (*Michels v. United States Olympic Committee*, 741 F.2d 155 (7th Cir. 1984), per Posner J., concurring).

290. If VANOC attempted to depart from the Host City Contract and the Olympic Charter, it is very unlikely that the Games would be held in Canada again in the foreseeable future. The Plaintiffs point to the "risk of a contractual tiff with the IOC" should VANOC act under the declaration that the Plaintiffs seek (Argument at para. 328). The risk is far more serious than that. Essentially, if VANOC holds a women's ski jumping event without the IOC's permission it would be appropriating, or attempting to appropriate, the IOC's property in the Games. If VANOC attempted to determine aspects of the Olympic Programme and hold "Olympic" events, it would be infringing on the intellectual property associated with the Olympic Movement which it does not own. The Plaintiffs admit that "[t]he IOC is the owner of the Olympic brand and related trademarks" (Further Amended Statement of Claim at para. 36). While VANOC has certain intellectual property rights, it is only in the context of the Host City Contract and its defined role within the Olympic Movement in relation to the Games. The infringement would be upon perhaps the most prevalent "brand" in the world. Mr. Furlong believes this would create a very serious incident and would deeply impair the relationship between VANOC and the IOC. It would also have long standing negative ramifications for the COC, who will deal with the IOC on an ongoing basis as the NOC for Canada beyond the 2010 Winter Games. The majority in *Martin* wrote, when considering the plaintiffs' claim under a California statute:

> In addition, we find persuasive the argument that a court should be wary of applying a state statute to alter the content of the Olympic Games. The Olympic Games are organized and conducted under the terms of an international agreement -- the Olympic Charter. We are extremely hesitant to undertake the application of one state's statute to alter an event that is staged with competitors from the entire world under the terms of that agreement

Furlong Affidavit, para. 95;

Sieber Affidavit #1, para. 42
Martin, supra

291. Indeed, again, certain of the Rules under the Olympic Charter have effect as customary international law.

***Nafziger, supra*, at 32-34**

292. The Plaintiffs plead that "any term of any agreement between the IOC and VANOC or any of the Governments preventing VANOC from including a women's ski jumping event in the Games [is] void at law as being illegal, against public policy or otherwise" (Further Amended Statement of Claim at paras. 13, 134). Of course, VANOC has no inherent power to include events in the Olympic Games. While the Plaintiffs suggest that "any legal provision that purports to prevent it from doing so is illegal or otherwise rendered void and of no effect", there is no question of prevention – rather, VANOC simply does not have this power. Further, the Plaintiffs rely on *Block Bros. Realty Ltd. v. Mollard* (1981), 27 B.C.L.R. 17 (C.A.), which self-evidently pre-dates the *Charter*. Indeed that case had no constitutional component at all. The page to which the Plaintiffs refer further quotes from other case law which provided that "there is no reason for disregarding the settled law that a contract good in the foreign country will be enforced here unless prohibited or unless it be contrary to our conceptions of essential justice or morality" (at 24). There is nothing in the Host City Contract which even approaches such a threshold.

293. Further, and as detailed above, VANOC simply could not put on an "Olympic" event which would be recognized as such. There is every justification for VANOC not to take steps which would be a sham and would not take care of the problem to which the Plaintiffs point. If the Plaintiffs' purpose is to inspire future competitors and attract sponsors by the holding of an "Olympic" event, the holding of an event which is not sanctioned by the IOC and falls outside the Olympic Movement would do no good at all.

PART VIII - REMEDY

294. The Plaintiffs seek only declaratory relief. In the event that one or more of the Plaintiffs' claims are made out, this Court should exercise its discretion and decline to grant the declaratory relief sought, because, first, the relief sought will not resolve the issue between the parties, and second, the relief sought is improper as it will indirectly impugn and prejudice the IOC, who is not before this Court.

Plaintiffs' Argument, para. 3

295. In other circumstances this may seem a harsh result, but in this case it is the product of the Plaintiffs' choice to proceed by *Charter* litigation against VANOC rather than proceeding directly against the IOC in an appropriate forum.

296. On the first point, the Plaintiffs concede that for declaratory relief to be granted, "[t]he declaration must be capable of resolving the questions at issue between the parties". It is plain that the underlying issue in this case is whether VANOC is constitutionally obliged to stage a women's ski jumping event at the 2010 Winter Olympic Games. That is, what the Plaintiffs want is a women's ski jumping event in the 2010 Games. But there is no reason to expect that the declaration they request will lead to the result they seek. It is simply not within VANOC's capacity to unilaterally stage an Olympic women's ski jumping event, as has been discussed at length above. The fact is that the necessary authority rests exclusively with the IOC, an entity not before this Court who will not be bound by any declaration. With or without the declaration sought, the Plaintiffs are in the same position *vis à vis* the IOC.

Plaintiffs' Argument, paras. 5, 36 331
***Solosky v. The Queen*, [1980] 1 S.C.R. 821 at 832**

297. The Plaintiffs' hope seems to be that a declaration against VANOC may influence the IOC to reconsider its decision, where no lobbying to date has had that effect. This is extremely speculative, and certainly falls short of "resolving the questions at issue between the parties". Indeed the Plaintiffs have even recognized this hole in their case, stating in their Argument:

> By staging an event for women's ski jumping despite the IOC – even if it could not ultimately be held – VANOC would effectively declare that these athletes are entitled to recognition at a level equal to that of their male colleagues.
>
> **Plaintiffs' Argument, para. 122 (emphasis added)**

298. Further, this Court should not base a conclusion of law on speculation as to the conduct of a foreign entity that is, in this action, not subject to its jurisdiction. Albeit in different circumstances, in *Operation Dismantle v. The Queen*, the majority of the Supreme Court of Canada agreed to strike the plaintiffs' claims because they were premised on speculation:

> What can be concluded from this analysis of the statement of claim is that all of its allegations, including the ultimate assertion of an increased likelihood of nuclear war, are premised on assumptions and hypotheses about how independent and sovereign nations, operating in an international arena of radical uncertainty, and continually changing circumstances, will react to the Canadian government's decision to permit the testing of the cruise missile.
>
> ***Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441 at 454**

299. In this case, this Court should not conclude that the relief sought will resolve the question at issue on the basis of speculation as to what the IOC may or may not do.

300. On the second point, given the requirements of *Solosky*, the Plaintiffs' hope must be that the declaration they request will influence the conduct of the IOC. But it is not proper to grant a declaration that, in effect, seeks to apply the *Charter* to a foreign non-governmental entity. As Wilson J. noted in *McKinney*: "I do not believe that the *Charter* was intended as an alternate route to human rights legislation for the resolution of allegations of private discrimination". This Court should not aid the Plaintiffs to do indirectly what the *Charter* and the limits of this Court's jurisdiction do not permit them to do directly.

***McKinney, supra* at 341-342**

301. A relevant analogy is the extra-territorial gathering of evidence in Canadian criminal prosecutions, where the *Charter* does *not* apply because its application is

limited to its *enforceable jurisdiction.* In *R v. Hape,* a majority of the Supreme Court of Canada held:

> The *Charter*'s territorial limitations are provided for in s. 32, which states that the *Charter* applies only to matters that are within the authority of Parliament or the provincial legislatures. In the absence of consent, Canada cannot exercise its enforcement jurisdiction over a matter situated outside Canadian territory. Since effect cannot be given to Canadian law in the circumstances, the matter falls outside the authority of Parliament and the provincial legislatures.
>
> ***R. v. Hape,* [2007] 2 S.C.R. 292, 2007 SCC 26, para. 69 (emphasis added)**

302. While the Plaintiffs seek a declaration against VANOC, their real target is the IOC. They seek to apply the *Charter* indirectly to a foreign, non-governmental entity.

303. Last, even if it does not bind the IOC, there is little question that a declaration on the terms sought has negative implications for the IOC. This Court ought not to issue a declaration that will indirectly prejudice the IOC. This principle was set out by the House of Lords in an action between employee and employer, wherein the employee sought by declaration to void a clause of a collective agreement to which he was no longer a party. The House of Lords held it would be improper to grant the declaration without the union present:

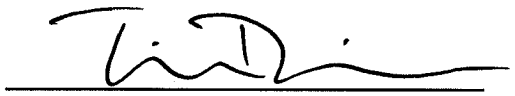
> ...[T]he Courts have always recognized that persons interested are or may be indirectly prejudiced by a declaration made by the court in their absence, and that, except in special circumstances, all persons interested should be made parties, whether by representation orders or otherwise, before a declaration by its terms affecting their rights is made.
>
> ***London Passenger Transport Board v. Moscrop*, [1942] A.C. 332 (H.L.) at 345**

304. In this case the Plaintiffs made a strategic choice not to proceed against the IOC in order to pursue a possible remedy under the *Charter.* That is their right, but they should also shoulder the consequences of that choice in terms of the relief available.

PART IX - CONCLUSION

305. In all the circumstances the Plaintiffs' action should be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,



George K. Macintosh QC
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Tim Dickson
Eli Walker

PART X - TABLE OF AUTHORITIES

Commentary