No. S-083619
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

PLAINTIFFS' MEMORANDUM OF ARGUMENT

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I. Opening

1. The Plaintiffs in this case are highly ranked women ski jumpers, young women who want to become highly ranked ski jumpers, and former women ski jumpers who have retired from the sport. Simply because of their sex, the Plaintiffs have been told that they cannot participate in the 2010 Winter Olympic Games, (the "2010 Games").

2. The 2010 Games are being planned, organized, financed and staged by the Defendant Vancouver Organizing Committee for the 2010 Olympic and Paralympic Games ("VANOC"). VANOC is staging three ski jumping events for men, but none for women. The Plaintiffs say that, in light of the development of women's ski jumping over the last two decades, VANOC's failure to put on even one event for women ski jumpers violates their equality rights under the *Canadian Charter of Rights and Freedoms.*

> *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the "*Charter*")

3. At this stage, the Plaintiffs ask this Court only for the following declaration:

> If VANOC plans, organizes, finances and stages ski jumping events for men in the 2010 Winter Olympic Games, then a failure to plan, organize, finance and stage a ski jumping event for women violates their equality rights, as guaranteed in section 15(1) of the *Canadian Charter of Rights and Freedoms*, and is not saved under s. 1.

4. VANOC's only publicly stated reason for its failure to plan, organize, finance and stage a ski jumping event for women, is that it is following an instruction from the International Olympic Committee ("IOC"). According to VANOC, it would be inappropriate to question the IOC about a women's jumping event at the 2010 Games. Essentially, VANOC says that it is contractually bound to implement the IOC's decision, regardless of the effect on the Plaintiffs' *Charter* rights.

5. Those among the Plaintiffs who are active jumpers want the chance to participate in the 2010 Games. It 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.

6. The IOC's decision perpetuates the historical prejudices that have to date excluded women from ski jumping in the Olympics. VANOC's blind acceptance of the IOC's decision effectively incorporates these historical prejudices into its own organization, staging and financing of the 2010 Games.

7. Women have historically been excluded from participation in organized ski jumping, and are still subjected to such exclusion in much of the world. This was the result of misguided stereotypes: that they were too frail, or that the sport was insufficiently "ladylike". Because of the basis on which the IOC decided to exclude women ski jumping from the 2010 Games, those stereotypes affect the Plaintiffs today. The historical prejudices meant that there were very few officially sanctioned ski jumping competitions open to women, and it is the relative lack of such competitions that is now advanced as the reason for excluding women ski jumpers from the 2010 Games. This is a hurdle women ski jumpers cannot overcome by athleticism, perseverance, and dedication alone.

8. To avoid discrimination, the law of Canada demands more than the rote toting up of numbers. The inquiry into discrimination must, in circumstances of historic exclusion based on prejudice and stereotype, go behind the numbers. It must look to the Plaintiffs' human dignity interest. It must take the perspective of a reasonable person in the Plaintiffs' circumstances, so as to determine whether the denial of their rights would demean their dignity. Ultimately, in the

case at bar, the Court must ask whether the Plaintiffs are being treated as "less than" their male peers, unworthy of the recognition accorded their male peers, simply because they are women.

9. This is not the first time women have challenged a decision by the IOC to exclude them from competing in the Olympic Games. Before the 1984 Olympic Summer Games in Los Angeles, the IOC decided that women could not participate in distance running events because there had been too few women's competitions. A two-judge majority of 9th Circuit Court of Appeals in the United States rejected the women's complaint, because the regulation of the IOC was facially neutral and was not adopted with discriminatory intent. In other words, the IOC justified its decision with numbers. The women distance runners lost because American law did not, at that time, recognize adverse effects discrimination.

> *Martin v. International Olympic Committee*, (9th Cir. 1984), Hansen Affidavit, Exhibit C

10. In 1995, the Supreme Court of Canada rejected such a view of discrimination as "thin and impoverished"[1]. Our courts would have almost certainly sided with the dissent in the American case, and would have required the organizing committee for the 1984 Games to plan, organize, finance and stage the distance running events requested. So it should be here, in relation to the single ski jumping event that these Plaintiffs seek.

11. VANOC's failure to plan, organize, finance and stage a ski jumping event for women as part of the 2010 Games is a direct assault on the human dignity of these Plaintiffs and elite women ski jumpers across the world. It denies them the opportunity to demonstrate their accomplishments, dedication, and athleticism, and to have them celebrated and recognized. It

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[1] *Eldridge v. British Columbia (Attorney General),* [1997] 3 S.C.R. 624 ("*Eldridge*")

denies them the opportunity to even show that they are deserving. It says to them, overtly and explicitly, that their years of dedication to and accomplishments in the area most central to their young lives are categorically unworthy of the respect and acknowledgement granted their male peers.

12. This benefit is being denied in circumstances where the Plaintiffs can ski jump, the facility has been built, and there are more than enough elite women ski jumpers from enough countries to make for a compelling competition. This demeans them not just as elite female athletes, but as women. It is only because they are female that they are denied this opportunity.

13. VANOC's claim to be shielded from *Charter* scrutiny by the IOC is untenable. It is VANOC, not the IOC, that is planning, organizing, financing and staging the 2010 Games. These are the activities by which the events and the 2010 Games are brought to life, and it is as a result of being denied the benefit of these activities that the Plaintiffs are denied equal treatment. The obligation to accommodate thus rests squarely on VANOC's shoulders. VANOC's constitutional obligations cannot be weakened, much less eliminated, by the IOC.

14. The functions of the Olympic movement are divided among many entities. While overarching responsibility for the movement and its Olympic Games rests with the IOC, the IOC does not itself engage in the activities of hosting, planning, organizing, or staging any particular Games. These are tasks for the host city, the National Olympic Committee ("NOC") of the host country, and potentially, other parties through an Organizing Committee for the Games ("OCOG"). In the case at bar, it is the Government of Canada, the Government of the Province of British Columbia, the City of Vancouver, the Resort Municipality of Whistler (the

"Governments") and the Canadian Olympic Committee ("COC")who have undertaken to host, plan, organize, finance and stage the 2010 Games through VANOC.

15. VANOC asserts that it need not respect the Plaintiffs' rights because the *Charter* does not apply to it. But there is ample evidence that VANOC has in fact, from the start, been subject to regular and routine government control and supervision in the planning, organizing, financing and staging of the 2010 Games and there is ample evidence that, the hosting, planning, organizing, financing and staging of the 2010 Games has, from the start, been a Government project. Thus, VANOC is performing these activities under the Governments' control and on their behalf, and it is obliged to comply with the *Charter*. As VANOC is obliged to plan, organize, finance and stage the 2010 Games and its events under contract with the Governments, in doing so, VANOC is providing a benefit of the law to which the equality rights of section 15(1) of our *Charter* apply.

16. In the bid for the 2010 Games, the Government of Canada submitted a covenant to the IOC. The covenant provided numerous guarantees of actions that it would take in ensuring that the 2010 Games were successfully planned, organized, financed and staged. Significantly, it also said this:

> Should Vancouver be chosen by the IOC at its 115th Session in Prague, Czech Republic on July 2, 2003 to host the Games, it is understood that: ... the laws and sovereignty of Canada shall prevail on all matters related to the conduct of the Games in Canada.[2]

17. The ski jumping events that VANOC is planning, organizing and financing, and will stage as part of the 2010 Games, are happening in Canada. They are "the conduct of the Games

[2] Furlong Affidavit, Exhibit 18, p. 1787.

in Canada", as are all VANOC's efforts in respect of them. The *Charter* is the "supreme law"[3] of Canada.

18. At a minimum, for the laws and sovereignty of Canada to prevail requires that the events put on as part of the 2010 Games reflect the Canadian understanding of discrimination[4]. This is a constitutional requirement. It cannot be outsourced to a foreign authority with a "thin and impoverished"[5] view of equality.

[3] *Constitution Act, 1982*, s. 52(1), being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
[4] This understanding is required under both the jurisprudence of the *Charter* and human rights legislation.
[5] Language from *Eldridge, supra* para. 73, describing an understanding of discrimination that does not require the accommodation of adverse effects and does not consider the relevant social context and impediments.

II. Overview of Submission:

19. The Plaintiffs' submission begins by addressing the violation of their rights under section 15(1). Following a review of the legal principles under s. 15(1), the relevant facts are then reviewed to demonstrate the violation. This includes detailed evidence from each of the Plaintiffs, as it is essential to understand how the exclusion affects them in order to analyze the section 15(1) violation. It also includes a detailed examination of the benefit women are being excluded from, and why they are being excluded, as this is required for the analysis. While the violation will be readily apparent at that stage, a brief summary of how the facts fit into the legal guidelines will follow.

20. The submission then addresses VANOC's defence that the *Charter* does not apply to it. The Plaintiffs will show that this defence cannot stand in light of the law developed under the "control" basis and the "ascribed activity" basis for *Charter* application.

21. VANOC has also pled that any violation of section 15(1) is justified under section 1 of the *Charter* as a "limit prescribed by law that is reasonably justified in a free and democratic society". However, because no "limit prescribed by law" is raised by this case, section 1 of the *Charter* has no application.

22. The submission closes with a brief argument showing the appropriateness of the declaratory relief sought in this case.

III. Section 15(1) of the Charter

A. Introduction of section 15(1)

23. This is a case of both formal and adverse effects discrimination.

24. VANOC is planning, organizing, financing and staging the 2010 Games, including the events in the ski jumping discipline. It is obligated to do so under a contract with the Governments, and by the purposes that they set for it in its bylaws.

25. In fulfilling these obligations, VANOC is under-inclusively providing the benefit of planning, organizing, financing and staging the 2010 Games, because it is including three events in the discipline of ski jumping for men but none for women.

26. This violates section 15(1) of the *Charter*. Women ski jumpers cannot access the benefits being provided to male ski jumpers – not because they are unable to ski jump, or because the level and international spread of their competition is such that they could not benefit from accessing them, but because they are women. The explicit message is that the Plaintiffs' competitive efforts are not just less worthy of respect and admiration than those of their male colleagues, but that they are completely unworthy by comparison. This is a discriminatory affront to their human dignity.

27. The differential treatment underlying the inequality in this case has three aspects, two based on "formal inequality" and one based on "adverse effects":

(a) VANOC fails to provide the benefit of planning, organizing, financing and staging any events in the discipline of ski jumping for women, while providing three events for men.

(b) VANOC implements the IOC's assessment, by accepting its instruction not to provide any women's events, even though there is no such assessment for men.

(c) VANOC implements the IOC's failure to take into account the systemic and historic barriers to women ski jumpers, which are grounded in prejudice and bias.

28. As a consequence VANOC – *not* the IOC – is providing an under-inclusive benefit for men, and none for women. Each of these aspects of discrimination, on its own, constitutes a violation of the Plaintiffs' section 15(1) rights.

29. The Plaintiffs' argument with respect to discrimination proceeds as follows. The first section explains the rights and obligations arising from section 15(1). The second section addresses the evidence, specifically: (1) the evidence of the Plaintiffs themselves, in order to provide the Court with an understanding of their perspective; and (2) the evidence relating to The historical exclusion of women from the sport of ski jumping, historical attitudes towards women's participation in ski jumping, and the effect of the exclusion on the sport. The third section shows how these facts violate the Plaintiffs' equality rights.

B. The Law: The Rights and Obligations Arising from Section 15(1)

30. Section 15(1) protects and ensures equality rights in Canada. Section 15(1) is not just an anti-discrimination section. It was worded to provide substantive equality, including protection from adverse effects discrimination.

L'Heureax-Dube; "Realizing Equality in the Twentieth Century: The Role of the Supreme Court of Canada in Comparative Perspective", Int'l J. Const. L. 35, January 2003, at 5-7

31. Section 15(1) of the *Charter* provides:

> Every individual … has the right to the … equal benefit of the law without discrimination … based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." (emphasis added.)

32. At issue in the present case is the obligation, imposed by s. 15(1) on those providing a "benefit of the law", to ensure that this is not under-inclusive by reason of discrimination based on an enumerated or analogous ground. The unanimous Supreme Court of Canada explained it this way in *Eldridge*: "Once the state does provide a benefit, it is obliged to do so in a non-discriminatory manner".

Eldridge, supra at para. 73

33. This obligation attaches to benefits "of the law". The qualifier "of the law" is not a rigid one. The obligations of section 15(1) can attach to action as well as to benefits sourced in contract.

Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497 ("*Law*") at para 23;
Eldridge, supra, at para. 19;
Douglas/Kwantlen Faculty Association v. Douglas College, [1990] 3 S.C.R. 570 ("*Douglas*") at 585

34. Fundamentally, the section 15(1) obligation attaches to the outcome of the provision of the benefit, not to what motivated that outcome. It is a right to an "equal benefit", not to any particular decision-making process or standard. So in the *Douglas College* case, the benefit was

employment with the College extending from a negotiated contract.[6] In *Eldridge,* the question was whether "the appellants had been afforded 'equal benefit" (emphasis added), not whether there was a discriminatory decision.

> *Douglas, supra*;
> *Eldridge, supra* at para. 60

35. This accords with the purpose of section 15(1), which focuses on the *effect* of the failure to provide the benefit to the plaintiff:

> [A] discriminatory purpose or intention is not a necessary condition of a s. 15(1) violation . . . It is sufficient if the effect of the legislation is to deny someone the equal protection or benefit of the law.
> (emphasis in original; citations omitted)
>
> *Eldridge, supra* at para. 62

36. This obligation is one that "[i]n many circumstances will require governments to take positive action, for example, by extending the scope of a benefit to a previously excluded class of persons".[7] This is what the Plaintiffs are asking of VANOC. The Plaintiffs ask VANOC to plan organize, finance and stage an event in the discipline of ski jumping in which they can participate.

> *Eldridge, supra* at para. 73

37. The purpose of the section is important because, as noted by the Supreme Court of Canada in *Law*, a conflict between the purpose of section 15(1) as described above, and the

---

[6] In *Douglas, supra,* the Supreme Court of Canada held that s. 15(1) applied to the mandatory retirement term of a collective agreement negotiated between the Defendant college and the applicant employee association, confirming that a contract can be "law" for the purposes of the *Charter*.

[7] Note that in *Eldridge, supra*, the body required to take the positive action was not the government *per se* but the Medical Services Commission and hospitals that were determined not to be government, but carrying out an activity that could be ascribed to government. As will be seen in the analysis related to "of the law" and the application of the *Charter* under section 32, nothing turns on the nomenclature in the case at bar.

denial of equality benefit is what grounds a section 15(1) claim. Writing for the Court, Iacobucci, J. summarized the key elements of the claim as follows:

> It may be said that the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern , respect and consideration. Legislation which effects differential treatment between individuals or groups will violate this fundamental purpose where those who are subject to the differential treatment fall within one or more of enumerated or analogous grounds, and where the differential treatment reflects the stereotypical application of presumed group or personal characteristics, or otherwise has the effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society. ...
>
> *Law, supra*, at paras. 41, 51

38. Iacobucci J. went on to discuss the abstract concept of human dignity by which section 15(1) violations are measured:

> What is human dignity? ... Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised on personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals or groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society *per se*, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?
>
> The equality guarantee in s. 15(1) of the *Charter* must be understood and applied in light of the above understanding of its purpose. The overriding concern with protecting and promoting human dignity in the sense just described infuses all elements of the discrimination analysis. [Emphasis added.]
>
> *Law, supra* at paras. 53, 54

39. Like the present case, *Eldridge* involved a benefit whose under-inclusiveness was not mandated by any law but by the actions of a non-government actor. In that context, the unanimous Court expressed the purpose of s. 15(1) as follows:

> [T]he purpose of s. 15(1) of the *Charter* is not only the to prevent discrimination by the attribution of stereotypical characteristics to individuals, but also to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society.
>
> *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 ("*Eaton*") at para. 66 cited in *Eldridge, supra* at para. 65

40. *Eldridge* applied this principle to a deafness disability that effectively prevented access to the benefit of health services because it was not accommodated by sign language translators. The relevant barriers are not limited to those imposed by biology, but can also include social barriers based on immutable personal characteristics such as sex. Thus, the principle also applies in relation to women's participation in gender-segregated sports if women, because of the immutable personal characteristic of their gender, are prevented access to the benefit of competitions available to men unless women's competitions are also provided.[8]

> *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] 3 S.C.R. 381, 2004 S.C.C. 66;
> *Ontario Human Rights Commission v. Simpson-Sears*, [1985] 2 S.C.R. 536

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[8] Where the levels and "universality" of participation and the number of previously organized competitions may be generally reasonable criteria for the provision of the benefit of a sporting event, in circumstances where it is likely that relatively lower levels of female participation is based on historical prejudice regarding the sports suitability for women or some other discriminatory factor the accommodation to be made is the waiver of these criteria so as to allow participation. As Sophinka J. stated for the Court in *Eaton, supra,* at para. 67, section 15(1) "seeks to take into account the true characteristics of [the] group which act as headwinds to the enjoyment of society's benefits and to accommodate them." In this case the true characteristics that act as headwinds to the enjoyment of society's benefits, is gender - specifically "femaleness" - and the accommodation required by VANOC is to plan, organize, finance and stage an event open to these Plaintiffs in defiance of those who would seek to prevent such action on the basis of criteria that do not take these headwinds into account.

41. As stated in Law, section 15(1) violations are grounded in a conflict between the impugned measure and the section's purpose. The analysis of this conflict requires a blend of subjective and objective perspectives. The conflict should be examined from the perspective "of a person in circumstances similar to the claimant who is informed of and rationally takes into account the various contextual factors which determine whether an impugned law infringes human dignity, as that concept is understood of the purpose of s. 15(1)."[9]

> *Law, supra*, at paras. 41, 59-61

42. The Supreme Court of Canada set out guidelines for analysis under s. 15(1) in *Law*:

> The approach adopted and regularly applied by the Court to the interpretation of s. 15(1) focuses upon three central issues:
>
> (A) whether a law imposes differential treatment between the claimant and others, in purpose or effect;
>
> (B) whether one or more enumerated or analogous grounds of discrimination are the basis for the differential treatment; and
>
> (C) whether the law in question has a purpose or effect that is discriminatory within the meaning of the equality guarantee.
>
> The first issue is concerned with whether the law causes differential treatment. The second and third issues are concerned with whether the differential treatment constitutes discrimination in the substantive sense intended by s. 15(1).
>
> Accordingly, a court that is called upon to determine a discrimination claim under s. 15(1) should make the following three broad inquiries:
>
> (A) Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) 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?
>
> (B) Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?

---

[9] In the case at bar, the conflict alleged by the Plaintiff should be examined from the perspective of an elite female ski jumper or athlete who will be without an event at the 2010 Games because she is female.

and

> (C) Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?
>
> *Law, supra* at para. 88

43. More recently, in *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, the Court explained that the *Law* guidelines are not rigid: "[T]here is no magic in a particular statement of the elements that must be established to prove a claim under s. 15(1)".

> *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] 3 S.C.R. 657, 2004 S.C.C. 78 ("*Auton*") at para. 23

44. In keeping with this approach, the analysis that follows will explain the case in relation to: (1) the denial of benefit; (2) the source of this benefit in "law"; (3) the formal and adverse effects sources of the inequality at work in this case; and (4) the discrimination in relation to the "human dignity interests". In the result, this will show the section 15(1) violation that arises from denying the Plaintiffs the opportunity to participate in the 2010 Games, by failing to plan, organize, finance and stage an event for them.

45. The Plaintiffs say that in order to protect their human dignity interest – their interest in not having their accomplishments, perseverance, efforts and athleticism demeaned and ignored -- VANOC is required to extend the scope of the benefit it offers by "organizing, …" the 2010 Games to include a ski jumping event for women.

C. The Evidence: Women in Ski Jumping, in Sport and in the Olympics

(a) Plaintiffs

(i) The Contenders

46. At least until this year's world championships, Anette Sagen was the world's most decorated and highest profile women ski jumper. She is Norwegian. Ski jumping is a major sport in Norway, and because of her excellence on the hill, she is a celebrity there. She will be 25 years old during the 2010 Games, and will be 29 in January of 2014.

47. She has won the overall title in the women's Continental Cup Circuit, and the women's prestigious four hills title.

48. Anette started ski jumping when she was 11. She continued despite being told by her own mother that "she would give it up because she is a girl". She trained and jumped with the boys, always thinking that she would win everything there was to win. Only in her teens did she realize that, unlike her male training partners and competitors, she could not compete in a World Championships or Olympics.

49. Nevertheless, she started competing internationally at 14. By 16, she had left home to train full time. She has stayed with the sport despite major surgeries, the isolation that comes from giving up a "normal" youth, the enormous financial drain, and establishment resistance to her participation -- all for the sake of perfecting her ski jumping. She has established herself as one of the best in the world.

50. For Anette, "it would be an honour to participate in the Olympics". She believes that "winning an Olympic gold medal is the biggest achievement in the world of sports." As a jumper

and as a member of the Ski Jumping Committee for the Norwegian Ski Jumping Association, it is her view that women need to be able to participate in the major championships, including the Olympic Games, in order to get sponsorships to pay for coaching etc., to increase the number of competitors, and to get better as jumpers.

Sagen Affidavit (reference for paragraphs 46-50 of this Argument)

51. Lindsey Van of the United States is the first and current world champion of "normal hill" ski jumping for women. Like Anette, she is currently 24, will be 25 at the time of the 2010 Games, and will be 29 when the 2014 Olympic Winter Games take place in Sochi, Russia.

Plaintiffs' Document 1388-89, Common Book, tab 1

52. Lindsey is the current record holder on the Whistler Olympic Park normal hill ski jump – a record she set at the Canadian National Championships in January, 2007. She beat all of the American male jumpers on the Large Hill during the same competition, starting from the same "gate" as the men. She has become a power of the sport for women.

Notice to Admit, paras. 170-177

53. Lindsey started as a ski racer, switching to jumping when jumps were built in her home town of Park City, Utah, when she was 7 or 8. She began ski jumping competitively as an 8-year old. Her rise from local competitions around Park City to World Champion was the result of 16 years of perseverance. She sacrificed schooling and financial security, and had to fight against resistance to her participation in order to train and compete.

54. In perfecting her jumping, Lindsey has trained, traveled and worked as hard as the male colleagues who can participate in the 2010 Games while she cannot. She is not treated like the elite athlete she is, and is denied respect and worth as a human.

55. Participation in the 2010 Games would show Lindsey that she, her dedication and her accomplishments, are worthy of the recognition of being able to compete on the highest stage of her sport. For Lindsey, "simply being able to compete in the Olympics is more important ... than winning an Olympic medal". That said, given Lindsey's reaction to winning the World Championships, it can be expected that, like any great athlete, that view may change once she finds herself staring down the ramp of the normal hill jump at Whistler Olympic Park!

56. Participation in the Olympics would also give Lindsey the chance to gain some financial security. She has been informed by various sponsors that they cannot provide her with sponsorship because she will not be recognized as an Olympian. She has been informed by current sponsors that their sponsorships could be increased if she was allowed to be an Olympian. Such sponsorships would allow her to extend her competitive career and perhaps improve her financial security in the short term. Over the longer term, Lindsey hopes to parlay the sacrifices that she has made to become an elite ski jumper into a career coaching the next generations of women jumpers. Her experience as a jumper and a part-time coach has convinced her that the inclusion of women in the Olympics will increase participation of women in the sport, especially at the elite levels as increased sponsor dollars ease the financial burden and make it more similar to that of the men. Of course, the Olympics themselves would provide young women with a forum for recognition.

Van Affidavit (reference for paragraphs 51-56 of this Argument)

57. Ulrike Grassler is a 21-year old German. She was the silver medalist at the world championships, and finished third overall on the Continental Cup this year. This pushed her back to the top level of women's jumpers after the 2007/2008 season, where she finished 10th overall on the Continental Cup. Ulrike first showed her consistent prowess at the elite international level in the 2006/2007 season when she finished second overall on the Continental Cup.

> World Championship Standings, Plaintiffs' Documents 1388-89, Common Book, tab 1
> Continental Cup Standings, Plaintiffs' Document 1422-23, Common Book, tab 2

58. Like so many of the other Plaintiffs in this case, Ulrike's initiation to ski jumping had a family connection. Her brother, older by 3 years, was a ski jumper and she followed him onto the hills as a 6-year old in 1994. She trained and competed in her town of Eilenburg, Germany, until she was 13. At that time, she decided that she wanted to compete at a higher level, and so moved 2 hours away from her family and friends to attend boarding school in Kilgenthal.

59. Since then, Ulrike has trained once or twice a day during the school year, and twice a day, from August to April, when she is not in school.

60. Ulrike acknowledges her good fortune because the German Ski Federation has been supportive of women's jumping since 2004 which has helped provide her with the opportunity to attend a sports school, and has helped the growth of the sport in Germany, a country where ski jumping is very popular. The German national competitions have become very competitive,

even for someone as accomplished as Ulrike. These women's competitions have sufficient numbers for two classes, and Germany is able to field two national teams. This she credits to the support the German Federation has provided to women jumpers since they were recognized on the Continental Cup in 2004.

61. At paragraph 27 , Ulrike lists the expenses to which the support from her Ski Federation and her sponsors are allocated. That the lack of similar support in other countries affects the level of women's participation on the sport is evident from the fact that the support in countries where it is provided is so recent.

62. Like Lindsey and Anette, Ulrike sees the benefit of participation in terms of self-fulfillment, financial security and in relation to the good of the sport. It has been her dream to compete in the Olympics, and the ability to do so, both for the competition and the experience, would be the fulfillment of that dream. She also believes that the exposure that would accompany participation in the 2010 Games would lead to more sponsorships, enabling her to make a living from ski jumping and, hence, to extend her career. Finally, she believes that the failure to include women in ski jumping in the Olympic Games is the biggest hurdle women jumpers have to overcome.

Grassler Affidavit (reference for paragraphs 57-62 of this Argument)

63. At 18, Nathalie de Leeuw of Calgary, Alberta, is Canada's champion. She is the highest ranked Canadian ski jumper – male or female. She would represent Canada's best hope for an Olympic medal in 2010. In the three years that Nathalie has competed on the Continental Cup

for Canada, she has had five podium finishes. She was 11th at the world championships and was ranked 5th overall on the women's Continental Cup as of the end of February.

64. As a Canadian, it is especially important to Nathalie to compete in the 2010 Games. For her, the question is one of recognition. Nathalie finds it discouraging that despite her efforts to perfect her sport, and despite the efforts of her female colleagues and competitors, they are not regarded as worthy of recognition, though the men who put in similar efforts and are similarly talented are recognized.

de Leeuw Affidavit (reference for paragraphs 63-64 of this Argument)

65. Jessica Jerome is a 22-year old American ski jumper. She has had 15 to 20 podium finishes in her international career stretching back to 2002. Between the normal hill, large hill and nordic combined events, she has been the U.S. national champion seven times. In 2005/2006 she finished 5th overall on the International Ski Federation ("FIS") points list.

66. When Jessica was 7, a group of ski jumpers visited Jessica's school and she was taken by the sport. She jumped recreationally until she was 12 or 13; then, after discussion with her parents, she committed to the sport and began serious training with male jumpers. By the time she was 15, Jessica, along with fellow jumper Lindsey Van, was chosen as a "forejumper" at the 2002 Olympics in Salt Lake City, because she was ranked in the top 20 of all ski jumpers in the United States – male and female.

67. To pursue her sport, Jessica has battled through injury and being denied access to certain high level competitions because of her gender. She has sacrificed schooling, her personal life, her own financial security, and the bank account of her supportive parents.

68. For Jessica, the ability to participate in the Olympics is important because it would acknowledge her devotion to ski jumping, because of its positive financial impact and the resultant ability for her to stay in the sport, and because of the positive impact she expects it to have on the sport in the future. Participation in the 2010 Games is particularly important for Jessica because, for financial reasons, she believes that she will not be able to continue to ski jump at the elite level until 2014 if she is not allowed to participate in 2010.

Jerome Affidavit (reference for paragraphs 65-68 of this Argument)

69. Jenna Mohr is a 21-year old German who began ski jumping when she was 5. At 8, she started her competitive career, ski jumping at small hills around Germany. She beat the boys against whom she competed. As she got older, she was able to enter a higher level of competition and began to compete against other girls. She has continued training at the level and intensity of her male colleagues since she began competing against other girls.

70. When Jenna was 16, the German Ski Federation started its first national team for women. Even in a country like Germany, where ski jumping is very popular, the support of the Federation only followed a fight for it.

71. To Jenna, the Olympics represent the highest level of competition in ski jumping. Ski jumping is something that Jenna has dedicated her life to. As she says, "ski jumping is not just a hobby, it is a job. In my life, ski jumping comes first and everything else comes second." Jenna feels that "[n]ot being allowed to compete in the Olympics [because I am a woman] makes me feel like a lesser member of society." It makes her "wonder why we train so hard".

Mohr Affidavit (reference for paragraphs 69-71 of this Argument)

72. If women can ski jump at the 2010 Games, 17 year old Katherine Willis will be Canada's dark horse. After starting jumping when she was 8, she began training and competing with the boys in Calgary. By 2004, she had worked her way up to qualify for the Canadian national team, and she then began competing on the Continental Cup circuit.

73. Katherine was the first Canadian woman to win a Continental Cup competition, at Klingenthal in 2005. In 2006/2007, she followed this up with a win at Schonach, a bronze at Breitenberg and a silver at the junior world championships. She finished the 2007/2008 season ranked 9th in the Continental Cup standings after finishing in 3rd place in two Continental Cup events.

Willis Affidavit (reference for paragraphs 72-73 of this Argument)

74. Katherine is in grade 12 and her 2008/2009 season was cut short because she could not sacrifice the diploma exams that will allow her to graduate. Nevertheless, she has continued to dedicate herself to pursuing excellence in ski jumping.

75. For Katherine, participation in the 2010 Games "would serve to affirm the work that I have put into perfecting my ski jumping and my accomplishments as an athlete." She says that "[i]t would mean a lot to me to be put on the same level in this regard as the boys with whom I trained when I was a younger girl."

Willis Affidavit (reference for paragraphs 74-75 of this Argument)

(ii) The Modern Pioneers

76. From 1994 to 1999, Marie-Pierre Morin was the best female ski jumper from Canada. "From" Canada as opposed to "in" Canada is apt, as Marie-Pierre had to train in Lake Placid in the United States. This was because the Canadian ski jumping establishment would not accommodate women at our jumps in Calgary. Only men were allowed, and the Canadian development program was open only to men until at least the late 1990s.

77. Instead of being able to go to a sports school like her American colleagues at Lake Placid, or like her male childhood friends who played major junior hockey in the Ontario Hockey League, Marie-Pierre could only participate in ski jumping by taking all her schooling by correspondence. She persevered. Her parents personally paid for all of her training and travel for competitions. Meanwhile, the Canadian males at her level were being supported through a combination of funding from Ski Jump Canada, Canadian Ski Federation and the federal government.

78. The combination of women's exclusion from the Olympic Games and the sacrifices made by Marie-Pierre and her family eventually drove her out of the sport. Before 1999, Marie-Pierre had been told by coaches and other officials that women would be included in the 2002 Olympics. This had kept her motivated to continue her tremendous sacrifices in order to compete at the elite levels (which were the Gran Prix's in the 1990s). But by 1999, it became apparent to Marie-Pierre that women would in fact remain barred from the 2002 Olympics. She was turning 18, and starting to realize that her parents could no longer support her financially. In order to stay in the United States to train, she would have to get a job, which she could not do without acquiring American citizenship. At that point, Marie-Pierre gave up.

79. The 1990s were the first time that women were officially welcomed into international ski jumping competition, which was followed by women being granted participation in the Continental Cup Circuit. The current Continental Cup contenders owe their careers to Marie-Pierre and those like her that pushed the sport despite the significant obstacles put in their path.

80. For Marie-Pierre, the Olympics were the ultimate competition and regardless of the result of this lawsuit, they will come too late. She is a Plaintiff because she does not want the sacrifices she made to push herself and her sport to have been made in vain, and because she does not want her story and her retirement to become that of the current contenders.

Morin Affidavit (reference for paragraphs 76-80 of this Argument)

81. Along with Eva Ganster, Karla Keck is the "dean" of women's ski jumping. She is a 33-year old American from Wisconsin who started ski jumping as a young girl because she comes from a ski jumping family. Her father, Robert Keck was on the American men's ski jumping team from 1961 to 1964. Her older brother John was also a ski jumper, and Karla got into the sport after watching him.

82. When they were young, Karla and her brother were coached by their father. She competed for the first time in 1980 when she was 5. From 1980 through 1992, the Keck family spent nearly every winter weekend travelling the American midwest to ski jumping competitions. Karla competed against the boys, and often beat them. Perhaps it was not a fair competition, given that by age 9, Karla had determined to take the sport seriously, and had begun dry land training as well as summer jumping on "plastic" jumps.

83. Karla's pursuit of ski jumping became even more serious in the 1990s. She qualified for and competed in the junior Olympics in Steamboat Springs. She regularly finished first or second at "Central Division" competitions. In 1991 she finished 7th at the junior Olympics in Anchorage, in a field that included future Olympic ski jumpers: Randy Weber, Todd Lodwick, Casey Colby and Alan Albourn.

84. Because of her accomplishments, Karla was invited to train and compete at the Austrian school for skiers in Stams, Austria, in 1992. This allowed Karla to complete school while continuing to pursue high level ski jumping. Like any elite athlete who must sacrifice "regular" school for his or her sport, being in Stams left Karla somewhat isolated. She was there with one other woman jumper, Eva Ganster, and a number of men. All the participants in the program trained and competed together. Only the men, however, were able to go on to become Olympians, and many of them did.

85. As Karla progressed, she began to understand that, as a woman she would be treated differently than the men.

86. In 1991 she was not selected for an American trip to train in Finland despite having placed better than some of the men selected. After she had been chosen to train in Austria, her male colleagues in Wisconsin became resentful of her and her success.

87. When she was about to enter university in 1994, her eligibility for the U.S. Olympic Education Center (granted to her because of her results against male jumpers) was taken away because she was a woman. Though this was eventually reinstated, she was not allowed to

compete as a representative of the USOEC. Nor was she eligible for any funding from the program, because she was unable to participate in the Olympics.

88. Once women's competitions had become officially sanctioned, they were put on regardless of the prevailing conditions. This was because women ski jumpers feared that cancellation of an event would be used to stigmatize women's ski jumping generally. In effect, this was a catch-22, since bad conditions would prevent an event from showcasing the sport. On such event in 1999 was memorable. Under heavy rains, the men's event was cancelled. For fear that a cancellation would be used against the women, the coaches started the first round of the competition. Rain water was pooling on the jump but they went ahead anyway. Eventually, the competition was ended after one run. The male jumpers did not have to jump that day.

89. Throughout her career, Karla was worried that a fall would be used to diminish not only her own reputation but that of all women participating in the sport. Under this pressure, she turned herself into a more conservative jumper, meaning that she would not fly as far as she was capable.

90. Negative comments, from other jumpers, fans, coaches and officials, dogged Karla's career, demeaning her and her athletic accomplishments and abilities. They ranged from an Austrian spectator who told her that he knew how to make her "V" style spread wider, to being told that her breasts would prevent her from getting a good run in, to comments such as "girls can't jump" and "what is 'she' doing here?". These were obviously discouraging, but Karla persevered.

91. Throughout her competitive career, Karla competed ostensibly as an American, although there was no team for her until the final year of her career when the U.S. Women's Ski Jumping Team was founded. This meant that throughout her career, she participated in international ski jumping on her own. She was not extended support by the U.S. team such as the men got, whether that be in relation to the significant financial costs of international competition or the invaluable benefits of coaching, or more minor matters such as the acknowledgement that came with a U.S. Team jacket.

92. Even though she was the top-ranked female ski jumper in the United States, and even though she was highly ranked against the men, Karla could get no sponsorships of any significance. From her current perspective as director for the U.S. women's team, she has come to the conclusion that this was largely due to her inability to participate in the Olympics.

93. For Karla, letting women participate in the 2010 Games would finally recognize the abilities, dedication and accomplishments of the athletes on the US Team of which she is a director, as well as the accomplishments and sacrifices of herself and her pioneering colleagues such as Eva Ganster. Equally important is the effect such acknowledgement will have on future of the sport. Karla recalls that after women were denied participation in the 2002 Games, a number of her colleagues retired, leaving the sport somewhat depleted. Karla fears that this will also be the result of continued exclusion from the 2010 Games, and that it will be used to justify future exclusion by discouraging women from pursuing the sport.

Keck Affidavit (reference for paragraphs 81-93 of this Argument)

94. Monika Planinc of Slovenia is a 22 year old jumper who was forced by her ski federation to choose between further competition and a university education. This is a choice that Slovenian men do not have to make. The treatment that she has received as a woman jumper in Slovenia has disappointed her to such a degree that she is willing to participate in this lawsuit despite the threat of her former coach to bar her from the Slovenia national team.

95. Slovenia is a country where ski jumping is very popular. It is also one in which women find themselves nearly excluded from the sport due to an officially established bias against them. There is a Slovenia women's team, but it receives no financial support. In contrast, male ski jumpers receive salaries when they compete for the Slovenian national team, and the male team receives approximately €2,000,000 per season, as well as cars for the athletes. The female team's budget is €30,000 per season. Its members get no special consideration at university because they cannot compete in the Olympics, whereas the men's university schedules are adjusted to their training and competition needs because they are Olympians.

96. For Monika and other Slovenian female jumpers, inclusion in the Olympics is important not just for practical reasons such as funding and education, but also for more deeply personal reasons related to recognition of their accomplishments and dedication. As she says, "Slovenian male ski jumpers are revered and respected as heroes and idols. Meanwhile, it appears that most people do not even know that women's ski jumping exists and women ski jumpers are not respected as athletes. Indeed, it appears to me that we are resented for our attempts to participate in this 'male' activity."

Planinc Affidavit (reference for paragraphs 94-96 of this Argument)

(iii) The Dreamers, the Prospects and the Future

97. Jade Edwards is an 18 year old Canadian jumper who, after winning a silver medal in the men's Canadian Championships in 1999, was seriously injured in 2006 before she was able to qualify for the Canadian National Women's Team to compete in the Continental Cup. She continues to work herself back into competitive shape. Even though she will not be ready to compete in the 2010 Games, it would mean a great deal to her if her colleagues and competitors could, because this would also serve to recognize her accomplishments as a jumper.

Edwards Affidavit

98. Charlotte Mitchell is a 14 year old on the Alberta Ski Jumping and Nordic Combined Team who started ski jumping when she was 8. She has competed in two Continental Cup competitions, scoring points in one of them. This is what she says about the Olympics:

> I want to win a gold medal at the Olympics in ski jumping for Canada some day. I would like to set Olympic gold as my long term goal in ski jumping but, unlike my 16 year old brother Eric who is on the Canadian men's team and with whom I train, I cannot see this as anything more than a dream because I am female and thus not included at the Olympic Games.

Mitchell Affidavit

99. Megan Reid is a 15 year old ski jumper on the Alberta Ski Jumping and Nordic Combined Team who has been ski jumping for 5 years. She now trains 5 to 6 times per week and is working to qualify for the Canadian National Team so that she will be able to compete in Continental Cup events. This is what she has to say about the Olympics:

> Since I started jumping, I have trained alongside boys, working just as hard as they do, overcoming the same obstacles. I have found myself to be treated their equal in ski jumping with the exception of them being able to have Olympic dreams while, because women remain excluded from Olympic ski jumping competition, I cannot. Some of my male team mates are currently trying to qualify for the Olympics. This is my ultimate

> goal too, but because women are currently excluded, I am not sure whether it is something that I will ever be able to achieve regardless of how hard I train or well I compete.

Reid Affidavit

(b) The Historical Context Through Which Female Ski Jumpers have Suffered

100. Historical perspective reveals the full scope of the discrimination inherent in VANOC's failure to provide an opportunity for women to participate in ski jumping at the 2010 Games.

(i) Historical Prejudice against Women in Sport and in the Olympic Movement Generally

101. It is a notorious fact in Canada that women have historically been excluded and discouraged from undertaking athletic pursuits.

102. Sport Canada, a department of the federal Ministry of Heritage, considered the issue of the exclusion of women from sport sufficiently significant to create a "Sport Canada Policy on Women in Sport" in 1986. The Policy was a direct response to the new gender equality obligations created by the *Charter*. It recognized that "history has demonstrated that opportunities for women to develop either participants or leaders at any level in the sport system have been significantly fewer than those made available for men."

Notice to Admit, Canada vol, tab 32, Common Book, tab 3

103. The Policy describes the societal and structural biases that have prevented women's full participation in sport, and is worth quoting at length:

> Like the majority of Canadian institutions, sport is essentially dominated by men. Although Canadian society is less patriarchal than in years gone by, some structural injustices are so deeply rooted in the general arrangements of society that they escape notice.

> For example, a 10-year old girl who wishes to play organized competitive sport may be as talented as and, in some cases, stronger and faster than her male counterpart. And yet, because of the traditional rules or mandate of the sport organization in question, she is unable to participate because of her gender. Another example can be found in the disproportionate number of events on the Olympic Calendar for men and women. These kinds of structural injustices - generally in the form of a complete lack of or very limited opportunity for female sport involvement - do not discriminate against any single individual female, but discriminate against females as a group.
>
> ...systemic injustices refer to injustices or discrimination that are a part of a system rather than being intentionally directed at women. Systemic injustices are conditions that apply equally to everyone but that negatively affect opportunities or advancement for specific groups of people. An example of a systemic injustice is the lack of women coaching at the high performance level. There is no rule disallowing this. However, conditions in sport and society at large have precluded their advancement.
>
> Numerous reports and studies have demonstrated the inequalities that exist based on facility allocation, dollars spent and time apportioned to women's sport. Studies in the U.S. and Canada have unequivocally demonstrated that the recent growth in women's participation has been due to the increase in opportunities (Coakley, 1978). As resources for women continue to grow, in all likelihood so will opportunities and hence participation.
>
> The majority of females have, for a long period of time, been subjected to informal types of discrimination. Traditionally, young girls are not necessarily discouraged from being physically active but are not given the same kind of encouragement that boys receive (Coakley, 1978). Over a period of time, this subtle form of discrimination has long-term detrimental effects on the quality and quantity of female participation in sport. The traditional roles ascribed to girls and women have severely restricted their participation rates. If young people do not see women in roles related to sport and physical activity, a process of restrictive and adverse sex-stereotyping begins to take shape. Unless this situations is changed, the advancement of women in sport will be severely hampered.
>
> This statement is not intended to underestimate the importance of other support systems including the way in which attitudes and images are portrayed in both the education system and the media. Positive role models can have a significant impact on the learning process. However, opportunities for girls and women to participate in the sport system need to be available in order to make the role model effective.

Notice to Admit, Canada vol., tab 32, p. 3, 7-8, Common Book, tab 3

104. These statements are applicable to sport generally, to the Olympics as a whole and to ski jumping in particular.

105. The history of women's participation in the Olympics is described by Pregerson J. in his dissenting reasons in *Martin v. International Olympic Committee,* (9th Cir. 1984).

> Barron Pierre de Courbertin, founder of the modern Olympic Games, described the Olympics as 'the solemn and periodic exaltation of male athleticism with internationalism as a base, loyalty as a mean, art of its setting, and female applause as reward.' As late as 1954, the International Olympic Committee (IOC) voted to limit women's participation to those events 'particularly appropriate to the female sex.' This attitude toward women has resulted in a continuing disparity between male and female opportunities to compete in the Olympic Games.
>
> [. . .]
>
> Against this background of institutional, gender-based discrimination, the IOC in 1949 adopted a facially neutral policy designed to limit the number of new events added to the Olympic program. Because women started from a position of distinct disadvantage in the total number of Olympic events, this policy, now Rule 32 of the Olympic Charter [Rule 47 of the 2004 Olympic Charter], affected women athletes disproportionately and contributed to continuing gender-based disparity in opportunities for Olympic competition.
>
> Hansen Affidavit, Exhibit C

106. That disparity continues today. In fact, even if the Plaintiffs are able to compete in the 2010 Games, that disparity will linger, since there would be only one ski jumping event and no nordic combined events open to women.

107. United States District Court Judge Kenyon reviewed the issue in the trial decision of *Martin v. International Olympic Committee*:

> No women were allowed to compete in the 1896 Athens Olympic Games. Although women first competed in the 1900 Paris Games, it was not until the 1928 Games held in Amsterdam that women were allowed to compete in track and field contests. After the 1928 Games, the IAAF executive committee agreed to limit the distance of women's races to no longer than 400 meters. This limitation was made because some competitors collapsed from exhaustion after the women's 800 meter race, and remained in effect until the 1960 Games were held in Rome.
>
> At no time have women achieved parity with men in the Olympic Games either in the number of competitors participating or in the number of events staged. Additionally, the plaintiffs cite a number of remarks by past IOC presidents that "all female events be eliminated from the Games," and that women be allowed to compete only in "aesthetic

> events." While refusing to eliminate women's events entirely, in 1954 the IOC did vote to limit women's participation in the Games to those events "particularly appropriate for the female sex.
>
> Hansen Affidavit, Exhibit B, pp. 6-7

108. Though rooted in history, this bias against women manifested itself once again in the fact that women had to apply to the IOC for inclusion of ski jumping event in the 2010 Games, while men's jumping is included automatically.

(ii) Historical Prejudice in Particular Relation to Ski Jumping

109. Ski jumping is a microcosm of sport. It is a "man's sport" in which women have suffered particularly vigorous exclusion and marginalization. The affidavit of Dr. Patricia Vertinsky traces this history.

110. Dr. Vertinsky notes that the origins of ski jumping trace back nearly 200 years, to a Norwegian belief that it was a method for turning boys into men. As competitions were organized for men, an evolving rationale about the supposed frailty of women was used to justify, if not dictate, the exclusion of women.

> Vertinsky Affidavit, Exhibit B, paras. 1-8 and 18-20, pp. 39-42

111. Though women were jumping from the 1930s on, they could compete only in competitions they organized themselves, such as the intra-club competitions held by the Penguin Ladies Ski Club. Sometimes, rarely, they were allowed to jump as exhibition jumpers.

> Vertinsky Affidavit, Exhibit B, paras. 9-17, pp. 40-41

112. Even as physicians began to encourage participation in physical activity for women, vigorous activities like ski jumping remained discouraged. Ski jumping by women was considered a "very daring experiment" to be "strongly advised against".

Vertinsky Affidavit, Exhibit B, paras. 18-19, p. 41

113. This view subsisted in the ski jumping establishment until the late 1990s and mid 2000s, even as competitions for women were starting to be organized. In 1975, Anna Fraser Sproule, subsequently a Canadian Olympian in freestyle aerials, was told that she could not participate in an Ottawa ski jumping event because it might harm her reproductive organs. In the 1990s, Mr. Kasper, the then and current president of FIS, expressed his belief that women should not ski jump because the female uterus might burst during landing. FIS has justified the exclusion of women on the basis that the women's spine could break on impact because of particularly fragile bones. In 1995, the Finnish coach, Matti Pulli, said that he believed that ski jumping was too demanding for women and that they should not do it. As recently as 2006, Mr. Kasper, the head of FIS, said that ski jumping did not seem "appropriate for ladies from a medical point of view."

Vertinsky Affidavit, Exhibit B, para. 20, p.42
Schmitz Affidavit #2, Exhibit A

114. None of these justifications for exclusion is justified, as is so amply demonstrated by the Plaintiffs and their personal histories. The Plaintiffs are as capable as their male colleagues of sustaining significant physical injury if they crash, but they are also as physically capable as their male colleagues of jumping successfully without injury. The stereotypes and prejudices that inform the opinions set out above have no basis in reality.

Sagen Affidavit, para. 12
Van Affidavit, para. 9
Jerome Affidavit, paras 5, 13-14;
Edwards Affidavit, para. 7;
Pappas Affidavit, Exhibit A and B;
Vertinsky Affidavit, para. 4(c)

115. The effect of those stereotypes and prejudices is pernicious, because it remains today. Women's participation in ski jumping is at a much lower rate than it could have been. This created a vicious circle, where the reduced participation reinforced the belief that the sport was not appropriate for women, which further reduced participation and so on.

Vertinsky Affidavit, para. 4

116. Justifying women's continued exclusion from the Olympics on the *very basis* of this reduced participation is, thus, both the direct result and the perpetuation of the prejudice that has tried to keep women out of ski jumping for so long.

Sieber Affidavit, para. 87, Exhibit 29, p. 672

117. Given the importance of role models, exclusion from the 2010 Olympics will in itself put further roadblocks in the way of women's participation in ski jumping, because it will continue to discourage the future and grassroots participation needed for competition at the most elite levels.

D. Application of Law to Facts: Analysis of Section 15(1) Violation

118. As discussed, the Plaintiffs will address the violation of section 15(1) in relation to: (1) the denial of benefit; (2) the source of this benefit in "law"; (3) the adverse effects at work in

this case; and (d) the discrimination in relation to the "human dignity interests" of the Plaintiffs.

(a) The Plaintiffs are Denied a Benefit on the Basis of Sex

119. VANOC is treating the Plaintiffs differently from elite male ski jumpers solely because they are women. This is differential treatment based on the enumerated ground of sex. To elite male ski jumpers, VANOC is providing the benefit of planning, organizing, financing and staging three ski jumping events. To the Plaintiffs, VANOC is providing nothing. Indeed, VANOC's failure to provide this benefit to the Plaintiffs is ultimately harmful, because it makes their sport – and thus their accomplishments, athleticism, dedication and sacrifice – appear categorically undeserving of acknowledgement.

> Notice to Admit, pars. 213-214;
> Amended Statement of Defence, para. 2

120. That there is a "benefit" provided by VANOC's planning, organizing, financing and staging of events in the 2010 Games cannot be seriously contested. VANOC admits that "the opportunity to compete and watch competition on the Games' facilities during the Games is generally regarded as valuable." The Plaintiffs' evidence overwhelmingly demonstrates the very real value this benefit would have for them, both in personal terms, in terms of the support that would be made available to them from other sources, and in terms of what such recognition and opportunity would mean to the growth and prospects of their sport.

Notice to Admit, para. 10;
Sagen Affidavit, paras. 23-24 and 27-30;
Mohr Affidavit, paras. 20-23;
Van Affidavit, paras. 18-39;
Jerome Affidavit, paras. 35-39 and 42;
Grassler Affidavit, paras. 25-26 and 29-31;
Planinc Affidavit, paras. 24-29 and 31-32;
Morin Affidavit, paras. 16-17;
Keck Affidavit, paras. 60, 62, 72, Exhibit A
de Leeuw Affidavit, paras. 5-7;
Willis Affidavit, paras. 11-12;
Mitchell Affidavit, para. 9;
Reid Affidavit, paras. 6-7

121. In fact, given the historical bias against women's ski jumping, the planning, organizing, financing and staging of a ski jumping event for women by VANOC would provide a benefit for the Plaintiffs regardless of the obstinate resistance of other organizations, because of the recognition they would bring. As Ms. Sagen states at paragraph 25 of her affidavit:

> I do not feel that women's ski jumping is considered a real sport because we are not allowed to participate in the Olympics. I train and sacrifice as much as male ski jumpers, and I just want the credit and recognition for all my hard work.
>
> Sagen Affidavit, para. 25

122. By staging an event for women's 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. By refusing to do so, VANOC agrees that they are not. Recognition is about the symbolism that accompanies these public statements as much as it is about the actual participation. Each of these factors are, themselves, benefits.

123. VANOC's refusal to plan, organize, finance and stage an event in which the Plaintiffs can participate bars them not just from the opportunity to participate itself; it also bars them from the

recognition that would accompany such participation. In contrast, VANOC is providing the benefit of both the opportunity to participate and the concomitant recognition to male ski jumpers.

124. That the benefit is denied on the basis of sex is obvious. There is no evidence whatsoever that male ski jumpers, as a category, should be more entitled to it than women ski jumpers. Women ski jumpers share *all* of the males' characteristics relevant for qualification for the benefit of Olympic ski jumping, except for their sex. This meets the relevant legal criteria for the comparative analysis set out by Binnie J. in *Hodge v. Canada (Minister of Human Resources Development).*

> *Hodge v. Canada (Minister of Human Resources Development)* [2004] 3 S.C.R. 357, 2004 S.C.C. 64 ("*Hodge*") at para. 1

125. Each of these factors are, themselves, benefits. The Plaintiffs have sacrificed and trained similarly to male ski jumpers and other elite athletes to get to the top of their sport. They are obviously capable of jumping at a high level, confirmation of which can be found in Exhibit B of Mr. Pappas' affidavit. There are enough of them to run a competition whose outcome could not be said to be a foregone conclusion.

Reid Affidavit, para. 6
Mitchell Affidavit, para. 9
Keck Affidavit, paras. 5-12, 16-21, 29-30, 33-43, 63, 66-71;
Morin Affidavit, paras. 5-12;
Grassler Affidavit, paras. 9-20;
Jerome Affidavit, paras. 6, 13-14, 16, 25-27, 33
Van Affidavit, paras. 3-4;
Mohr Affidavit, paras. 4-10, 21;
Sagen Affidavit, paras. 3-8, 12-15;
Sieber Affidavit, para. 78
Pappas Affidavit, Exhibit B

126. The IOC's analysis as set out in Mr. Sieber's Affidavit cannot detract from this conclusion. The "basis" for the denial of the benefit does not depend on the intention behind that denial. Rather, the question is whether the Plaintiffs are similarly situated to the comparator group. Accordingly, the fact that men's ski jumping has been in the Olympic Winter Games since 1924 while women's jumping would be a new event is irrelevant to the conclusion that the men and women are not similarly situated.

Eldridge, supra at para. 62;
Law, supra at para. 57
Hodge, supra at para. 23
Sieber Affidavit, paras. 74-87;
Notice to Admit, paras. 151-154

127. The IOC's use of its evaluation criteria is similarly inapt to the evaluation of whether male jumpers are similar situated. In the context of the complaint, giving effect to those criteria would amount to a finding that the women were not similarly situated to the men precisely *because* they have been subjected to discrimination. Such an approach would completely frustrate the purpose of section 15(1).

Law, supra at para. 63, 64

128. VANOC is providing a benefit to male ski jumpers that it is not providing to women including these Plaintiffs. The reason for its failure to provide the benefit to women, including the Plaintiffs is, that they are women.

(b) "The law" is the source of the benefit.

129. A benefit provided under contract can be a benefit "of the law" for the purposes of section 15(1). The term includes "all acts taken pursuant to powers granted by law", where "law" includes the common law, and thus includes acts taken pursuant to contractual obligations.

> *Douglas, supra* at 585;
> *McKinney v. University of Guelph,* [1990] 3 S.C.R. 29 ("*McKinney*") at 276-77

130. The planning, organizing, financing and staging of the 2010 Games, including its events, are acts that VANOC is taking pursuant to contractual obligations and its own bylaws.

> Furlong Affidavit, Exhibit 18, p. 1763, clause 11.4(a);
> Notice to Admit, By-Laws vol., tab 1, Common Book, tab 4.

131. Clause 11 of the Multiparty Agreement obliges VANOC to "organize, plan, finance, stage, manage, promote, and conduct the Games". This agreement was created before VANOC came into existence. VANOC became a party to it on December 23, 2003.

> Furlong Affidavit, paras. 46 and 47; Exhibit 18, p. 1763, para. 11.4(a)

132. VANOC's bylaws, set for it by the Governments and other parties to the Multiparty Agreement, similarly obliges it as its first purpose to "support and promote the development of sport in Canada by planning, organizing, financing and staging the XXIst Olympic Winter Games".

Furlong Affidavit, Exhibit 18, p. 2.1;
Notice to Admit, By-Law vol., tab 1, Common Book, tab 4.

133. The obligations so expressed include the obligation to plan, organize, finance and stage the *events* in the Games' disciplines. VANOC has agreed that the "Olympic Games are a collection of sporting competitive events in different sporting disciplines". The point is self-evident. VANOC would not be planning, organizing, financing and staging the 2010 Games if it was not doing so with respect to the events, as without the events there would be no Games.

Notice to Admit, para. 53(a).

134. In summary, VANOC is planning, organizing, financing and staging events in the discipline of ski jumping in partial fulfilment of an obligation to the Governments to plan, finance, organize and stage the 2010 Games. This activity is thus a benefit of the law.

(c) Source of Inequality

135. *Law* stresses that the source of the inequality must be identified, by asking this question:

> Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) 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.

Fundamentally, the issue in this respect is how the discrimination came to pass. The first point addresses a formal discrimination, while the second addresses adverse effects. Either constitutes a denial of equality in terms of section 15(1).

Law, supra at paras. 24, 25

136. In the present case, the inequality came to pass through both formal and adverse effects discrimination. This accords with the multiple sources of the exclusion:

- The IOC, by subjecting women's ski jumping to its criteria for the evaluation of new events but not doing so for men because men's events have always been part of the Olympic Winter Games, has always drawn a formal distinction between men and women. VANOC has and plans to continue to implement the IOC's formal discrimination, by offering the benefit of planning, organizing, financing and staging a ski jumping discipline for men but not women.

- In using its criteria without recognizing and accommodating the historical exclusion of women from the sport of ski jumping by going behind the numbers to examine women jumper's true characteristics and the impact of historical discrimination on the assessment, the IOC has engaged in an adverse effect discrimination. VANOC has and plans to continue to implement the IOC's adverse effect discrimination, by not recognizing how historical discrimination led to the IOC instruction, and by failing to ameliorate this disadvantage by disregarding the IOC instruction and planning, organizing, financing and staging an event for women regardless.

The Plaintiffs will discuss both the formal discrimination and the adverse effect discrimination in turn.

(i) The Inequality is a Formal Distinction Between Men and Women.

137. Men will be ski jumping in the 2010 Games because they have always ski jumped in the Olympic Winter Games. But for the outcome of this case, women will not be ski jumping in the

2010 Games because they have never ski jumped in the Olympic Winter Games. This is because VANOC will plan, organize, finance and stage three events for men and none for women. It is a formal distinction between the treatment VANOC provides male ski jumpers, and a similarly situated enumerated group – female ski jumpers.

Notice to Admit, paras. 151-154

138. Once elite female ski jumpers had become similarly situated to their male colleagues, subjecting them to the differential treatment in planning, organizing, financing and staging events in the discipline of ski jumping constituted formal discrimination. VANOC's implementation of that treatment for the 2010 Games denies the Plaintiffs formal and substantive equality.

139. The IOC applies its criteria for the evaluation of prospective new events regardless of whether the applications are for wholly new events such as ski cross, or for a women's version of a men's event or events already included. While there may be a facial equality in such a process as between athletes generally, there is also a formal inequality established as between men and women. Women are subjected to this process while men are not. This has applied generally, and is of specific application in relation to ski jumping.

Sieber Affidavit, paras. 77, 78 and 80

140. In terms of sport in general and in relation to the question of track and field sports in particular, the effect of such evaluation on formal equality has been explained as follows by Pregerson J. in his dissenting reasons in *Martin v. International Olympic Committee.*

> Against this background of institutional, gender-based discrimination, the IOC in 1949 adopted a facially neutral policy designed to limit the number of new events added to the Olympic program. Because women started from a position of distinct disadvantage in

> the total number of Olympic events, this policy, now Rule 32 of the Olympic Charter [Rule 47 of the 2004 Olympic Charter], affected women athletes disproportionately and contributed to continuing gender-based disparity in opportunities for Olympic competition.
>
> Hansen Affidavit, Exhibit C, p. 74

141. That the IOC has gradually started to redress its blatant discrimination of the past is irrelevant to this case. This case is about ski jumping. It is about the rights of these Plaintiffs – not about all the other women who were told "next time" along the way.

> Sieber Affidavit, paras. 55-57 and 62

142. There is no evidence that the IOC subjected any of the men's ski jumping events to review before it instructed VANOC to plan, organize, finance and stage them. Indeed, ski jumping was contemplated in the bid book, a document prepared prior the determination of the sports and disciplines for the 2010 Games. Women's jumping, however was subjected to the review set out in Mr. Sieber's Affidavit.

> Notice to Admit, VANOC, vol. 1, tab 15, (p. 10 of vol. 2 of Bid Book), Common Book, tab 5.
> Sieber Affidavit, paras. 74-87 and Exhibit 1, p. 90, rule 47.2.3.

143. A comparison of the two shows the differential treatment that results from subjecting women ski jumpers to the IOC criteria while waiving them for their similarly situated male colleagues. According to Mr. Sieber, the IOC instructed VANOC not to plan, organize, finance and stage a ski jumping events for women primarily because of a lack of universality. The "universality" requirements for men's and women's events are set out in section 3.3.3 of the 2004 Olympic Charter which requires participation by men in at least fifty countries and women in thirty five countries.

Sieber Affidavit, para. 87, Exhibit 29, p. 672 and para. 71

144. Currently, FIS has registrations for male ski jumpers from 29 countries for all three events combined. That represents 58 percent of the required universality. Currently, FIS has registrations for female ski jumpers in 18 countries. That represents 52 percent of the required universality.[10]

Plaintiffs' document 1314-1366; Common Book, tabs 6 and 7

145. In other words, both men's and women's ski jumping fall short of the required universality by approximately the same degree. However, because men were already allowed to compete, the IOC did not subject them to its inclusion evaluation and instructed VANOC to plan, organize, finance and stage three events for them. Because women could not previously compete, the IOC subjected them to its inclusion process and instructed VANOC not to plan, organize, finance and stage any events for them.

146. This is a formal inequality that VANOC now asks this Court to be allowed to import and perpetuate in Canada. It may be that the IOC can legally engage in such formal distinction drawing when offering benefits in Switzerland. VANOC cannot do so in Canada. When it offers a benefit "of the law" it does so subject to our Constitution.

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[10] Note that the application of the "Olympic tradition" rule referred to at paragraph 72 of Mr. Sieber's affidavit would, had it been invoked to maintain men's ski jumping in this case show an even more blatant and intentional discrimination as the application, for benefit of a rule that similarly situated women did not have access too.

(ii) The Denial of Benefit Is an Inequality Created by Adverse Effects of Facially Neutral Criteria

147. Even assuming the unequal application of the IOC criteria explained by Mr. Sieber did not amount to a formal distinction between men and women, nonetheless there remains an adverse effect distinction in the application of these facially neutral criteria.

148. By implementing the direction of the IOC not to plan, organize, finance and stage a ski jumping events for women, VANOC itself imports this distinction. VANOC cannot do this and is obliged to disregard the direction of the IOC and to plan, organize, finance and stage a ski jumping event for women. The IOC may be able to draw distinctions between the benefits it provides to men and women in its activities in Switzerland. In its activities in Canada, VANOC cannot.

A. What is Inequality by Adverse Effects

149. An adverse effects discrimination is one where a facially neutral criterion excludes a group's access to a benefit, by attributing to the group a characteristic that does not reflect their true needs or abilities. *Eldridge* was a needs-based case; the need for healthcare was the same as between the hearing impaired and able, but without the assistance of sign language interpreters, was inaccessible to the hearing impaired. In *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, a human rights case that has been referenced in *Charter* litigation[11], the Supreme Court applied the principle to a facially neutral regulation for the employment of forest firefighters that effectively eliminated women from the occupation.

> *Eldridge, supra* at para. 71;
> *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 ("*BCGSEU*")

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[11] See for example *Auton, supra*; *Gosselin v. Quebec (Attorney General)* [2002] 4 S.C.R. 429.

150. In both cases, the Supreme Court required accommodation for the adverse effects discrimination. In *Eldridge*, it was the provision of sign language interpreters. In *BCGSEU*, it was the restoration of the complainant to her job as a forest firefighter. The underlying principle in adverse effects discrimination was expressed by the Supreme Court of Canada in *Eaton*:

> In *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 169, McIntyre J. stated that the 'accommodation of differences ... is the essence of true equality.' This emphasises that the purpose of s. 15(1) of the *Charter* is not only to prevent discrimination by the attribution of stereotypical characteristics to individuals, but also to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society as has been the case with disabled persons.
>
> The principal object of certain of the prohibited grounds is the elimination of discrimination by the attribution of untrue characteristics based on stereotypical attitudes relating to immutable conditions such as race or sex. In the case of disability, this is one of the objectives. The other equally important objective seeks to take into account the true characteristics of this group which act as headwinds to the enjoyment of society's benefits and to accommodate them.
>
> *Eaton, supra* at paras. 66-67

151. While this principle was expressed here in relation to disability and society generally, it is equally applicable to women in relation to the field of gender segregated sports where they, as women, are excluded from access to the benefit of participation in sanctioned competitions. In a field like ski jumping, which has historically excluded women because of prejudice and stereotype, a facially neutral rule for the inclusion of new events can have an adverse effect if it looks only at the number and frequency of events without considering the impact of doing so.

Notice to Admit, FIS, tabs 1, 2, and 7, Common Book, tabs 8, 9 and 10;
Vertinsky Affidavit, para. 4 and Exhibit B;
Keck Affidavit, paras. 4-70;
Morin Affidavit, paras. 8-10;
Sagen Affidavit, paras. 77-89;
Mohr Affidavit, paras. 11-12;
Van Affidavit, paras. 12-16;
Jerome Affidavit, paras. 29-34;
Planinc Affidavit, paras. 9-29.

152. Pregerson J. explained in *Martin v. International Olympic* Committee this as follows in relation to the distance runners' case regarding the State of California's *Unruh Civil Rights Act,* Cal. Civ. Code, s. 51 (West 2007).

> Contrary to the majority's belief, the existence of a facially neutral rule, such as Rule 32, which effectively perpetuates past discrimination, is also irrelevant to the Unruh Act analysis. The Act eschews *any* form or discrimination based on sex, race, color, religion, ancestry or national origin practiced or perpetuated by a business establishment.

Hansen Affidavit, Exhibit C, p. 683

Pregerson J.'s understanding of differential treatment, rather than the majorities, accords with the standards under our *Charter*.

153. Adverse effects in the context of this case is rooted in the IOC's application of a facially neutral standard of universality to women's jumping in a context where it could not be met because of historical discrimination.

B. The Adverse Effects

154. VANOC says that it is not planning, organizing, financing and staging a ski jumping event in which women can participate because it has been instructed not to do so by the IOC. Remarkably, before this instruction VANOC did conditionally support the idea, believing it to be

in the interests of gender equality and, presumably, the Games generally. Upon receiving the IOC instruction, VANOC changed its position to having no position.

> Amended Statement of Defence, para. 2;
> Bagshaw XFD, Q. 9-22 and 24-61, in particular 36-47;
> Defendant's document 31, Common Book, tab 11
> Defendant's document 91, Common Book, tab 12

155. Mr. Sieber, for the IOC, sets out the reasons for the IOC's instruction. References to the evaluation and criteria are set out at paragraphs 70-87 of his affidavit. Mr. Sieber invokes a wide variety of standards at various paragraphs. Some of these are contradictory, and it is thus difficult though not impossible to determine just how the IOC arrived at its decision. The combined effect of paragraphs 37, 66-67, and 86 suggests that the IOC's Executive Board adopted the conclusions of the Programme Commission for the reasons provided to it by that Commission, though Mr. Sieber does not actually swear that this occurred here.

> Sieber Affidavit, paras. 37, 66-67, 70-87, Exhibit 29, p. 672

Those reasons appear to be set out in Exhibit 29. At paragraph 87, Mr. Sieber references a document attached as Exhibit 29 saying that

> [o]n page 3 of this Exhibit is the reference to women's ski jumping and four points with respect to it. Although this Exhibit summarizes the evaluation by the Executive Board, the summary it contains with respect to women's ski jumping also reflects the thinking and deliberations of the OPC in its meeting earlier in November 2006.

156. The points in Exhibit 29 summarize why VANOC was instructed not to plan, organize, finance and stage a ski jumping event for women:

> Ski Jumping -- Women's Event
>
> - Universality of the event is very low considering that only 8 to 10 nations organize national championships.

- Only 10 nations represented in 2006 Continental Cup standings.
- Thus far, only 12 nations have won medals at international competitions.
- *Satisfies requirement of inclusion in at least two World or Continental Championships (although first World Championships planned for 2009, numerous continental championships took place in 2006)*

157. The Program Commissions' failure to make any consideration of gender equity issues, (or VANOC's obligations thereto) is striking.

> Sieber Affidavit, para. 87, Exhibit 29, p. 672

158. It is striking in light of the Program Commission's own mandate which, according to Mr. Sieber, includes consideration of "the social value of a sport (e.g. elements of ... non-discrimination)". It is striking in light of the IOC's own mandate in relation to gender equity, set out in the Olympic Charter and its supposed commitment to this goal. It is striking in light of Mr. Justice Pregerson's decision, the over twenty years that have passed since it was made, and the subsequent general acceptance of his understanding that a facially neutral rule can be discriminatory.

> Sieber Affidavit, para. 83, and Exhibit 1, p. 9 (s. 4&5), p. 10-11 (s. 6&7);
> Hansen Affidavit, Exhibit C, pp. 73-77

159. The IOC's failure to take into account gender equity is even more striking given that Canada's bid affirmed its strong commitment to human rights. The IOC was warned that the *Charter* would apply to the hosting of the Games in Canada. Mr. Furlong admitted this on discovery in relation to the Bid Book, in a statement that has not been qualified or contradicted:

132 Q: It [the bid Book] says "Canada is a stable democracy. [C]lear and well established jurisdictions[s] between different levels of government, would facilitate effective decision-making for the 2010 Games. Human rights are guaranteed through a modern constitution that includes the Charter of Rights and Freedoms."

A: Yes.

133 Q: That's what you were telling the IOC, it -- that was going to guide the work of VANOC should it get the Bid?

A: Yes.

[Emphasis added.]

> Furlong XFD, Q. 132-133;
> Notice to Admit Documents, VANOC vol. 1, p. 5, Common Book, tab 5;
> Furlong Affidavit, Exhibit 9(8), p. 444, clause (iii).

160. And yet, the IOC did not consider the gender issues raised by women's continued exclusion from ski jumping. Specifically, there is no evidence that the IOC considered any of the following factors:

(a) a historic prejudice against women's participation in such a dangerous and unladylike activity;

> Vertinsky Affidavit, para. 4 and Exhibit B

(b) the personal barriers that confronted women's participation including derogatory comments, a lack of encouragement, a lack of respect and relatively greater sacrifices in relation to education;

Sagen Affidavit, paras. 3, 6, 17-20;
Mohr Affidavit, paras. 18-19;
Van Affidavit, paras. 12-16;
Jerome Affidavit, paras. 28-34;
Grassler Affidavit, para. 29;
Planinc Affidavit, paras. 9-11, 14-22;
Morin Affidavit, paras. 5-15;
Keck Affidavit, paras. 14-15, 22-24, 29, 32, 34, 45, 47, 49-52, 54-55, 61-68, 71;
Vertinsky Affidavit, Exhibit B, para. 2

(c) the exclusion from participation in training programs and access to training facilities even in modern progressive countries such as Canada;

Morin Affidavit, paras. 8-9;
Keck Affidavit, paras. 12, 13, 64, 69

(d) the failure of national organizations to establish teams for women or programs for women until very recently, despite women competing in the sport;

Mohr Affidavit, paras. 11-12;
Keck Affidavit, paras. 31-32, 45, 59-65
Morin Affidavit, paras. 11-12

(e) the failure of FIS to establish any sort of circuit in which women could participate in ski jumping competitions until 2004;

Notice to Admit, paras. 165 & 166;
Grassler Affidavit, para. 15;
Keck Affidavit, paras. 17-21, 25-27, 30-31, 33, 36-43, 44
Van Affidavit, paras. 14-30;
Sagen Affidavit, paras. 17-20;
Vertinsky Affidavit, Exhibit B, paras. 21-24

(f) the financial barriers that have stood in the way of participation in the sport which, while traditionally associated with the Olympics, was not an Olympic event for women but required extensive travel and was expensive to pursue;

Van Affidavit, paras. 14-15, 25-27, 34-39;
Sagen Affidavit, paras. 7, 11, 14;
Jerome Affidavit, paras. 29-34
Keck Affidavit, paras. 60-63, 67
Planinc Affidavit, paras. 10-11;
Mohr Affidavit, para. 14;
C. Keck Affidavit.

(g) the incredible disadvantages faced by female jumpers as compared to males in parts of the world;

Planinc Affidavit, paras. 9-23

(h) the consistent and overtly discriminatory attitude of FIS, the body through which women were required to get their events sanctioned, which continued at least until the fall of 2005, when Gian Franco Kasper, the president of FIS said

> don't forget, it's like jumping down from, let's say, about 100 metres on the ground about a thousand times a year which seems not to be appropriate for ladies from a medical point of view.

Sieber Affidavit, paras. 7, 18-21
Vertinsky Affidavit, para. 4, Exhibit B, paras. 20-24;
Schmitz Affidavit #2, Exhibit A

161. As Ms. Sagen puts it at paragraph 29 of her Affidavit:

> Talented young girls often compete in many sports. The way the sport is currently, young girls may choose another sport like soccer because of the money and chance to go to the Olympics. It is only the most stubborn and passionate girls that stay. You must be able to put your life on hold for something that makes you lose, rather than make, money.

162. Ms. Van summarizes the relative lack of events available to women at paragraph 30 of her affidavit:

> Male ski jumpers currently have a Four Hills Tournament which, aside from the Olympics, is the most prestigious event in ski jumping; a World Cup Competition; a Ski Flying Competition; World Championships; and the Olympics. Elite female ski jumpers have not had any of these major world class events. We have our Continental Cup, and

> other smaller events such as national championships, although we will finally be included in the World Championships this ski season.

163. The IOC's criteria are essentially a factor of the number and prestige of the events that are offered. VANOC's document on women's participation notes the "explosion of participation" in women's hockey that accompanied its entry to the Olympic Program. Given that the women require FIS or their national ski federations to organize and sanction events, what were they to do in the face of such overt discrimination?

> Sieber Affidavit, paras. 83, 87, Exhibit 29, p. 672;
> Defendant's document 226, p. 2; Common Book, tab 13

164. Significantly, Mr. Sieber provides no evidence that he raised any issues in relation to gender equity with the Programme Commission in respect of women's ski jumping, even though he was on VANOC's Board of Directors, and though he knew that the reason for the rule against OCOG interference was to prevent OCOGs from lobbying for sports in which the host country was dominant.

> Sieber Affidavit, paras 1 and 35

165. Given Mr. Sieber's failure to deal with the Commission's consideration of gender issues, or even to address in his affidavit why such issues were not considered, it becomes obvious that they were in fact ignored. In other words, contrary to VANOC's assertion that "[t]he Olympic Movement as a whole values and advances equality and human dignity", those concerns were here passed over altogether.

> Amended Statement of Defence, para. 9

166. By failing to look behind the numbers at the real issues affecting women's participation in ski jumping, at the real talents of the Plaintiffs (as can be seen in the DVDs attached to Mr. Pappas' affidavit) and at the stories of dedication and sacrifice of the jumpers themselves, the IOC has fallen short of own goals and aspirations. The result is this: by failing to even advert to the impact of these various manifestations of prejudice on the number of events available to women ski jumpers and women's participation in the sport, the IOC has applied a facially neutral criterion so as to treat women ski jumpers substantially differently from their similarly situated male counterparts. This is adverse effects discrimination.

Pappas Affidavit, Exhibits A & B

167. The IOC may have no obligations in relation to adverse effects discrimination, but VANOC does. VANOC cannot deny a benefit to women where that denial is squarely based on a failure to take account of their true characteristics and the barriers to their participation.

168. VANOC is bound by the *Charter*. It was not open to VANOC simply to accept, and give effect to, the IOC's instruction. VANOC has a constitutional duty to recognize that the Plaintiffs and their colleagues are elite athletes, similarly situated to elite male ski jumpers in every way except insofar as they face historical barriers to participation. VANOC had to insist to the IOC that it could not import a decision that perpetuated rather than critically examined the lack of high level ski jumping events for women. VANOC had to tell the IOC that, because of this duty, and because of the priority of this duty over any contractual terms, it had be planning, organizing, financing and staging a ski jumping event regardless of the instruction.

C. The IOC Analysis of Universality Does Not Justify Exclusion

169. It bears pointing out that the IOC's analysis does not, in any event, accurately represent the "universality" of the sport as compared to others. This leaves it an open question what the real motive for the exclusion might be – whether this 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.

170. The first comparison is by numbers in relation to the 2005/2006 and 2006/2007 seasons. Those numbers show women's ski jumping in the same range as the men's and women's ski cross events, and the women's luge, bobsleigh, and skeleton events – even though the latter events had been in the Olympics since 1964 and 2002.

Comparison of Athletes with Points at Highest Level of International Competition

This table does not include all athletes in competition, but only those who earned points by placing in competition. For example, there were 99 women ski jumpers from 15 countries on the Continental Cup Circuit in 2007-2008, but only 73 who were able to score points by achieving a top 30 finish.

Sport	05/06 Season		07/08 Season	
	Number of competitors with points on top international circuit	Number of countries they represent	Number of competitors with points on the top international circuit	Number of countries they represent
Women's Ski Jumping	61	10	73	13
Men's Ski Cross	46	13	61	14

Women's Ski Cross	35	16	49	20
Women's Snowboard Cross	65	20	55	18
Women's Two person Bobsleigh	32 (teams competing)	14	25 (teams)	13
Women's Skeleton	41 (individuals)	11	28	13
Women's Luge	43	20	39	18

Notice to Admit, Sports Results vol, tab 1-4, 6-8, Common Book, tabs 14-20
Sieber Affidavit, Exhibit 25, p. 598

171. Further evidence can be found in the number of countries winning medals at competitions. Mr. Sieber's affidavit refers to 22 countries having won medals in international ski cross competitions as opposed to 12 in women's ski jumping. The ski cross figures must represent the cumulative total of men's' and women's figures, and given their level of participation on the ski cross world cup, would appear to involve a double counting.

Sieber Affidavit, Exhibit 29, p. 672

172. A similar result appears from a comparison of the nationalities represented in men's large hill and women's normal hill competitions from the commencement of the Continental Cup in 2004. Over this time, there were 12 nations that medalled in the 127 events held for men. There were 9 nations that medalled in the 91 events held for women.

Plaintiffs' documents 1390-1423 and 1665-1806; Common Book, tabs 2 and 21-25;
Notice to Admit, Sports vol., tab 1, Common Book, tab 14.

173. The conclusions that Mr. Sieber and his Commission drew in relation to the universality of women's ski jumping were obviously faulty. As a result, even the IOC justification on which VANOC relies for its differential treatment fails.

(d) The Differential Treatment of Men and Women is Discriminatory in the Meaning of Section 15(1)

174. Discrimination under section 15(1) is concerned with how the differential treatment affects the human dignity of the plaintiff from her perspective acting reasonably. It is a question of whether she should feel as though she is considered 'less than'. The issue is whether she would feel like she is being considered less worthy of recognition or respect.

> *Law, supra*, at paras. 59-61

175. Iacobucci J. expressed the point as follows in *Law*:

> What is human dignity? ... Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised on personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals or groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society *per se*, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?
>
> *Law, supra* at para. 53

176. Should the Plaintiffs, acting reasonably, feel that they are being considered less worthy of respect than their similarly situated male colleagues? The answer is clearly "yes". It is implicit in the very reasons for their exclusion, as expressed by the IOC and effectively adopted by

VANOC, that their sacrifices, their dedication and their athleticism have less merit than those of male ski jumpers, simply because they are women and compete against each other.

177. Ski jumping is the central driving factor in each of the Plaintiffs' lives. That the Plaintiffs have made sacrifices and commitments with a dedication worthy of considerable admiration is stunningly apparent. The historical prejudice and stereotypes under which they have laboured are readily apparent from both the Plaintiffs own materials and the broader historical perspective provided by Dr. Vertinsky.

178. Human dignity, as it is understood in relation to section 15(1) of the *Charter*, is the central interest that accompanies participation in the Olympic Games. The Plaintiffs have provided practical reasons for wanting to compete in the 2010 Games. But these pale in comparison to the recognition that accompanies it.

179. For the Plaintiffs, the recognition following on participation in the Olympics means that the time they have spent perfecting their ski jumping is equally worthy to that spent by their male colleagues. It is equal credit given for equal hard work. It is the fulfillment of a goal they share with the boys they train with but only the latter can reach. It is the fulfillment of a dream and the end of the sense that the women's sport is not worthy of the effort put into it. It is the mitigation of a frustration at banging at the door of a male world and being told that you cannot enter because you are a woman. It is the dream of doing something personally fulfilling. It is the end of a frustration and being seen as worthy of competing. It is affirmation of a life time of hard work. It is a spark of hope that women have opportunity too. It is validation that their efforts were not a hopeless futility. It is a hope for a future in which they can set goals and dream, just like the boys.

Sagen Affidavit, para. 25;
Mohr Affidavit, para. 21;
Van Affidavit, paras. 23, 32;
Jerome Affidavit, para. 37;
Grassler Affidavit, para. 25;
de Leeuw Affidavit, paras. 6-7;
Willis Affidavit, paras. 3, 12;
Planinc Affidavit, paras. 28-29;
Keck Affidavit;
Morin Affidavit;
Mitchell Affidavit, para. 9;
Reid Affidavit, para. 7.

180. Although none of them say it, it must be the recognition of having friends and family and acquaintances and people who have known them saying proudly as they prepare to jump, "I know her".

181. What the Plaintiffs have instead is Dr. Rogge, the president of the IOC, telling them not just that they do not merit such recognition, but that other athletes allowed to compete in the 2010 Games would themselves be demeaned by the Plaintiffs' participation. When Dr. Rogge was asked why the Plaintiffs, who have worked so hard, who have sacrificed so much, and who have demonstrated such inspiring athleticism, should not be included in the 2010 Games, he said this: "We do not want the medals to be diluted and watered down. That is the bottom line."

Plaintiffs' documents, 1591-95, Common Book, tabs 26 and 27

182. At its core, VANOC's failure to plan, organize, finance and stage even one ski jumping event for women is an affront to the human dignity of the Plaintiffs.

IV. VANOC is Subject to the *Charter* in Planning, Organizing, and Staging the 2010 Games and the Events that Comprise Them

A. Overview to Application of Charter

183. VANOC denies that it is subject to the *Charter*. It says that it is not "government" within the meaning of s. 32 of the *Charter*. It contends that it is not "controlled" by government but by the IOC, and that government's role with respect to VANOC is merely that of a regulator and a funder.

184. VANOC's position is at odds with the law and the facts. The reach of the *Charter* does not end at the doors of Parliament and the legislatures. It extends to all government action regardless of the branch from which it emanates or the formal structure under which it is organized.

185. The Supreme Court of Canada has formulated two bases on which the *Charter* may apply to a private entity: the "control" basis and the "ascribed activity" basis. Either suffices to make the entity subject to the *Charter*. In *Eldridge v. British Columbia (Attorney General)*, the Court summarized the applicable tests as follows:

> ...[t]he *Charter* may be found to apply to an entity on one of two bases. First, it may be determined that the entity is itself "government" for the purposes of s. 32. This involves an inquiry into whether the entity whose actions have given rise to the alleged *Charter* breach can, either by its very nature or in virtue of the degree of governmental control exercised over it, properly be characterized as "government" within the meaning of s. 32(1). In such cases, all of the activities of the entity will be subject to the *Charter*, regardless of whether the activity in which it is engaged could, if performed by a non-governmental actor, correctly be described as "private". 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 at para. 44.

186. VANOC is subject to the *Charter* under both tests.

187. As for the control test, VANOC is regularly and routinely subject to extensive government control and supervision in its planning, organizing, financing and staging of the 2010 Games. In fact, VANOC has expressly and repeatedly said so itself. In planning, organizing, financing and staging the Games, VANOC fulfils its responsibility to the City of Vancouver, a responsibility for which the City of Vancouver and the Province of British Columbia will be liable should VANOC fail.

188. As for the "ascribed activity" test, this is met where government is effectively responsible for the activity in question. In the present case, the evidence of government responsibility for VANOC's planning, organizing, financing and staging of the 2010 Games is overwhelming, and pervasive. The various levels of government have been intimately involved in that activity from beginning to end: from the bid to hold the Games here, to Vancouver's agreement to act as host city and to bind itself contractually to the creation of VANOC, to the Province's provision of indemnities for VANOC and to the IOC, and to the federal Government's myriad contributions.

189. The Plaintiffs will discuss each test in turn. The evidence in relation to the "control" test also supports the "ascribed activity" test.

B. Control

190. The purpose of the control test is to ensure that the activities of entities that are superficially independent but in reality part of government are subject to *Charter* scrutiny. In this

regard, the benchmark of "routine or regular control" responds to the plurality of potential structures by which government organizes itself. Organizations outside the traditional ambit of "government" may thus be subject to the *Charter*.

> *Eldridge, supra* at paras. 36, 40

191. "Routine or regular control" does not mean total control. The entity may remain independent in some aspects. Moreover, as long as the right of control exists, it is not necessary that control be exercised in fact.

> *Eldridge, supra* at para. 36;
> *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483 ("*Stoffman*") at 506-07, 513-14;
> *Douglas, supra* at para. 16.

192. The facts of this case clearly meet the control test. Acting together, all three levels of government have "extensive, ongoing supervision of, and control over, [VANOC's] governance and decision-making". This is evidenced by two factors: first, VANOC itself has expressly admitted that it is controlled by government; and second, there is significant evidence to support that admission. The fact that the IOC may have contractual rights over specific aspects of VANOC's activities in no way derogates from that conclusion.

> Bagshaw Affidavit, Exhibit A, para. 4, p. 1;
> Lai Affidavit, Exhibit B, paras. 4 and 18, pp. 21 and 27

(a) VANOC has admitted that it is controlled by government

193. VANOC "is a government-controlled, not for profit corporation created solely to plan, organize and stage" the 2010 Games. This is how VANOC has described itself, on more than

170 occasions, to the federal Trade Marks Commissioner in order to claim public authority status justifying the protection of trademarks under section 9 of the *Trade-Marks Act.*

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

194. On each of those 170 occasions, VANOC has elaborated on this description in a supporting memorandum, stating that "[t]he Multiparty Agreement provides the Government Parties with *extensive, ongoing supervision of, and control over, [VANOC's] governance and decision making*" and that "the Multiparty Agreement provides the Government Parties with *extensive control over [VANOC] and all of its activities*."

> Bagshaw Affidavit, Exhibit A, paras. 4, 5

195. This description easily meets the "routine or regular" control test articulated by the Supreme Court of Canada in *Stoffman* and applied in *Douglas*. More importantly, it is accurate.

196. VANOC's admissions of government control were not made lightly, or incidentally. On the contrary, they were made on the basis of legal advice received from Borden Ladner Gervais LLP, and they were scrutinized by VANOC's own lawyer. Mr. Bagshaw, in-house counsel for VANOC, acknowledged on discovery that the trademarks memorandum was prepared by VANOC's external counsel on VANOC's instructions. That the memorandum was revised from time to time is readily apparent and indicates ongoing instruction to BLG from VANOC on its contents.

> Bagshaw XFD, Q. 390, Request #16; Qs. 360, 370
> Bagshaw Affidavit, Exhibit A, para. 3
> Lai Affidavit, Exhibit B

197. Further, VANOC swore to the accuracy of a version of its memorandum in 2006, in the context of an opposition to the trademark registration of "Eco-tourism 2010". In support of this opposition it filed the affidavit of Dorothy Byrne Q.C., at that time Vice President and Corporate Secretary of VANOC. Documents in this case record that she was involved in the project at least as early as November of 1998, nearly 6 years in advance of Mr. Bagshaw. Ms. Byrne swears that she "is familiar with the operations and activities of [VANOC] and has access to [VANOC's] business records." She attaches the memorandum and says that it "contains information about the background and mission of [VANOC]", and that, as of 2006, the memorandum had been filed with the Trade-Marks Office over 130 times. Clearly, Ms. Byrne – and thus VANOC – was adopting the statements contained in the memorandum as an accurate description of the government's control over VANOC.

> Lai Affidavit, Exhibit A, p. 10 (para. 6), Exhibit C, pp. 21-30
> Byrne Affidavit, para. 1;
> Furlong Affidavit, Exhibit 2;
> Bagshaw XFD, Q. 62

198. Remarkably, VANOC now seeks to resile from all of these admissions. Mr. Bagshaw has said, under oath, that the statement that VANOC was controlled by government is false. He has subsequently sworn an affidavit with more massaged and nuanced language, allowing that the governments had some rights of control, but denying that they were extensive and equating these rights to those of mere "lenders". He has pointed to the description of rights of control in Mr. Furlong's affidavit, a description that contrasts starkly with the detailed description of these same rights in the memorandum.

Bagshaw XFD, Q. 369;
Bagshaw Affidavit, para. 4 and 5;
Furlong Affidavit, paras. 45-63

199. If Mr. Bagshaw's evidence is to be believed, VANOC has repeatedly secured its trade mark protection under false pretences and continues to hold them on that basis. Given the expedience of VANOC's change of position in response to this litigation[12], its earlier express, repeated, and consistent descriptions of its relationship with government ought to be preferred.

200. This is not to say that VANOC is subject to government control for the purposes of the *Charter* simply because it has public authority status under section 9 of the *Trade-Marks Act*. The test under the *Trade-Marks Act* is somewhat different, requiring a significant degree of control (found in being a statutory body with no ability to amend its corporate powers, objects, or functions) combined with "some ongoing supervision", or "a significant degree of government control". Rather, the real issue here is VANOC's conveniently elastic understanding of government control.

Ontario Association of Architects v. Association of Architectural Technologists of Ontario (2002), 19 C.P.R. (4th) 417 (F.C.A.) at para. 59 ("*Ontario Association of Architects*") (emphasis added);

Registrar of Trade-Marks v. Canadian Olympic Association (1982), 67 C.P.R. (2d) 59 (F.C.A.) ("*Canadian Olympic Association*")

See You In - Canadian Athletes Fund Corporation v. Canadian Olympic Committee, 2007 FC 406, 57 C.P.R. (4th) 287 ("*SYI Canadian Athletes*") at paras. 59-63 ("control is both a legal and factual matter exercisable both directly and indirectly" at para. 63), aff'd 2008 FCA 124.

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[12] Note that the trademark memorandum itself was only disclosed in this litigation eight months after the demand for production and discovery of documents despite being obviously central to the issue of government control. Note as well that the evidence provided to the Trade Marks Office along with the opposition to Eco-Tourism 2010 was discovered through the efforts of Plaintiffs' counsel and not disclosed by VANOC in these proceedings despite its obvious relevance.

(b) VANOC is Subject to Routine and Regular Control of Government

201. Even apart from VANOC's direct admissions that it is controlled by government, the evidence in this case meets the control test. Indeed, VANOC's trademarks memorandum does not even fully capture the extent of that control.

202. As discussed, the control test as articulated in *Stoffman* requires "routine or regular control". Collectively, the leading Supreme Court of Canada cases have considered the control exercised by government in the following areas: (1) governing structure (i.e., government control over establishment of the entity, composition of the Board, whether a Crown agent in legislation expressly or by implication); (2) policy (i.e., government control over the activities of the entity – the ability to direct its operations); and (3) funding (i.e., economic assistance and fiscal accountability).

> *Douglas*, *supra* at paras. 3, 4, 16, and per Wilson J. dissenting at paras. 67-76;
> *Lavigne v. Ontario Public Services Union,* [1991] 2 S.C.R. 211 at paras. 48-50, 211 ("*Lavigne*");
> See also the dissenting reasons in *McKinney, supra* at paras. 247-261 (adding the additional control area of "decision-making"); and *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451 at paras. 22-36;
> *Stoffman, supra* at paras. 78-92.

203. The question is to be directed centrally at the rights government *may* exercise in these areas, as opposed to whether they are in fact exercised, and it is directed entirely at whether or not the government has those rights of control, rather than whether the entity is immune to outside influence.

> *Douglas, supra* at para. 16;
> *McKinney, supra* at para. 41.

204. That the determining factor is a right of control rather than the actual exercise of control makes sense. The purpose of the control test is to determine whether a formally non-government entity is "government" for the purposes of section 32. The question is whether the entity is akin to a department of the government though formally outside it. The government may choose to interfere with one of its departments that is functioning effectively, but still retains the power of control.

> *Stoffman, supra* at 506-07.

205. The statements in VANOC's trademarks memorandum, and the evidence on which those statements are based, go well beyond these requirements. Together, they readily meet the "routine or regular" control test for the purposes of section 32 of the *Charter*. Significantly, VANOC offered evidence of this level of control in support of its trademark applications even though it far exceeded what was required to meet the standard of s. 9 of the *Trade-Marks Act*.

> *Ontario Association of Architects, supra*;
> *Canadian Olympic Association, supra*
> *SYI Canadian Athletes, supra*

206. Together with the additional evidence before the Court in this case, the facts relayed in VANOC's trademarks memorandum amply support the conclusion that VANOC was subject to the routine or regular control of government in its governance, its activities, and its finances.

(i) Government has control over VANOC's governance

207. VANOC's trademark memorandum sets out the Governments' rights to control VANOC's governance at paragraphs 6, 11, 12, 13, 14[13], 15, 16[14], 17, 18, 19(f), (h), (x).

Bagshaw Affidavit, Exhibit A, pp. 2-7

208. The rights described in these paragraphs provide for extensive control over VANOC's purpose, by-laws, composition of its board, and winding up. Paragraph 19(f) is particularly noteworthy in this regard; it references section 3.5 of the Multiparty Agreement, which prohibits VANOC from amending its by-laws with respect to any essential matter of its governing structure or purpose without the consent of the Governments.

Bagshaw Affidavit, Exhibit A, para. 19(f), p. 4;
Furlong Affidavit, vol. 4, Exhibit 18, s. 3.5, p. 1761

209. Further evidence of government control relates to VANOC's directors. The directors are not independent in the traditional sense, because the by-laws provide that their appointment can be revoked at will by the entity that nominated them. The Board of Directors is given the right to "prescribe such rules and regulations not inconsistent with [VANOC's] bylaws relating to the governance, management and operation of [VANOC] as it deems expedient". VANOC's directors may amend its by-laws, other than those included in the letters patent, which by and large provide for VANOC's purposes in accordance with the Multiparty Agreement. The

[13] Note that Mr. Bagshaw claims in his discovery and affidavit that the Governments do not appoint the majority of the board members (Bagshaw Affidavit, para. 7, p. 3; Bagshaw XFD, 369). This is simply incorrect. The structure of VANOC allows for the governments to appoint 10 of the 19 original members (Notice to Admit, By-Laws vol., tab 1, paras. 1.1, 1.6, pp. 1-2; Common Book, tab 4). The bylaws also provide that an additional member can be appointed by a majority vote, which would allow the ten government appointees to appoint this member (Notice to Admit Documents, By-Laws vol., tab 1, paras. 1.1, 1.6, pp. 1-2; Common Book, tab 4).

[14] The Audit and Finance Committee which must approve any VANOC expenditures over $500,000, and subsequently extended to the finance committee following the 2006 amendment to by-law 1 (Notice to Admit Documents, By-Laws vol., tab 7, paras 43, 55, pp. 8-9; Common Book 28).

Governments may also designate special "Designate Appointees" who have what amounts to veto rights over votes on certain issues such as significant amendments to the business plan (3.3(a)).

> Notice to Admit Documents, By-Laws vol., tab 1, paras. 1.3, 1.7(b), 3.1, 3.3(a), 10.3, 10.4, pp. 1, 2, 6, 14; Common Book, tab 4

210. Certainly, the Province thinks that government control over VANOC's governance is real. In the legislature, Colin Hansen, Minister of Finance for British Columbia said this on May 16, 2007:

> Three of the board members of VANOC are provincial government appointees. I meet with them on a regular basis to make sure that the interests of the province are being reflected. We have a partnership with VANOC in terms of delivering a successful games, and it is in this spirit that we are approaching all of these issues.
>
> > Plaintiff's document 806, Hansard (BC Legislative Assembly), May 16, 2007, pp. 8109-10 at 8110, Common Book, tab 29

211. The Province's right to involve itself in the directors' governance of VANOC does not constitute an interference with their fiduciary duties as directors, as the interests of the Province and the interests of VANOC are both aligned towards the same purpose. It was the Governments that established as VANOC's purpose the planning, organization, financing and staging of the 2010 Games. This also is a reflection of the power that accompanies the ability of the Governments to remove their directors at pleasure. In this regard, it should be further noted that one of the City of Vancouver's nominees is and has always been its City Manager, first Judy Rogers and now Dr. Penny Ballem.

> Bagshaw Affidavit, Exhibit A, p. 3, para. 17;
> Notice to Admit, Bylaw, vol. 1, tabs 1-8; Common Book, tabs 4, 30-34, 29, 35
> Furlong Affidavit, paras. 46-47, Exhibit 18, p. 1760, s. 2.1;
> Plaintiffs' document 1033, Common Book, tab 36

212. Together, these facts manifest extensive control of VANOC's governance by the Governments, including specifically: control over the founding and purposes of VANOC and its dissolution once those purposes have been achieved; an inability on the part of VANOC to change any of its purposes; majority control of the Board of Directors which the government appointees chose to use to elect a 20th member; certain veto rights for the government-appointed directors; and, perhaps most importantly, the right of government to remove their directors at pleasure.

(ii) Government has Control Over VANOC's Activities

213. VANOC's trademarks memorandum sets out the Governments' rights to control VANOC's activities at paragraphs 15, 18, 19(d), (e), (g), (h), (i), (j), (k), (l), (m), (o), (p), (q), (r), (s), (t), (u), (z), (aa), (bb), and (cc).

> Bagshaw Affidavit, Exhibit A, pp. 3-7

214. Together, these provisions describe the Governments' control over the majority of VANOC's activities. Of special note is the overarching control of VANOC's purpose, being the planning, organization, financing and staging of the 2010 Games.

> Furlong Affidavit, Exhibit 18, p. 1760, s. 2.1;
> Notice to Admit, By-Laws vol., tab 1; Common Book, tab 4

215. While these provisions are more than enough to establish routine and regular control, there is more. The Governments have additional rights of control over VANOC's activities under their contribution agreements, by virtue of their influence over VANOC's directors, and through their direct involvement in VANOC's activities.

216. The Performance and Accountability agreements between VANOC and the Province of British Columbia give the Province extensive rights to directly participate in the negotiation, vetting and approval of all agreements related to construction and venues.

> Defendant's document 12, Common Book, tab 37

217. VANOC's Board of Directors, comprised mainly of government appointees and an additional member that they have selected, gives VANOC its direction in relation to its operations to a significant degree. In a speech he gave to the Board of Trade on October 25, 2006, Mr. Furlong said that VANOC has a "roll up its sleeves board that works tirelessly to guide, influence, encourage and coach the organization to the success that we have to have".

> Notice to Admit, By-Laws vol., tab 1, ss. 1 and 3; Common Book, tab 4
> Notice to Admit, VANOC vol. 2, tab 38; Common Book, tab 38

218. Along these same lines, the British Columbia Minister of Finance has explained to the legislature how the Province is able to control VANOC's operations through its appointees to the Board and directly through its own influence:

> The bottom line is that we are engaged with VANOC on a day-to-day basis. We sit at the table with them as they develop their plans in multitudes of areas. I think the bottom line is that our obligation is not to micromanage how VANOC organizes the Games. Our obligation is to make sure that there is a competent team in place that is actually managing the affairs of VANOC.
>
> Plaintiffs' documents 806, BC Hansards, May 16, 2007, p. 1715; Common Book, tab 29

219. This direct involvement of the Governments was illustrated in the preparation of the Master Schedule. VANOC's business plan says that this is a significant document in the organization of the 2010 Games, a point reiterated by Mr. Furlong on discovery. Its purpose was to outline for the Governments what government services VANOC needed to be "identified, aligned and delivered (or enhanced)" for the staging of the Games. According to VANOC's business plan, the Master Schedule was "workshopped" with the Governments in November 2006, and since then they have received monthly (later bi-monthly) reports on it.

> Furlong Affidavit, paras. 40-41
> Notice to Admit VANOC, vol. 1, tab 8, pp. 19, 39, 176-178; Common Book, tab 39
> Defendant's document 220, Confidential Document Book, tab 1[15]
> Bagshaw XFD, response 14;

220. Finally, it seems clear that the Governments set out that VANOC was to plan, organize, finance and stage the 2010 Games in accordance with gender equity principles. Specifically, the Governments required that VANOC plan, organize, finance and stage the 2010 Games in accordance with Canadian law, including our human rights legislation, and that VANOC comply with the Hosting Policy which included creating a "policy and plan demonstrating an appropriate gender balanced (sic) for all areas related to the event", and to "honour the unique characteristics, values, goals and principles of the host communities".

> Furlong Affidavit, Exhibit 18, paras. J(iv), 17.3, pp. 1757, 1766 and 1781

[15] At VANOC's request, the Master Schedule is being entered subject to a confidentiality agreement.

221. That the Governments have failed to do anything meaningful in relation to gender equity in this case (for instance, by requiring their directors to instruct VANOC to inform the IOC that VANOC cannot follow the IOC's directions in relation to the exclusion of women jumpers because of its obligations under the Multiparty Agreement and Canadian human rights legislation, or even by instructing its legal staff to investigate whether it may have this obligation) cannot negate the right the Governments have to do this. Governments regularly violate their own *Charter* obligations. That they would allow an entity they control to do so does not mean the right itself does not exist.[16]

(iii) Government has Control Over VANOC's Finances

222. VANOC's trademarks memorandum sets out the Governments' rights to control VANOC's finances at paragraphs 12, 16(c), 19(m)(iii), (n), (u), (v), (w), (x), (v), (y), and (z).

Bagshaw Affidavit, Exhibit A, pp. 2, 3, 6, 7

223. These paragraphs go nowhere far enough to describe the full scope of the Governments' control of VANOC's finances. Additional factors are as follows.

224. Collectively, the Governments have provided VANOC with *all* of its financial capital as well as some of its operating budget. Any 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.

Notice to Admit, VANOC, vol. 1, tab 8, Common Book, tab 39

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[16] Further, it should be noted that actual influence, input or control over the decision in issue is not the relevant standard under the control test. This was not used in *Douglas* where the Government of British Columbia did not exercise control over the negotiated contractual terms requiring mandatory retirement (*Douglas, supra* at para. 76 (Wilson J. dissenting but agreeing with La Forest J. on this point)).

225. The Governments have the right to review and approve VANOC's business plan and budget. In fact, they exercised this right when they did not approve the first budget that VANOC prepared. They subsequently worked with VANOC to arrive at an acceptable version, directing specifically what was required.

> Furlong Affidavit, vol. 4, Exhibit 18, para. 4.2, 4.4, 4.5, p. 1761-62;
> Bagshaw XFD, Q. 289-298, 303-305, request 13.

226. Further, the Governments have directly financed several projects or services specific to the 2010 Games which VANOC would need to perform itself were it not for the Governments' contributions. These include: security services; the Vancouver and Whistler athletes' villages; health services; the timely completion of the Sea to Sky Highway; and the road to the ski jumping facility at Whistler Olympic Park. 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.

> Furlong XFD, Q. 221-231
> Bagshaw XFD, Q. 467-475, 492-496;
> Notice to Admit, VANOC, vol. 2, tab 34, pp. 33, 43-45, Common Book, tab 42
> Plaintiffs' document 1377-87; Common Book, tab 40;
> Plaintiffs' document 1596-97; Common Book, tab 41;
> Furlong Affidavit, Exhibit 16, p. 1696-97, 1699-1700, paras. 18(d), 21, 27;
> Furlong Affidavit, Exhibit 18, pp. 1794-95

227. The Governments also play a significant role with respect to any profits or losses that VANOC may gain or suffer from the Games. It is the Governments which have dictated the projects to which any profits shall be put, and it is the Governments which will suffer directly

from any loss VANOC incurs, including any losses incurred by the IOC in relation to any of VANOC's actions.

> Notice to Admit, VANOC, vol. 2, tab 34, pp. 3-4; Common Book, tab 42; Furlong Affidavit, vol. 4, Exhibit 16, paras. 4, 9; pp. 1690-92 and Exhibit 18, para. 33, pp. 1770-1790.

228. All told, the Governments have total control over all of VANOC's finances, except for its revenues and expenses which can, in any event, amount to nothing more than forecasts outside of the control of anything beyond market forces. Even with respect to these revenues and expenses, the Governments retain approval and other rights as they bear the benefit of a profit which will fund the programs of their choosing, and the burden of loss, which they will suffer by virtue of their financial guarantees.

(iv) The Suggestion that the IOC Controls VANOC in the Sense Raised by Section 32 is Misguided

229. Through Mr. Furlong's affidavit, VANOC appears to suggest that because of the IOC's contractual rights, it is the IOC that "controls" VANOC within the meaning of section 32. That suggestion is wrong in law and in fact.

> Furlong Affidavit, paras. 32-44

230. As for the law, there is no support for the view that an entity cannot be subject to the "routine or regular" control of government unless it is also free of other outside obligations. The suggestion is inimical to the firmly established principle that the *Charter* applies to the "private" and "commercial" arrangements of government:

> To permit government to pursue policies violating *Charter* rights by means of contracts and agreements with other persons or bodies cannot be tolerated. The transparency of

> the device can be seen if one contemplates a government contract discriminating on the ground of race rather than age.
>
> *Douglas, supra* at para. 18;
> *Eldridge, supra* at para. 40.

231. If government cannot rely on a private arrangement to escape its *Charter* obligations, then it cannot rely on the same arrangement to say that is not "government".

232. As for the facts, the evidence of IOC "control" proffered in Mr. Furlong's affidavit is limited. It does not relate to its rights of control in the section 32 sense of that term. In fact, the IOC's role in relationship to VANOC, as explained in paragraphs 36-43 of Mr. Furlong's affidavit, 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.

Furlong Affidavit, paras. 36-43

233. This is not "control" in the sense referred to in *Douglas*, but the very different kind of control exercised under the proposition that "the customer is king". VANOC is putting on the Games for that "customer" in return for a significant share of the revenue that the Games generate. The IOC, as the party which collects that revenue and subsequently provides VANOC with its share in exchange for putting on the Games, clearly has "control" over the product that VANOC will put forward; however, such control is categorically different from the control of the Governments.

Furlong Affidavit, Exhibit 16.

234. The IOC did not establish VANOC's purposes. It does not nominate VANOC's directors (and if the provision that Canadian IOC members sit on the board is such a nomination, it did not set out any of their powers). The IOC had no input in determining VANOC's bylaws. The IOC

does not have representation on VANOC's audit and finance committee, and has no right to approve any expenditures over $500,000. There is no evidence that the IOC has any similar right. Its rights are those of a sophisticated customer, blessed with superior bargaining power, who purchases a sophisticated product.

235. The IOC's rights are thus categorically different from those of the Governments. Only the latter are relevant to determining "routine or regular" control for the purposes of section 32.

236. Accordingly, the specific rights relied on in paragraph 35 of Mr. Furlong's affidavit are not indicia of control in the sense explained in the authorities above. At best, they show that the "customer is king" in the relationship between the IOC and VANOC. In particular:

(a) Clause 1: The portions of the IOC Charter related to the Olympic Games are by and large focussed on what is to occur, and the organization of how the various pieces (i.e. the Federations, National Olympic Committee ("NOC"), Organizing Committee for the Olympic Games ("OCOG") and IOC) fit together, and thus explain what the IOC is purchasing with the revenue it shares with VANOC in exchange for hosting the Games. That the Olympic Charter includes reference to the IOC being the "supreme authority" in all matters related to the Games simply expresses the "customer is king" concept. Similarly, the provisions in relation to the IOC's control over the Programme merely set out what exactly the IOC is "purchasing". But none of this overrides the limits of what the OCOG, here VANOC, can lawfully provide. VANOC 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.

Furlong Affidavit, vol. 4, Exhibit 16, pp. 1688, 1690; Sieber Affidavit, vol. 1, tab 2, pp. 195-200;
Sieber Affidavit, Exhibit 2; Clause 1(1) and clause 6(3).

(b) Clause 2: Mr. Furlong has overstated the reach of the IOC's review powers in relation to VANOC's constating documents. The City of Vancouver and the COC were generally free to organize VANOC as they saw fit, provided that Canadian IOC members, the COC president and secretary general and an athlete from a previous version of the Olympic Games was on the board. The Board could have included these seven members along with 10, or 20, or 100 members appointed by the Governments, yet VANOC would still have fit within the IOC's prescribed conditions. These conditions should be seen as ensuring the further development of the Olympic Movement throughout the world, including in Canada, which according to the recitals of the Host City Contract, is one of the things the IOC wishes to purchase, and perhaps to guard against the potential of a Games becoming a propaganda show piece as occurred in Munich in 1936 - something the IOC is certainly not purchasing.

Furlong Affidavit, Exhibit 16;
Furlong Affidavit, Exhibit 16, pp. 1689-90.

(c) Clauses 12 and 44: These clauses simply provide for the IOC's payment for the services rendered.

Furlong Affidavit, Exhibit 16, pp. 1692-93, 1709.

(d) Clauses 14, 24, 25, 26, 32 and 45: These are clauses that allow the IOC input if not control over the product that VANOC is providing it in return for a share of the revenues.

They are analogous to those found in a highly sophisticated commercial contract for the production of a product or construction that will evolve over the course of its creation. They 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. They also allow VANOC to benefit from the IOC's previous involvement with the Olympics by sharing its accumulated experience. They fall far short of establishing the routine or regular control of VANOC itself by the IOC.

Furlong Affidavit, Exhibit 16, pp. 1694-1710.

(e) Clauses 15, 40 and 41: These clauses set out some of the benefits the IOC is to receive from VANOC, namely, the protection of its intellectual property in Canada through rights of review, and obligations on VANOC to protect such property. This is no different than 18 - 23 and 27-38 which provide a number of 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.

Furlong Affidavit, Exhibit 16, pp. 1694, 1696-1706.

(f) Clauses 66 and 67: These are largely irrelevant to the issue of control. The "no partnership" clause is of a standard form that courts will look behind. The clause in relation to the choice of Swiss law is of no consequence to the issue of "routine or regular control". If anything, it highlights the commercial nature of the relationship between VANOC and the IOC as one of producer and customer.

Furlong Affidavit, Exhibit 16, p. 1720

(g) Clause 67: This clause again expresses the notion that the customer is king, albeit with a twist. The clause speaks to the resolution of disputes as between the various organizations involved in the Olympic Movement, such as between an NOC and VANOC, NOC and International Federation ("IF"), or IF and VANOC. The IOC reserves the right to resolve the disputes between its suppliers, presumably to ensure that its interests are looked after.

Furlong Affidavit, Exhibit 16, p. 1720

(c) Conclusion on Control

237. If the Governments do not control VANOC, who does? VANOC has no shareholders, as it is a not-for-profit corporation. The closest thing it has to an owner is the Governments, since they provided its capital and have control of its board. Although it is a corporate entity, VANOC does not have perpetual life but was established by the Governments, acting in concert with the COC, only for a limited, and highly specific, purpose and duration.

Notice to Admit Documents, By-Laws vol., tab 1; Common Book, tab 4

238. In these circumstances, VANOC was entirely correct when it represented itself to the Trade Marks Office as being controlled by government. VANOC is simply the vehicle through which the Governments are hosting the 2010 Games. It cannot avoid its *Charter* obligations by hiding behind the IOC.

C. Activity

(a) The legal parameters of the "ascribed activity" test

239. In *Eldridge*, the Supreme Court of Canada recognized that the *Charter* follows government activities regardless of who performs them. Thus, the *Charter* may bind private entities that are not otherwise "governmental" in nature.

> *Eldridge, supra* at paras. 40-41.

240. The purpose of the "ascribed activity" test is to respond to the plurality of potential means by which government may act, so as to ensure that government activity does not escape the *Charter's* reach. What this means is that the *Charter* cannot be avoided by contract, by delegation or by devolution.

> *Eldridge, supra* at para. 42.

241. Under this test, it is not all of the activities of a private entity that are subject to *Charter* obligations, but only those which are ascribed to government. Effectively, the *Charter* applies to an activity when "it is government that retains responsibility for it". This may be the case because the activity implements a specific statutory scheme (*Eldridge*), or a government policy or program (*Desrochers v. Canada (Industry)*), or even simply because the activity would not have taken place but for the intervention of government (*Broyles*).

> *Eldridge, supra* at para. 42;
>
> *Desrochers v. Canada (Industry),* 2005 F.C. 987, 276 F.T.R. 244 ("*Desrochers*") rev'd on other grounds 2006 FCA 374, [2007] 3 F.C. 3, aff'd 2009 SCC 8;
>
> *R. v. Broyles*, [1991] 3 S.C.R. 595 (*"Broyles"*) at paras. 21-24.

242. In setting out the guidelines for the enquiry, the Court in *Eldridge* made it clear that "[t]he factors that might serve to ground a finding that an activity engaged in by a private entity is 'governmental' in nature do not admit of any *a priori* elucidation."[17] Because modern government activity is protean in nature, it requires a broad understanding of "government". In *Lavigne,* the majority expressed the point as follows:

> In today's world, it is unrealistic to think of the relationship between those who govern and those who are governed solely in terms of the traditional law maker and law subject model. We no longer expect government to be simply a law maker in the traditional sense; we expect government to stimulate and preserve the community's economic and social welfare. In such circumstances, government activities which are in form 'commercial' or 'private' transactions are in reality expressions of government policy, be it support of a particular region or industry, or the enhancement of Canada's overall international competitiveness. In this context, one has to ask: why should our concern that government conform to the principles set out in the *Charter* not extend to these aspects of its contemporary mandate? To say that the *Charter* is only concerned with government as law maker is to interpret our constitution in light of an understanding of government that was long outdated even before the *Charter* was enacted.
>
> *Lavigne, supra* at para. 216.

243. In *Eldridge*, the Court found that a certain activity of hospitals was a "government activity" even though it had previously determined in *Stoffman* that hospitals as such were not "government" for the purpose of s. 32. The Court put it this way:

> 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

[17] The Court in this case variously described as suitable for ascription to government "activities that can in some way be attributed to government", "specific activities where it can fairly be said that the decision is that of the government, or that the government sufficiently partakes in the decision as to make it an act of government", "implementing a governmental policy", "activities...viewed as the responsibility of government", "inherently governmental actions", "activities that are truly governmental in nature", "acting in furtherance of a specific governmental program or policy", "implementing a specific governmental policy or program", and "a particular activity that can be ascribed to government" (*Eldridge, supra* at paras. 41-44).

> 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* at para. 51.

244. It has been explained that "a function becomes governmental because a government has decided that it should perform that function, not because the function is inherently a governmental function". In other words, an activity becomes governmental because government decides to take it on.

McKinney, supra at para. 234.

245. The cases applying the ascribed activity test show that it is irrelevant, in this respect, whether this taking on was achieved by the creation of a new activity, or by the taking over of an activity previously performed by others.

Desrochers, supra (new business development plan created by government);

Eldridge, supra (healthcare provided by hospitals before government took over responsibility).

246. Likewise, it is irrelevant how the government takes on the responsibility and how it delegates the activity in question. For instance, in *Eldridge,* government responsibility came from statute, and regulations delegated the authority to the hospitals and the Medical Services Commission. In *Desrochers*, government took on the responsibility through a departmental initiative, while the implementation activities by the Community Development Program North Simcoe, a non-governmental body, were delegated by contract. In *Toronto Transit Commission v. Amalgamated Transit Union Local 113,* the responsibility for policing similarly came from a

statutory source, but the delegation of the activity of policing on transit was made by contract. In the criminal law context where the question is whether an individual has acted as an agent of the state, the delegation could be as simple as a police officer requesting that a security guard perform a search or informer gather information.[18]

> *Toronto Transit Commission v. Amalgamated Transit Union Local 113,* 2004 CanLII 55085 (Ont. L.A.) ("*TTC*");
> *Broyles, supra.*

247. The common denominator is that once government takes on an activity, whether by statute, by contract or otherwise, this becomes government activity and is infused with the obligations of the *Charter.*[19]

248. In effect, the open-ended approach to "government activity" mandated by *Eldridge* has anticipated the unique kind of activity involved in the "planning, organizing, financing and staging" of the 2010 Games. That activity has no obvious parallel or precedent in terms of its scale, the simultaneous involvement of all three levels of government, and its multifaceted nature

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[18] The closest that the courts have come in determining a test for ascription under non-statutory branch of *Eldridge* is in the criminal law in relation to the *Charter's* application to statements from informers and evidence gathered by security guards. The test developed is a "but for" test where the court is to ask, would this evidence have been obtained but for the actions of the police in relation to the guard or informant? (*Broyles, supra*) If the answer is 'no' then the activity of gathering the evidence will be ascribed to the government and the *Charter* will apply. If the answer is 'yes', then it does not. In the former instance, the action is attributed to the government because the police, and thus the government, delegated the activity, and therefore was responsible for the act having been done (*R. Buhay,* [2003] 1 S.C.R. 631, 2003 SCC 30 at paras. 28-31).

[19] There is one post-*Eldridge* decision that conflates the "ascription of activity" test with the "control" test. In *HTMQ v. Dorsay,* 2002 BCSC 1807, the accused argued that the Legal Services Society (the "LSS"), which is required by its enabling statute to ensure that legal services are available to an accused who faces the possibility of imprisonment, was required to fund an appeal of a U.S. proceeding in order to uphold his s. 7 rights under the *Charter.* The Court found that because the LSS operates autonomously from government, its procedures for granting legal aid are not subject to the *Charter* under s. 32(1). However, the Court did not consider whether the provision of legal aid could be ascribed to government. With respect, this is clearly wrong. Not only does *Eldridge* consider the control and ascribed activity tests as alternative bases for liability, in *Eldridge* itself there was no evidence of control over the decision not to provide sign language.

as developed in conjunction with a foreign entity. Yet it is obvious that it squarely engages the policy concerns that animate the "ascribed activity" test.

(b) Application of the "Ascribed Activity" Test

249. The analysis in this respect begins with the Host City Contract, under which the Governments took on the responsibility, as well as the liability, for "planning, organizing, and staging" the 2010 Games. The activity of "planning, organizing, and staging" the Games was at that point infused with *Charter* obligations regardless of who ultimately performed it. The activity was transferred, or delegated, to VANOC through the contractual arrangements the Governments accepted in order to be able to host the Games.

Furlong Affidavit, vol. 4, Exhibit 16

250. These arrangements included ensuring that VANOC would be incorporated for the purpose of organizing the Games (para. 2); that VANOC would in fact plan, organize, and stage the 2010 Games (Multiparty Agreement, Furlong Affidavit, Exhibit 18, clause 11); and that it would complete these tasks in accordance with the Host City Contract (para. 3) and the Multiparty Agreement. As 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.

Furlong Affidavit, vol. 4, Exhibit 16, p. 1690; and Exhibit 18, p. 1760

251. This conclusion is supported by a review of the roles of the parties to the organization of the 2010 Games, by a review of the way in which government took on the activity and ascribed it

to VANOC, and by an abundance of corroborative evidence. Each of these will be discussed in turn.

(i) The Roles of the Parties

252. That the 2010 Games involve multiple roles and activities performed by multiple parties is not contested in this litigation. The Plaintiffs are not suing VANOC with respect to all of these roles and activities – only one. That activity is the planning, organizing, and staging of the 2010 Games and the events that comprise it. It is this activity that attracts *Charter* scrutiny, and it is this activity that is presently set to be performed in a manner that violates the Plaintiffs' equality rights.

253. The functions involved in the 2010 Games can be divided into several parts. The key division of functions is that the IOC has overarching stewardship of the Olympic movement, while the City has responsibility for planning, organizing, financing and staging them through the OCOG that it, along with the relevant NOC, establishes for this purpose. This could be summarized by saying that the Olympics generally belong to the IOC, but that the activity of putting on any particular version of them is completed by the City hosting them through the OCOG established for that purpose.

Furlong Affidavit, Exhibit 16, pp. 1688-1690

254. More specifically, the IOC is generally responsible for the oversight of any Games, as well as certain issues in relation to their governance and revenue generation. The IOC determines who will host the Games, how many people will participate, what nations may participate, and, subject to the caveat central to this case, what sports, disciplines and events will

be included in them. Through its sale of television and advertising rights, the IOC contributes significantly to the funding of any particular Games. Further, by virtue of its experience, the IOC provides considerable assistance to the OCOG in ensuring that the Games are organized in as efficient and spectacular a manner as possible.

> Sieber Affidavit, vol. 1, Exhibit 2, pp. 174, 181-83, 189-90, 193-200;
> Furlong Affidavit, vol. 4, Exhibit 16, paras. 12, 26; pp. 1692-93, 1698-99

255. What the IOC does not do is host the Olympic Games. Nor does it organize, plan, or stage them.

> Notice to Admit, para. 40;
> Furlong Affidavit, Exhibit 16, p.1690.

256. For any Games, the NOC of the host country has a role in their planning, organization and staging. The NOC's review and submit to the IOC applications from cities in their countries to host the Olympic Games. If the Games are awarded to a city in their country, the NOC is, jointly with the city that submitted the bid, responsible for the organization and staging of the Games, although the NOC bears no potential liability for a failure to do so as it is always indemnified by the city. In addition to these special roles for the NOC of the host country, and barring government boycotts as occurred in 1980 and 1984, the NOCs are the bodies that send qualified athletes to the Games.

> Furlong Affidavit, Exhibit 3; and Exhibit 16;
> Sieber Affidavit, paras. 22-23, Exhibit 2, pp. 170-76, 181-83;

257. The sports federations, such as the FIS, are the governing bodies of the sports included in the Olympic Games. They set the rules and supply technical delegates (i.e. referees, judges etc.)

for the events. Further, as was the case with ski jumping, they make recommendations to the IOC on what events should be included in the Games.

> Sieber Affidavit, paras. 18-21, pp. 166-67, 200-03;
> Furlong Affidavit, paras. 73-74

258. The municipal government of the city chosen to host the Games is directly and financially responsible for their planning, organization and staging, or, colloquially, for putting them on. Further, it is the city, along with the NOC, which must ensure that the OCOG is established in order to actually carry out the day-to-day elements of the Games' planning, organization and staging. The City of Vancouver is the host city for the 2010 Games.

> Furlong Affidavit, Exhibit 16, pp. 1690, 1691 and 1692, ss. 1, 2, 4, 9 and 12.

259. The OCOG for any Olympic Games is an entity established by the NOC and host city through which they fulfill their responsibilities of "planning, organizing and staging" the Games. While an OCOG may have ancillary purposes, this is its core purpose, in the sense of being the reason for its existence. After it is brought into being, the OCOG becomes a party to the obligation to "plan, organize and stage" the Games, and it remains jointly and severally liable with the City for a failure to do so.[20] With minor restrictions on the membership of its board (no sitting government officials), and an admonition that the Games be organized in the best manner

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[20] Because the city provides an indemnity to the NOC, it is only the city and OCOG that are potentially liable for a failure to execute the activity of "planning, organizing and staging" an Olympic Games. Further, because the OCOG is a single purpose organization that is to be wound-up following a Games, the reality of this joint and several liability must be that the city (and through its taxing powers, its citizens) most likely assumes liability for the planning, organizing and staging of any particular Olympics. (Furlong Affidavit, Exhibit 3, clause 6(c)(ii) and Exhibit 18, clause 4.)

possible, the city and NOC are free to organize the OCOG as they wish, including providing any level of government with routine or regular control over it.

Furlong Affidavit, Exhibit 16, pp. 1690, 1691, s. 2, 4 and 9

260. All of these roles and activities seek undoubtedly to achieve the common goal of putting on a good Olympic Games. But that does not mean that they cannot be unbundled or separated from each other. No doubt, if the City of Vancouver and VANOC failed to "plan, organize and stage" the 2010 Games, the IOC would characterize this as an independent and discrete activity for which they were responsible rather than one that the IOC should ascribe to itself.

(ii) How the Government took on the Activity and Ascribed it to VANOC

261. The City of Vancouver and the Province of British Columbia are government for the purposes of section 32 of the *Charter*. Once they take on an activity for themselves, that activity is infused with *Charter* obligations.

Godbout v. Longeuil (City), [1997] 3 S.C.R. 844

262. In bidding for the 2010 Games and becoming their host city and the host province, the City of Vancouver and the Province of British Columbia took on the activities that go along with that status, including the responsibility of:

(a) staging the Games (Recital G);

(b) hosting the Games (Recital Q);

(c) organizing the Games (Clause 1);

(d) forming the OCOG (Clause 2);

(e) ensuring that the OCOG became a party to the Host City Contract (Clause 3);

(f) accepting joint and several liability with the OCOG for the planning, organizing and staging of the Games (Clause 4);

(g) ensuring that the relevant governments and public authorities honour their commitments in relation to the "planning, organization and staging" of the Games (Clause 5);

(h) agreeing to indemnify the IOC, its officers, members, directors, employees, consultants, agents, contractors (e.g. Olympic sponsors and broadcasters) and all other representatives for damages that the IOC suffers including that it must pay out, for acts and omissions of any of the City, the COC or the OCOG in relation to the Games (Clause 9)

Furlong Affidavit, vol. 4, Exhibit 16

263. More comprehensively, the City appears to have taken on direct responsibility to "plan, organize and stage" the 2010 Games in clause 12.

Furlong Affidavit, Exhibit 16, pp. 1688-1692; Exhibit 3, p. 207, s. 6(c)(i)

264. When the City of Vancouver took on these activities, they became governmental. This is not only because the City itself is "government", but also because under the Participation Agreement, the City's engagement in the project is entirely "on behalf of" the Province, and something that the Province will fully indemnify the City for.

Furlong Affidavit, Exhibit 2, pp. 180-81, ss. 1, 2, 4-7;

Defendant's document 273, Common Book, tab 43.

265. VANOC's derivative responsibility for "planning, organizing and staging" the 2010 Games is thus but a specific manifestation of the activity of the City and the Province, and attributable to them in law.

266. As VANOC admits, the Olympic Games are but the events that comprise them. As it stated at page 48 of its business plan, "the Games are primarily about sport and athletes". Accordingly, the "planning, organization, and staging" of the events that comprise the 2010 Games constitutes the specific implementation of the "planning, organization and staging" of the 2010 Games. They are thus infused with the *Charter* obligations of organizing the 2010 Games as a whole.

Notice to Admit, para. 53(a) and 54;
Notice to Admit, VANOC vol. 1, tab 8, p. 48, Common Book, tab 39.

267. In contrast, the IOC has *not* taken on the role of hosting the 2010 Games, of "planning, organizing and staging" them, or of ensuring that these tasks get done. Indeed, the Host City Contract expressly puts the burden of those activities on the City of Vancouver – not the IOC. As for the Province, it sought and assumed responsibility for ensuring that the 2010 Games are "planned, organized and staged" through its acceptance of liability in its indemnity to the City and its guarantee to the IOC.

Furlong Affidavit, Exhibit 2, pp. 180-81, s. 1, 2 and 4-7 and Exhibit 16;
Furlong Affidavit, Exhibit 2, 16, pp. 180-81, ss. 1, 2 and 4-7, Exhibit 16, p. 1690 and 1691;
Defendant's document 273, Common Book, tab 43;
Furlong Affidavit, Ex 18, p. 1794;
Bagshaw Discovery Transcript, Q. 451-454; XFD response 23;
Notice to Admit, VANOC vol. 2, tab 34; Common Book, tab 42.

(iii) The corroborative evidence

268. There is copious evidence to corroborate the fact that the hosting of the 2010 Games is a government activity, and that their "planning, organizing and staging" is a constituent element which should be ascribed as a government activity. A chronological discussion of that evidence amply supports this conclusion.

A. Bid was made on behalf of the Governments, led by British Columbia

1. Early Stages

269. Bidding to host the Olympic Games in Canada involves two key components – a domestic competition and an international competition. Where there is more than one potential bidder from the same a country, the interested cities must submit proposals, or "bids" to the COC, which then chooses one bid to be submitted to the IOC. The IOC first receives a "mini-bid book" as it reduces a larger number of "applicant" cities to a smaller number of "candidate" cities. These then have submitted on their behalf a more formal "bid book" that sets out their plan to host the Games. The IOC chooses the host city from among the "candidate" cities.

Furlong Affidavit, paras. 5, 6, 8, 14

270. In the case of Vancouver's bid to host the 2010 Games, the domestic bid to the COC was an activity led and performed by both British Columbia and the City of Vancouver, and made on their behalf.

271. In his affidavit, Mr. Furlong says that it was the Province and the City of Vancouver who, along with Arthur Griffiths, spearheaded the bid to bring the 2010 Olympic Games to British Columbia. While Mr. Furlong characterizes this effort as being made by three people, the better

view is that Mr. Waddell signed on in his position as the Minister of Small Business and Tourism for British Columbia, and Mr. Owen in his position as the Mayor of Vancouver.

Furlong Affidavit, para. 4

272. No copy of the bylaws or articles of incorporation of the Bid Society have been produced in this litigation, but it is clear from the recitals of the Participation Agreement entered into by the Province and the City that the Bid Society pursued the bid only with the consent of both governments.

Furlong Affidavit, Exhibit 2, pp. 179-80

273. Vancouver City Council approved of the concept for the 2010 Games in February of 1998. A similar motion was passed by the Resort Municipality of Whistler, the Squamish-Lillooet Regional District, and the Council of the Greater Vancouver Regional District. This was, of course, necessary because if the bid was successful, the City of Vancouver would have to undertake the responsibility of hosting the Games.

Furlong Affidavit, para. 4; Exhibit 1, p. 13; Exhibit 16

274. The Government of British Columbia then:

> . . . passed a motion of support-in-principle to provide the resources necessary for British Columbia to host the 2010 Olympic Winter Games. This include[d] significant transportation investment to move the Olympic Family and spectators during the Games. The Minister [had already] formed an Inter/ministry/inter-agency task force to provide the full support of the provincial government to the Bid.

Furlong Affidavit, Exhibit 1, p. 12.

275. The Province's endorsement of the bid in 1998 included the commitment of senior staff resources to ensure that planning efforts would be coordinated, the acceleration of the RAV Line project, and approval for the use of Crown land for the Olympic Nordic Events site in the Callaghan Valley.

Furlong Affidavit, Exhibit 1, p. 113

276. Interestingly, at this early stage the domestic bid contemplated the inclusion of not one but two ski jumping events in which women could participate. There was no contemplation of a ski cross event.

Furlong Affidavit, Exhibit 1, p. 39

277. At this stage, the Government of Canada was not yet involved in the Vancouver bid as would of course be expected as Vancouver had not yet been chosen to represent Canada.

Furlong Affidavit, Exhibit 1, pp. 93, 94

278. Before the COC selected the City of Vancouver as its nominee to host the 2010 Games, the Province and City entered into a formal agreement for the City's participation. It is clear from the recitals and terms of the agreement that it was made at the behest of the Province in order to ensure the City's full participation in both the bidding for, and subsequent hosting of the 2010 Games.[21] Mr. Furlong's narrow characterization of the indemnities contained in this

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[21] The Participation Agreement contemplates in its recitals that the City would be required to undertake the commitments of the Host City Contract if its bid was selected, but that the City would only enter the agreement on condition of indemnities from the Province for any liability "imposed on the City through or as a result of the Bids or the Bid Agreements". (Furlong Affidavit, Exhibit 2, pp. 179-80); Mr. Furlong's characterization of this indemnity in his circumstances does not accord with the evidence of the Participation Agreement (Furlong Affidavit, para. 7)

agreement is difficult to follow. These are not limited indemnities, applicable only to specific conditions, but expansive indemnities that only reserve limited conditions.

Furlong Affidavit, vol. 1, Exhibit 2, pp. 180-81, clauses 6, 7

279. On December 1, 1998, and following the selection of the City of Vancouver as the COC's nominee, the City, the Bid Corporation and the COC (then called the Canadian Olympic Association) entered into the Bid City Agreement. The Agreement set out a variety of structures and understandings, including that the City was directly involved in bidding for the Games, and doing so with COC support and assistance.

Furlong Affidavit, Exhibit 3, pp. 187, 189, 190-92

280. In June 1999, the Bid Society was disbanded and the Bid Corporation formed. The applicants were Arthur Griffiths; the Mayor of Vancouver, Philip Owen; and British Columbia's Minister of Small Business, Tourism and Culture, Ian Waddell. The bylaws of the Corporation provided membership to the City of Vancouver and the Resort Municipality of Whistler, the COC and the Government of British Columbia. The governments were effectively given control over the Bid Corporation by virtue of their ability to appoint two thirds of its directors, including special provincial and municipal government directors with powers beyond those of the ordinary director. Similarly, the Governments were entitled to appoint two thirds of the Executive Committee, the Audit and Finance Committee, and the Nominating/Governance Committee. Further, the Provincial Director was entitled to chair the Audit and Finance Committee.

Furlong Affidavit, Exhibit 4, pp. 225, 230, 232-35 and 239-42;
Notice to Admit, BidCorp By-Laws vol., tabs 1-9, Common Book, tabs 44-52.

281. After Vancouver won the right to advance a bid, the government of Canada needed to be brought on board. The bid could not proceed without its support. The Canadian Government has a Sport Hosting Policy with a formal application for the financing, support and participation of the federal government under its hosting program. Instead of the Bid Society, or Bid Corporation proceeding under this policy by submitting a formal application to get federal support for the 2010 bid, it was the Premier of British Columbia who wrote directly to the federal government requesting it[22]. This is because bidding for and hosting the 2010 Games is and always has been a project of the Government of British Columbia.

Furlong Affidavit, Exhibit 16, p. 1689, (clause H); Exhibit 18, p. 1757, clause G, and pp. 1779-84;
Bagshaw XFD, Q. 266-269.

2. Canada's Bid

282. The federal government did come on board, with Prime Minister Chrétien announcing its support in Vancouver on November 9, 2001. By November 22, 2001, the Bid Corporation and the Government's Department of Canadian Heritage had set out their roles and relationship in a Memorandum of Understanding. It states:

> [T]he Government of Canada regards the holding of the 2010 Winter Olympic and Paralympic Games (Games) in Canada as an event of national significance and wishes to ensure that, should the Games be held in Vancouver [and] Whistler they be a matter of pride to all Canadians and a credit to Canada abroad. The Government of Canada is also committed to assist the Municipalities of Vancouver and Whistler, the Province of British Columbia, the Canadian Olympic Association and the Vancouver Whistler Bid Corporation in <u>their</u> bid for the Games...(p. 1)

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[22] The Plaintiffs have requested a copy of this letter. It has yet to be produced and no explanation has been provided.

> ...the Minister [of Canadian Heritage] will be responsible for supporting transition activities and the establishment of an Organizing Committee for the Olympic and Paralympic Games should the Bid be successful in July 2003. ...(p. 1)
>
> The [Bid] Corporation has been incorporated to plan, organize, finance and present, on behalf of Canada and the Member Partners, the Bid for the 2010 Olympic and Paralympic Winter Games to the International Olympic Committee (IOC) for a decision to be rendered in July 2003. (p. 2)
>
> In the Bid phase, the Corporation acknowledges that it is undertaking a responsibility of national significance on behalf of all the members of the Bid Corporation, its supporters and all Canadians. Consistent with Canada's linguistic duality, it will produce simultaneously in both official languages all materials destined for public use and will make both official languages at all public events. (p. 6) (emphasis added throughout)

Notice to Admit, VANOC, vol. 1, tab 15, p. 19, Common Book, tab 5;
Defendant's document 188, pp. 1, 2 and 6; Common Book, tab 53.

283. In his discovery, Mr. Bagshaw sought to portray the repeated references to "their bid", "on behalf of" and "responsible for" as Canada's understanding of the structure of activities, until he was asked to turn to the last page where he found the signature of Mr. Poole, Bid Corp's President and CEO. Clearly, this Memorandum of Understanding was a carefully drafted document, intended to express the understanding of both Canada and the Bid Corporation with respect their ongoing relationship and the arrangement.

Bagshaw XFD, Q. 253-257

284. The phrase "on behalf of", especially when used in connection with Official Languages obligations, is particularly relevant. In *Desrochers,* the Federal Court applied the government activity test in *Eldridge* to determine whether an activity was done "on behalf of" the Government of Canada for the purposes of the *Official Languages Act.* According to *Desrochers*, then, if an activity is done "on behalf of the government" it meets the test for both

the ascription of activity for the purposes of the Official Languages Act and section 32 of the *Charter*. The Bid therefore should be ascribed to government for the purposes of the *Charter*.

285. On March 14, 2002, after being submitted for ministerial approval on November 7, 2001, the bylaws of the Bid Corporation were amended to make the Government of Canada a "member partner". On May 31, 2002, the Bid Corporation submitted a "mini-bid book" to the IOC on behalf of its member partners. The mini-bid book provided a specific account for the plans regarding the hosting of the 2010 Games as they stood at the time. These included a number of commitments from the Governments regarding government participation. These go well beyond the function of mere regulation or support.

> Furlong Affidavit, para. 9, Exhibit 8, pp. 380, 381, 383, 390-94, 397;
> Notice to Admit, Bid Corp By-Laws, vol. 1, tab 9, Common Book, tab 52.

286. In particular, the mini bid book describes the project, and the parties' relationship to it as follows:

> Vancouver 2010 has been authorized by the COC and the City of Vancouver to present Vancouver's Bid to organize the 2010 Olympic Winter Games and Winter Paralympic Games. The Member Partners of Vancouver 2010, who have joint responsibility for the actions and conduct of the Bid are the COC, the Governments of Canada and British Columbia, the City of Vancouver and the Resort Municipality of Whistler. This unique and effective partnership will continue as the Vancouver 2010 Candidature committee, should Vancouver be accepted as a Candidate City. All information regarding Vancouver 2010 would apply to the Vancouver 2010 Candidature Committee.

> Furlong Affidavit, Exhibit 8, p. 380

287. There is no equivocation in this statement. It is clear to the world that the Bid is being declared by those making it, and with the approval of the governments, to be a government activity.

288. On August 29, 2002 the City of Vancouver was short-listed as a candidate city to host the 2010 Games.

Furlong Affidavit, para 15

3. Candidate City to Host City

289. On November 14, 2002, with the candidature secure, the Bid Corporation members and the Bid Corporation itself entered into the Multiparty Agreement (Furlong Affidavit, para. 18). According to Mr. Furlong's testimony before the House of Commons Standing Committee on Official Languages, the Multiparty Agreement "was the brainchild of someone at the Ministry of Heritage" for the federal government.

Plaintiffs' Document 1033, Common Book, tab 36

290. The purpose of the Agreement was set out in its recitals, many of which speak to the issue of the bid and subsequent hosting of the 2010 Games as a government activity. Through this agreement, the Governments set out their priorities and how the 2010 Games would be planned, organized, financed and staged.[23] They established the general parameters for the governance of the yet to be created VANOC, and imposed upon it obligations including the obligation to plan, organize, finance and stage the 2010 Games. They agreed that it should be created for this purpose, and that it should be bound as a party to the Multiparty Agreement.

Furlong Affidavit, Exhibit 18;
Plaintiffs' Document 914, Common Book, tab 54

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[23] See James Moore's comments, May 16, 2007, p. 9604 2nd column.

291. As VANOC has admitted over 170 times in its trademarks memorandum, through the Multi Party Agreement the governments ensured themselves "extensive ongoing supervision of, and control over, [VANOC's] governance and decision making". Even if this admission were insufficient to demonstrate control for the purposes of the test set out in *Douglas, supra* it is certainly evidence that the Governments themselves considered their involvement in the bidding for and hosting of the 2010 Games to go far beyond the mere support of VANOC's activities.

292. The key component of the candidature phase was the preparation and presentation of the Bid Book and accompanying guarantee files. These are significant documents that fill several volumes (the guarantee file fills two volumes of Mr. Furlong's affidavit alone). The documents set out detailed plans for hosting the 2010 Games, the parties' positions on various issues, and significant commitments from the governments.

> Notice to Admit, VANOC vol. 1, tab 15, Common Book, tab 5
> Furlong Affidavit, Exhibit 9

293. Together, these documents show that the Governments' involvement in the 2010 Games is not merely one of support, subsidization and regulation. The levels of commitment, not just in relation to funding, but also to the additional and special services being directly provided by government, are far too extensive to permit of any conclusion other than that this is a government project, portions of which are being provided through the vehicle of VANOC.

294. The central role of planning, organizing, financing and staging the events in the context of hosting the 2010 Games, and the centrality of the athletes who participate in them, are both amply illustrated in the Bid Book. Clearly, the governments on whose behalf the Bid Book was prepared and presented, considered themselves not merely part of some construction project, but

actively involved in providing and putting on athletic competitions and a gathering of athletes from around the world.

Notice to Admit, VANOC vol. 1, tab 15, Common Book, tab 5.

295. An interesting point emerged from a review of the Bid Book on the discovery of Mr. Furlong: he agreed that the bidders were telling the IOC that the *Charter* would guide VANOC's work in hosting the 2010 Games.

Furlong XFD, Q. 132-133

296. In Mr. Furlong's affidavit and examination for discovery, and seemingly in anticipation of an argument of the Plaintiffs, he contended that "[i]t would have been very difficult, although possible, to win [the bid] without significant support from all [of the governments]". This is plainly incorrect.

Furlong Affidavit, para. 12;
Furlong XFD, Q. 194-213

297. The first criterion for the IOC's assessment of a bid, even according to Mr. Furlong, is the level of government support and public opinion. The vote for hosting was extraordinarily close and "[t]he bid process for the 2010 Winter Games was extremely competitive".

Furlong Affidavit, paras. 14-15

298. Moreover, the IOC's preconditions for acceptance would have been impossible to meet without significant government participation. The City of Vancouver was required to take on the

responsibility of hosting and organizing the 2010 Games, of ensuring that VANOC planned, organized and staged them, and of providing the IOC with a comprehensive indemnity. The Governments of Canada and the Province were required in their covenants to provide significant guarantees, special services and security, in addition to extensive commitments regarding infrastructure and venues.

> Furlong Affidavit, Exhibit 16, p. 1690-1; Exhibit 9(8), p. 432-58; Exhibit 9(9), p. 459-67

299. Given the closeness of the bidding process, it is incomprehensible to suggest, as Mr. Furlong did on discovery, that the City of Vancouver could have won the right to host the 2010 Games with a single lane dirt road being the only means to get to the ski jumps and nordic events.

> Furlong Affidavit, para. 15;
> Furlong XFD, Q. 220-230

300. The bidding process supports the legal conclusion that hosting the 2010 Games is a government activity, and that VANOC's actions in planning, organizing, financing and staging should be ascribed to government.

B. Direct Participation, Both in the Governance and Decision Making of VANOC and in the "Organization, Planning and Staging" of the 2010 Games Themselves

301. Once the 2010 Games were awarded, the Governments' participation did not end; rather, it expanded. This is true both in terms of their involvement with VANOC and in terms of their own activities directly involved in hosting.

302. It is not just the financial participation of the Governments in the 2010 Games that demonstrates that they are a government project. (Although that figure alone, estimated at approximately $6,000,000,000 by the business reporter for the Vancouver Sun after an investigative report, and the $2,506,000,000 excluding unfunded liabilities as estimated by the BC Auditor General as British Columbia's contribution, is certainly considerable.) It is what the Governments are doing, both through VANOC and apart from it, that is significant here.

> Plaintiffs' Documents 1596-97, Common Book, tab 41;
> Notice to Admit, VANOC vol. 2, tab 34, p. 8; Common Book, tab 42

303. VANOC admits only that the Governments "wish" the Games success. What the Governments are doing, however, goes far beyond that. They are working tirelessly to ensure it.

> Notice to Admit, para. 2

1. Participation through VANOC

304. In September of 2003 VANOC was formed for the single purpose of planning, organizing, financing and staging the 2010 Games as provided for in the Multi Party Agreement. The Governments have had extensive participation in VANOC's activities since it was created.

> Notice to Admit, By-Laws vol. tab 1, Common Book tab 4;
> Furlong Affidavit, Exhibit 18, p. 1760

305. Contrary to Mr. Bagshaw's and Mr. Furlong's suggestions, this participation is not merely by way of providing a "subsidy" or acting as a banker and regulator. It is far more intensive than that.

> Furlong Affidavit, para. 45;
> Bagshaw Affidavit, paras. 4 and 5

306. Following are but a few examples of this intensive participation. They must be considered in addition to the rights of control discussed above:

(a) The Governments appoint the majority of VANOC's 19-member board (where that majority can then determine the 20th member, who subsequently became the chairman) and the government appointees can be removed at pleasure.

Notice to Admit, By-Laws vol. 1, tab 1; Common Book, tab 4

(b) The City of Vancouver's board members include the City Manager.

Bagshaw Affidavit, Exhibit A, p. 3, para. 17;
Notice to Admit, By-Laws vol, tab 1; Common Book tab 4;

(c) As quoted above, and in Annex A to this Submission, British Columbia's appointees to VANOC are, according to the Minister of Finance, Mr. Hansen, looking after British Columbia's interests, rather than acting solely for VANOC.

Plaintiffs' document 806, Common Book, tab 29

(d) The President/CEO of the BC Secretariat, the government agency responsible for the bill chairs VANOC's Audit and Finance Committee, which must approve any VANOC expenditure over $500,000. This includes both operating and capital expenditures.

Notice to Admit, VANOC vol. 2, tab 34, (p. 16); Common Book, tab 42
Notice to Admit, By-Laws vol. tab 1, (clause 4.3); Common Book, tab 4

(e) The City of Vancouver provides VANOC with office space at what has been assessed as a substantial discount from market rates.

> Plaintiffs' documents 1596-97, Common Book, tab 41

(f) The Governments have provided all of VANOC's capital. This was not a loan and is not to be repaid. It is, essentially, VANOC's equity. Other funds coming to VANOC are revenues earned for putting on the 2010 Games regardless of whether they come from VANOC's own sale of tickets, sponsorships or merchandise, or indirectly from the IOC's sale of advertising or broadcasting rights. Commercial common sense suggests that the capital is used to perform the function to earn the revenue, which is used to pay the expenses of earning that revenue. Commercial common sense also suggests that the enterprise belongs to those who provided its equity.

> Notice to Admit, VANOC, vol. 1, tab 8, (p. 14-17); Common Book, tab 39
> Bagshaw XFD, Q. 475-491;
> Furlong Affidavit, paras. 27-30

(g) The Governments will absorb a significant share of VANOC's losses should it fail to stage the 2010 Games. If that happened, the operating expenses would have already been paid by revenue earned from domestic sponsors, ticketing and other sources. The IOC would come calling for the revenues it provided, along with damages. After VANOC paid out whatever cash it had, there would be nothing left to cover IOC losses and IOC revenue, and the City and Province would be required by their indemnities to step in and make the IOC whole. While the contracts have not been disclosed in this litigation, it

also seems likely that the Governments would absorb losses in relation to them should VANOC have insufficient cash to pay them back.

> Notice to Admit, VANOC vol. tab 34, pp. 2- 3, Common Book, tab 42;
> VANOC, vol. 2, tab 29, (p. 1), Common Book, tab 55;

(h) Any surplus that may result from the staging of the Games is not a profit for VANOC's own use but, after deductions in favour of the IOC and COC, will be used to fund sport legacy programs as decided by the Governments (Multiparty Agreement, clause 33). Contrary to the characterization provided by VANOC in the Affidavit of Mr. Furlong, the IOC imposes only a general requirement that the OCOG's profits go to benefit sport. It was the parties to the Multi-Party Agreement that dictated what these would actually be used for if there were any.

> Furlong Affidavit, para. 35(l), Exhibit 16, p. 1709 and Exhibit 18, p. 1770

(i) The Governments reviewed and approved VANOC's business plan of May 2007 after declining to approve the first plan of June 27, 2005. In his examination for discovery, Mr. Bagshaw described the process as the Governments and VANOC working together to get the plan right. The plan itself was a detailed 196 paged document, and was created so that it could "guide" VANOC's decisions (p.8).

> Bagshaw XFD, Q. 285-288 and 304-305; request 13
> Notice to Admit, VANOC, vol. 1, tab 8, p. 8, Common Book, tab 39;
> Defendant's document 271, Common Book, tab. 56

(j) The Master Schedule, which according to Mr. Furlong and the business plan is the key document in organizing the 2010 Games, was "workshopped" with the Governments. This cryptic terms suggests a hands-on, intensive process.

> Notice to Admit, VANOC, vol. 1, tab 8, (pp. 19, 39 and 176-78); Common Book, tab 39;
> Furlong Affidavit, paras. 40-41;
> Defendant's document 220, Confidential Document Book, tab 1.

(k) The Province and the City have participated in designing the traffic plan for the 2010 Games which will severely restrict the public's ability to get around the Lower Mainland, and its use of Highway 99.

> Plaintiffs' document 1367-1376; Common Book, tab 57;
> Furlong Affidavit, Exhibit 9(7)(a), p. 423-429

(l) The Province is likely set to contribute massively to the staff required to stage the 2010 Games, as it has offered its employees paid leave if they are willing to "volunteer".

> Plaintiffs' Document 1048-1049; Common Book, tab 58

(m) The Province has provided to VANOC the Crown land on which Whistler Olympic Park was constructed, for a nominal licensing fee as opposed to market rate.

> Defendant's Document 9, p. 2; Common Book, tab 59

(n) The Province has retained oversight of the construction contracts entered into by VANOC.

> Defendant's document 12, (clause 4.10(n), (k) and (l), pp. 4-5), Common Book, tab 60

(o) The Province had oversight in relation to certain staffing decisions.

Defendant's document 12, (clause 4.10(m)), p. 5; Common Book, tab 60

(p) The Government of Canada has imposed on VANOC the obligations of the *Official Languages Act* which, as mentioned above, are imposed on bodies acting "on behalf of" the government under a test identical to that for ascribing activity for purposes of section 32 of the *Charter*. Through the Official Languages Commissioner and the Senate and House Standing Committees on Official Languages, the Government of Canada has been actively assisting VANOC in meeting its commitments under the *Act*.

Furlong Affidavit, Exhibit 18, clause 8, p. 1763 and Annex A, p. 1778;
See eg. Plaintiffs' documents 810-889, 999-1029; Official Languages Commissioner Report, Plaintiffs' document 1598-1664, Common Book, tab 61, 62 and 63;
Official Languages Act, R.S.C. 1985 (4th Supp.) c. 31, s. 25

(q) The Governments of Canada and British Columbia have imposed on VANOC procurement policies, including those related to the nationality of goods and Canada's international obligations in relation to procurement.

Furlong Affidavit, Exhibit 18, clause 10.2, p. 1763
Defendant's document 12; (clause 4.10(n), p. 5), Common Book, tab 60

(r) The Government of Canada has imposed on VANOC its policies in relation to tobacco advertising.

Furlong Affidavit, Exhibit 18, clause 9 and annex C, p. 1763 and 1785

(s) The Government of Canada has imposed on VANOC certain investment requirements.

Furlong Affidavit, Exhibit 18, annex D, p. 1786

(t) 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.

Notice to Admit, VANOC, vol. 1, tab 8, (p. 177); Common Book, tab 39

(u) The Governments have imposed pay equity and equal employment standards on VANOC.

Furlong Affidavit, Exhibit 18, clause 11.4(b), p. 1763

(v) The Government of Canada will partake in the planning of the opening and closing ceremonies to ensure that they reflect Canada's cultural diversity and linguistic duality.

Plaintiffs' document 874, Common Book, tab 61

307. The level of government participation manifested in these examples significantly exceeds the picture painted by VANOC.

2. Direct Activities to Host the 2010 Games

308. Government participation in VANOC's own activities is but the tip of the iceberg when it comes to the hosting of the 2010 Games. The Governments' direct involvement stretches far beyond their regulatory roles, or their provision of generally available services, and includes

significant expenditures. The following are examples of government activities undertaken directly for the hosting, organization, planning and staging of the 2010 Olympic Games:

(a) The City of Vancouver undertook the development of the Vancouver Olympic village to house athletes during the 2010 Games. This is a massive development project that is being provided for the 2010 Games.

Furlong Affidavit, Exhibit 18, p. 1794; Exhibit 9(29), p. 1165-1198

(b) The Governments of Canada and British Columbia are going to be spending an estimated $900,000,000 on security. This amount in and of itself is far in excess of the entire contribution of the IOC to VANOC's revenue which was estimated as 447,000,000 in VANOC's January 2009 budget. On discovery, Mr. Bagshaw admitted that these security costs were not in the nature of ordinary policing, but solely for the purpose of hosting the 2010 Games. They are in addition to the policing and security which the Lower Mainland ordinarily receives.

Notice to Admit Documents, BC, vol. 1, tab 18; Defendant's document 256;
Plaintiffs' documents 1596-1597, Common Book, tab 41;
Bagshaw XFD, Q. 492-496.

(c) The Government of British Columbia upgraded the road from the Sea to Sky Highway to Whistler Olympic Park, the site of the ski jumps, cross country skiing and biathlon facility, solely for the 2010 Games.

Furlong XFD, Q. 221-231

(d) The Government of Canada passed special "anti-ambush" legislation to protect advertisers associated with the 2010 Games and the trademarks of the Games themselves. The legislation effectively removes any requirement to prove "irreparable harm" prior to being entitled to an interlocutory injunction to protect use. As noted during debate and committee hearings on the bill, this is a significant change to the prerequisites for injunctive relief. It is not generally available to other rights holders, even those involved in events taking place over a short duration and of general public interest. The purpose of this statute was to live up to a commitment made by the Government of Canada and to assist in raising money from the private sector. As Mr. Furlong stated to the House of Commons Standing Committee on Industry, Science and Technology:

> It is important for us to [pass this bill] so that we are never put in a position of having to come and ask anybody to help us out. We want to deliver it this way. This is the partnership we have, and we fully intend to deliver that. We never want to come back and ask for help because we haven't been able to meet our obligations.

See Plaintiffs' Documents 921-939; Common Book, tab 64 (quote at 931)

(e) From the early Bid books and correspondence from Premier Clark, it is clear that the Canada Line was an Olympic expense. This was confirmed by Mr. Bagshaw in discovery.

Furlong Affidavit, Exhibit 1, p. 113;
Bagshaw XFD, Q. 493-496

(f) The Province committed to completing the upgrade of the Sea to Sky Highway prior to the Games and has engaged in completing this project.

Furlong Affidavit, Exhibit 9(33), p. 1217

(g) Mr. Bagshaw also confirmed that the Sea to Sky Highway was an Olympic project. This view is shared by the Auditor General, and confirmed in the letter of the Minister of Transport to Mr. Poole contained in the Guarantee File.

> Bagshaw XFD, Q. 492-496;
> Notice to Admit, VANOC, vol. 2, tab 34, p. 10, note 4; Common Book, tab 42;
> Furlong Affidavit, Exhibit 9(33), p. 1217-8.

(h) Hosting the 2010 Games involves the provision of health care services and facilities to the "Olympic Family". This will be done by the Province through our public health care facilities at its cost.

> Furlong Affidavit, Exhibit 16, p. 1697; Exhibit 9(9), p. 461;
> Notice to Admit Documents, VANOC, vol. 2, tab 34, p. 7; Common Book, tab 42.

(i) The City of Vancouver and the Government of British Columbia have provided indemnities to the IOC for any losses that may accrue to it as a result of the hosting of the 2010 Games.

> Furlong Affidavit, Exhibit 13, p. 1622; Exhibit 9(9), p. 461, para. 4(a), Exhibit 2, pp. 180-81, Exhibit 3, p. 207, (6(c)(i);
> Defendant's document 273; Common Book, tab 43;
> Notice to Admit, VANOC, vol. 2, tab 34, (p. 3-4); Common Book, tab 42.

(j) The Government of Canada will be providing special visa and immigration status for Olympic Athletes and "Olympic Family Members" that are not extended to the general public or others coming to Canada for special events.

> Furlong Affidavit, Exhibit 9(8), p. 434

309. The Governments' own activities to support the Games go far beyond what one would expect from a lender or regulator. They go far beyond the ordinary provision of government services, both in their cost and in their scope. The hosting, planning, and staging of the 2010 Games is thus a comprehensive government project, and VANOC's role in this is just one aspect of the Governments' activities in relation to that project.

3. The Governments have Consistently said that this is a Government Project

310. Other than in the context of this lawsuit, all of the Parties to the hosting of the 2010 Games have, to one degree or another, repeatedly and publicly attributed the activity of hosting, organizing, planning and staging the 2010 Games to government. A review of some of these statements is attached to this argument as Annex A.

C. Conclusion on Government Activity

311. There is overwhelming evidence that the hosting of the 2010 Games, specifically their "planning, organization and staging", is a government activity.

312. This evidence firmly contradicts VANOC's suggestions that government involvement in that activity is limited to financing, "subsidizing" and regulating, and that the Governments are merely, and nebulously, "contributing" to VANOC.

313. In closing this submission it is useful to consider the following perceptive, and accurate, comment of the Official Languages Commissioner: "All partners understand that these are Canada's Games and that, as such, they must reflect the country's values". That understanding requires, at the very least, an appreciation that the 2010 Games are a government activity.

Plaintiffs' document 1598-1664, p. 3, Common Book tab 63

314. The Plaintiffs submit that this evidence, in combination with the rights of control discussed above, provide ample support for the conclusion that in "planning, organizing and staging" the 2010 Games, VANOC is engaged in an activity properly ascribed to government.

V. Argument on s. 1 Justification

315. VANOC cannot justify the discrimination against the Plaintiffs under section 1 of the *Charter*.

316. The violation of the Plaintiffs' equality rights is unconstitutional unless VANOC can justify it under s. 1 of the *Charter*. The justification proffered by VANOC does not meet even the basic prerequisites to the application of s. 1.

317. Section 1 of the *Charter* provides:

> 1. The *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.

318. To justify the violation of the Plaintiffs' equality rights, VANOC must show that the violation achieves a constitutionally valid purpose or objective, and that the means chosen for the violation are reasonable and demonstrably justified. Usually, the framework for the inquiry into justification is the well-known *Oakes* test (see *R. v. Oakes*, [1986] 1 S.C.R. 103, pp. 138-140), which has been summarized as follows:

> First, the objective of the legislation must be pressing and substantial. Second, the means chosen to attain this legislative end must be reasonable and demonstrably justifiable in a free and democratic society. In order to satisfy the second requirement, three criteria must be satisfied: (1) the rights violation must be rationally connected to the aim of the legislation; (2) the impugned provision must minimally impair the *Charter* guarantee; and (3) there must be a proportionality between the effect of the measure and its objective so that the attainment of the legislative goal is not outweighed by the abridgement of the right. In all s. 1 cases the burden of proof is with the government to show on a balance of probabilities that the violation is justified.
>
> *Eldridge, supra,* at para. 84

319. In the present case, however, it is unnecessary to consider any of the elements of the *Oakes* test. The justification advanced by VANOC does not engage s. 1 at all, because the discrimination against the Plaintiffs is not "prescribed by law".

Sieber Affidavit, paras. 74-87

320. The requirement that the limit in question be "prescribed by law" is concerned with the distinction between a limit imposed by law and one that is arbitrary. A limit will be prescribed by law within the meaning of s. 1 only if: (1) it is expressly provided for by statute or regulation; (2) it results by necessary implication from the terms of a statute or regulation or from its operating requirements; or (3) it results from the application of a common law rule.

R. v. Therens, [1985] 1 S.C.R. 613, at 645 per Le Dain J. (in dissent but not on this point)

321. Applying this test, the Supreme Court of Canada has consistently rejected the justification arguments of officials acting without express or necessarily implied statutory authority, or without the authority of a common law rule. By way of example, in the following situations *Charter* violations were found to be incapable of s. 1 justification because they did not arise from a limit "prescribed by law":

(a) a police officer demanding that a motorist accompany him to the police station for a breathalyzer test without informing him of his right to counsel: *R. v. Therens*, supra;

(b) the homophobic implementation by customs officials of a statutory scheme permitting the seizure of obscene materials: *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120 at para. 141 per Binnie J. (the equality rights violations

were clearly not justifiable in that case because they were not authorized by statute, but the Court proceeded to analyze the justification of an express statutory limitation of the freedom of expression);

(c) a police officer violating an accused's choice to remain silent by using a trick to negate his decision: *R. v. Hebert*, [1990] 2 S.C.R. 151, at 187 per McLachlin J.

322. In *Eldridge*, the plaintiffs' equality rights were violated by the decision of hospitals and an administrative commission not to fund medical interpretation services for the deaf. The court undertook the s. 1 justification analysis on the express assumption, without deciding the point, that the refusal to fund such services constituted a limit "prescribed by law". This was expedient because it was obvious in *Eldridge* that the decision in question did not constitute a minimum impairment of the plaintiffs' s. 15(1) rights, and thus failed the *Oakes* test in any event. What this highlights, however, is that the kind of "law" capable of prescribing a limit under s. 1 is much narrower than the "law" whose benefit is at issue under s. 15(1). The difference stems from the fact that s. 1 and s. 15(1) serve two very different purposes.

> *Eldridge, supra,* at para. 84
> *McKinney, supra* at 600 – 607, 610 – 612 per Wilson J. (in dissent but not on this point)

323. In the present case, VANOC does not suggest that the discrimination against the Plaintiffs has any constitutionally valid purpose or objective. It does not suggest that the discrimination is rationally connected to VANOC's objective in planning, organizing, financing and staging the 2010 Games. It does not suggest that the refusal to let the Plaintiffs participate in the Games

impairs their equality rights only minimally. It does not suggest that the violation of the Plaintiffs' equality rights is proportional to VANOC's objective.

324. Rather, VANOC justifies the discrimination by claiming that it does not need to comply with the *Charter* at all. According to VANOC, it is the IOC – an extra-jurisdictional, non-governmental entity with no presence in British Columbia – which is the sole arbiter of whether the Plaintiffs' constitutional rights can be denied. Effectively, it is VANOC's position that it has contractually outsourced its own obligations to comply with the *Charter* to a third party beyond the reach of this Court.

325. VANOC's position is untenable. The purely discretionary, and indeed arbitrary, decision of the IOC cannot possibly constitute a limit "prescribed by law" that would justify the discrimination against the Plaintiffs. The IOC has no statutory or common law authority to override the *Charter*. Nothing in the contracts in this case *prescribes* the discrimination against the Plaintiffs. Nor are these contracts, much less the IOC's decision, a *law* for the purposes of the Section 1 of the *Charter*.

326. If the Host City Contract on which VANOC relies in this regard had indeed purported to give the IOC authority to deny the Plaintiffs' equality rights, it would clearly be illegal and contrary to our public policy. A contract to be performed on Canadian soil – and in particular a contract to which government such as the City of Vancouver is a party – cannot bargain away the rights guaranteed by our Constitution.

> *Block Bros. Realty Ltd. v. Mollard* (1981), 27 B.C.L.R. 17 (C.A.), at 24;
> Furlong Affidavit, Exhibit 16;
> Bagshaw XFD, Q. 129-130

327. It would in any event be unreasonable to interpret the Host City Contract as achieving that result. Canada's bid for the 2010 Games proceeded on the condition that the laws and sovereignty of Canada should prevail on all matters related to the conduct of the Games. The Host City Contract does not exempt VANOC from complying with the *Charter*, nor does it make the IOC responsible for VANOC's compliance.

> Furlong Affidavit, Exhibit 9(8), p. 444, clause (iii);
> Furlong XFD, Q. 132-133

328. VANOC claims that it will not be able to abide by a judicial declaration that the Plaintiffs' equality rights are being violated, without breaching its contractual commitments to IOC and infringing the IOC's intellectual property rights. This confuses justification under s. 1 with remedial considerations. The risk of a contractual tiff with the IOC cannot justify the violation of the *Charter*.

329. Finally, VANOC professes its general support for women's participation in sport and points to its efforts in that regard. This is wholly irrelevant. VANOC's burden under s. 1 is to justify the actual discrimination against the Plaintiffs that is happening as part of the 2010 Games. It falls far short of that obligation.

VI. Declaratory Judgment

330. The Plaintiffs are seeking a declaration that if VANOC plans, organizes, finances, and stages a ski jumping event for men in the 2010 Games, then a failure to plan, organize, finance, and stage a ski jumping event for women in the 2010 Games violates the rights guaranteed to each of the Plaintiffs in section 15 (and is not saved by section 1) of the *Charter*.

331. The Supreme Court of Canada in *Solosky v. the Queen* has said that the granting of declaratory relief is discretionary and the two factors which will influence the court in the exercise of its discretion are:

(a) The dispute must be real and not hypothetical (a declaration will not normally be granted when the dispute is over and has become academic, or where the dispute has yet to arise and may not arise); and

(b) The declaration must be capable of resolving the questions at issue between the parties.

Solosky v. The Queen, [1980] 1 S.C.R. 821 at 832

332. Here there can be no doubt that there is a real and not a hypothetical, dispute between the parties. The declaration sought is a direct and present challenge to VANOC's decision not to plan, organize, finance, and stage a ski jumping event for women in the 2010 Games. That decision, so long as it continues, from the past through the present and into the future, is in controversy.

333. Once one accepts that the dispute is real, then the only further issue is whether the declaration is capable of having any practical effect in resolving the issues in the case. It is the Plaintiffs' position that it does.

334. First, VANOC agrees, under s. 51.1 of the Multiparty Agreement, to comply with "all applicable federal, provincial and local laws, regulations and bylaws" and, most importantly, under section 51.2(b) of the Multiparty Agreement, to comply with "any judgment, decree, order or award of any court…" made against it. As such, VANOC would have to comply with the declaration, if granted, which would resolve the issues in the case.

Furlong Affidavit, Exhibit 18, p. 1775

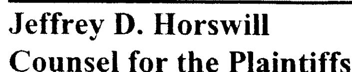
335. Second, the declaration would, in effect, change the status quo for other institutions that may, in turn, be subjected to human rights obligations to send athletes or delegates to the 2010 Games.

336. Third, the declaration would reaffirm the human dignity interests of the Plaintiffs protected thereunder are worthy of being protected.

337. Therefore, having met both factors set out in *Solosky*, the Plaintiffs should be granted the declaratory relief sought in this case.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

D. Ross Clark, Q.C.



Jeffrey D. Horswill
Counsel for the Plaintiffs

March 31, 2009

ANNEX A

BC Government quotes regarding the bid being a project of the government of BC

Premier Campbell indicated in the Legislature on March 7, 2002 that the bid was British Columbia's, supporting the inference that can be drawn from the evidence of Mr. Bagshaw on discovery that formal application under the hosting policy did not occur because the Premier made this via government-to-government communication. Premier Campbell said "we have a strong commitment from the Federal Government to support our bid for the winter Olympics ... Obviously, to be able to move forward with the Olympics, we have to have a bid prepared by January of 2003 -- not a qualified bid, not a maybe we'll do this bid, but a bid that says this is what we intend to provide and how we intend to provide it.

> British Columbia Hansard, March 7, 2002, p. 1634, Plaintiffs' document 674
> Common Book, tab 65

Gary Collins on February 18, 2003

"In a similar vein, the Government is moving ahead today with potentially one of the most significant economic development initiatives in the Province's history: the bid to host the 2010 Winter Olympic Games"

> Plaintiffs' document 676
> Common Book, tab 66

Government Control

The Government continues to work closely with VANOC. Hosting the games provides an opportunity for the Government of Canada to advance such federal priorities as official languages and to promote sustainable sport while generating social, cultural and economic benefits for all Canadians. The Department of Canadian Heritage has established the 2010 Olympic and Paralympics Winter Games Federal Secretariat to oversee the preparations for the games and to coordinate the efforts of various Federal Government departments and are provincial, municipal and private-sector partners.

> Testimony of Minister Emerson before the Standing Committee on Official Languages, April 14, 2008, Defendant's document 1019
> Common Book, tab 62

Q: Senator Nolen (starting at 875) So, what sort of mechanisms has the Government of Canada already put in place, or is in the process of putting in place, to ensure the various parties are meeting their commitments?

Everybody is pledging this and that and giving us their word that everything will be fine and that they're going to do their best. The games go on for two or three weeks. Two months before the deadline, it will be too late; money will already have been ear-marked and contracts will have been distributed. I hope you have envisioned a number of follow-up mechanisms to ensure that the people making political decisions -- that is to say, you Minister, the Minister for Sport, the Prime Minister of Canada, those in authority who wield a lot of weight in such an operation -- will be receiving advice and be prepared to make changes both forcefully and with resolve should the need arise.

A. Mr. Emerson: It is fair to say VANOC has done a good job so far. As I mentioned, when VANOC brings the revised business plan to us, it will be an important document requiring Federal sign off, and we will require an evaluation and assessment mechanism, performance metrics, and critical paths. I urge this Committee to call me, or whoever is responsible by the middle of next year, to confirm the evaluation and tracking frame work is accomplishing what we hope. You will have my assurance we will work closely with VANOC, and will not sign off until we are satisfied those mechanisms are in place and we are getting timely information. If it is not evolving satisfactorily, we can intervene before it is too late.

> Minister Emerson testifying before the Senate Official Languages Committee on December 11, 2006, Plaintiffs' document 874 to 875
> Common Book, tab 61

Transitional Team

The team that will ultimately be created is the team I talked about, the implementation team. Of course, there are four parties involved in these games that will play a lead role. There's the Federal Government, the Provincial Government, the City of Vancouver and Whistler, and they will be part of that overall team.

> The Honourable Ted Nebbling, British Columbia Minister in charge of the Olympics before the BC Legislature on April 1, 2003, Plaintiffs' Document 677
> Common Book, tab 67

Honourable G. Campbell: ... VANOC is a partnership between the Provincial Government, between the Canadian Olympic Committee, between the Federal Government -- trying to do something great that's great for Canada.

> Premier Campbell before the British Columbia Legislature on May 9, 2006, Plaintiffs' document 759
> Common Book, tab 68

Hon. G. Campbell: VANOC is not a provincial organization. Again, I think it is important for the opposition to spend some time to see how these structures are created. VANOC is a partnership between the Canadian Olympic Committee, the Federal Government, the Provincial Government, the City of Vancouver and the City of Whistler. Clearly, once again VANOC is independently audited. Those records are available for people. Since it is not a member of British Columbia's entity, it is not included.

> Premier Campbell before the BC Legislature on May 16, 2006, Plaintiffs' document 760
> Common Book, tab 69

Honourable C. Hansen: ...There is an ongoing dialogue between VANOC and the Provincial Government, whether that's through the work that the CEO of the Olympic Secretariat does in her meetings with VANOC officials or whether it is the meetings I have, which are on a regular basis, with the provincial representatives who sit on the VANOC Board. We make sure they are aware of our priorities and our views, and they carry those messages.

> Minister Hansen before the BC Legislature on May 16, 2007,
> Plaintiffs' document 799 - 800
> Common Book, tab 29

Hon. C. Hansen: ...But all of those things are not actually managed in their conversations with me; they're managed through the Board of Directors.

Yes, three of the Board members of VANOC are Provincial Government appointees. I meet with them on a regular basis to make sure that the interests of the province are being reflected. We have a partnership with VANOC in terms of delivering successful games, and it's in that spirit that we are approaching all of these issues. ... I am not going to go in and micromanage the affairs of a Federally-incorporated, not-for-profit corporation, of which the Province is one of the partners. I expect that the Board of Directors will do their job. I expect that the management team will do their job.

Plaintiffs' document 806
Common Book, tab 29

Hon. C. Hansen: The bottom line is that we are engaged with VANOC on a day-to-day basis. We sit at the table with them as they develop their plans in multitudes of areas.

I think the bottom line is that a part of our obligation is not to micromanage how VANOC organizes the games. Our obligation is to make sure there is a competent team that is in place that is actually managing the affairs of VANOC. I can say unequivocally that there is a very competent team that enjoys our 100% confidence.

Secondly, we have our representatives that are sitting on the Board, and we have our representatives who sit on the Finance Committee to make sure that the interests of the BC taxpayers are protected. That is exactly what is happening.

Plaintiffs' document 806
Common Book, tab 29

Furlong quote on nature of relationship between VANOC and Government of Canada

Mr. Furlong's testimony before the House of Commons Standing Committee on Official Languages.

Q: Richard Nadeau: Thank you Mr. Chairman. ... Is it correct to say that you are a third party of the Federal Government in hosting the Olympic games?

A: Mr. John Furlong: I am not sure. We were the bid committee, and the Federal Government and the Province of British Columbia were assigned partners in that endeavour. Yes, I think that would be fair. ...

Q: Richard Nadeau: Fine. As I understand it, when a third party represents the Federal Government, it must respect all of the laws of the Federal Government. One of the laws you must respect is the *Official Languages Act*, just as all departments must. You deal with subcontractors for sponsorships, advertising and other matters, because that is how promotional work is done. The objective is also to ensure maximum efficiency.

Under their contracts, do subcontractors face the same requirements as you, namely to ensure that everything is in both official languages?

A: Mr. John Furlong: It would be a stretch for me to say yes to that. I would say that many perform this way everyday, especially the big companies we are affiliated with. But some of the smaller ones, no. As much as we're able to, we try to influence them. For example, when we sign a small partner in some area, they may be the only applicant to provide a particular service to the games that critical for us. We would announce them in both languages, we would do all of those things properly. But do they function fully bi-lingually? Most probably don't. Some do. With some, it's easy. In fact, some prefer to perform in French only. But for most, I would say the answer is no. It would not be fair to say that the majority of them would have capacity in this area.

Plaintiffs' document 1044
Common Book, tab 36