IN THE HIGH COURT OF THE DOMINION OF CANADA

(ON APPEAL FROM THE MANITOBA COURT OF APPEAL)

B E T W E E N

TARA KEIGH AND TAMARA KEIGH

(BY THEIR LITIGATION GUARDIAN VALERIE KEIGH)

Appellant

-AND-

WINNIPEG SCHOOL DIVISION

Respondent

FACTUM OF THE APPELLANTS

COUNSEL FOR THE APPELLANTS

TEAM 9

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PART I – OVERVIEW

[1] Tara and Tamara Keigh are excellent soccer players. They play soccer as well as any of the boys at their high school. Because they are girls, they were denied the opportunity to try out for the most competitive soccer team at their school to accommodate the religious views of some of the male team members. In Canada in the 21st century, it is unjust and impermissible for a public, secular school to push aside girls in the name of religious accommodation. This appeal provides the High Court with a rare opportunity to instruct on balancing gender equality and religious freedom in administrative matters and to clarify the scope of *Charter* damages.

PART II – STATEMENT OF FACTS

[2] Tara and Tamara are twin sisters and elite soccer players. In 2013, they enrolled in Hawerchuk Secondary School ("Hawerchuk") in Winnipeg, Manitoba. They wanted to try out for Hawerchuk's boys' soccer team because it was the most competitive soccer team at their school. Girls are generally permitted to try out for boys' soccer teams under the guidelines of the Manitoba High Schools Athletic Association ("MHSAA"), to which Hawerchuk belongs.

Official Problem, Wilson Moot 2017 at 1, 3, 4 [Official Problem].

[3] Head coach Jay Bala denied Tara and Tamara the opportunity to try out for the team, citing the religious beliefs of a number of the team members. Twelve of the team's 23 players were Orthodox Jewish and believe that physical contact between men and women who are not married or related is impermissible.

Official Problem, *supra* para 2 at 3, 5–6.

[4] After receiving submissions from Coach Bala, the Keigh sisters, and several players from the boys' soccer team, Arthur Vandalay, the principal of Hawerchuk, decided that the appropriate solution was for the sisters to play on the girls' soccer team at the neighbouring Oakwood High School. Principal Vandalay provided his reasons on October 15, 2013, in a letter to Coach Bala and the Keigh family. His decision was affirmed by a vote of the Winnipeg School Division ("School Division") trustees on October 23, 2013. It is undisputed that Principal Vandalay's letter constitutes the reasons of the School Division's decision.

Official Problem, *supra* para 2 at 4–5.
Clarifications to Official Problem, Wilson Moot 2017 at para 6 [Clarifications].

[5] The Keigh sisters commenced an application for judicial review of the School Division's decision on the grounds that it discriminated against them based on sex contrary to section 15 of the *Canadian Charter of Rights and Freedoms* (*Charter*). In May 2015, Justice Abbott allowed the application, holding that Principal Vandalay had improperly balanced the *Charter* rights at stake. She found that Principal Vandalay failed to consider whether the boys could make a limited exception to play soccer with girls for a restricted number of hours each week, and that publicly-funded schools should offer the same athletic opportunities to girls as they do to boys.

Official Problem, *supra* para 2 at 1, 8–9.
Canadian Charter of Rights and Freedoms, s 15 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

[6] The School Division appealed. Justice Lau, writing for the majority of the Manitoba Court of Appeal, allowed the appeal and reversed Justice Abbott's decision. Justice Lau held that Principal Vandalay had properly balanced the rights at stake, and

that the accommodation offered to the girls was reasonable. He further stated that Justice Abbott had conflated the strength of the boys' religious beliefs with their sincerity, and that a pluralistic society requires accommodation of diverse religious beliefs. In dissent, Justice Enright noted that women continue to participate in sport at lower rates than men, and that ruling against the Keigh sisters sends an "unfortunate and dangerous message" about female participation in sport.

Official Problem, *supra* para 2 at 9–10.

[7] Tara and Tamara graduated from Hawerchuk in June 2016 and were admitted to the University of California Los Angeles (UCLA) on partial soccer scholarships.

Official Problem, *supra* at 10.

PART III – STATEMENT OF POINTS IN ISSUE

A) Did the School Division's decision to prohibit Tara and Tamara from trying out for Hawerchuk's most competitive soccer team infringe their equality rights under section 15 of the *Charter*?

B) If yes, did the decision properly balance the Keigh sisters' equality rights with the boys' freedom of religion under subsection 2(a) of the *Charter*?

C) If no, should Tara and Tamara be awarded damages under subsection 24(1) of the *Charter*?

PART IV – ARGUMENT

A) The School Division infringed section 15 of the *Charter*.

[8] The School Division's decision to prohibit Tara and Tamara from trying out for Hawerchuk's most competitive soccer team violated the sisters' equality rights. As the Supreme Court of Canada ("Supreme Court) laid out in *Kapp*, section 15 of the *Charter* is infringed when (1) a decision "create[s] a distinction based on an enumerated or analogous ground"; and (2) that distinction is discriminatory because it perpetuates arbitrary disadvantage (*Kapp*; *Kahkewistahaw*). The decision excluded Tara and Tamara from tryouts based on an enumerated ground: sex. This distinction was discriminatory because it perpetuated disadvantages that women face in sport.

> *R v Kapp*, 2008 SCC 41 at para 17, [2008] 2 SCR 483 [*Kapp*].
> *Charter*, *supra* para 5, s 15.
> *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at paras 18, 20, [2015] 2 SCR 548 [*Kahkewistahaw*].

1. The School Division's decision created a distinction based on sex.

[9] Tara and Tamara were treated differently than boys at Hawerchuk. A distinction under section 15 of the *Charter* exists when the claimant is "treated differently than others" because she is either (1) "denied a benefit that others are granted"; or (2) "carries a burden that others do not" (*Whithler*; *Kapp*). First, the sisters were *denied a benefit* granted to all boys at Hawerchuk: the opportunity to try out for the most competitive soccer team at their school. Second, the sisters *carried a burden* imposed on no boy at Hawerchuk: the requirement to travel to a different school to play on a soccer team that corresponded with their skill level.

> *Whithler v Canada*, 2011 SCC 12 at para 62, [2011] 1 SCR 396 [*Whithler*].
> *Kapp*, *supra* para 8 at para 17.

[10] This distinction was based on sex. Section 15(1) of the *Charter* lists sex as a prohibited ground of discrimination. As Justice Abbott correctly noted, Tara and Tamara were denied the opportunity to try out for the soccer team because they were girls (Official Problem). While Principal Vandalay faced a difficult decision and was genuinely concerned about respecting the Orthodox Jewish boys on the team, the distinction he made was based on sex, not religion. Religious beliefs have no bearing on whether male students are permitted to try out for this team. Had Tara and Tamara been boys, they would have been allowed to try out.

Charter, *supra* para 5, s 15(1).
Official Problem, para 13.

2. Hawerchuk's boys' soccer team is not saved under subsection 15(2) of the *Charter.*

[11] The soccer team is not protected as an activity that aims to ameliorate the conditions of Orthodox Jewish boys. Subsection 15(2) of the *Charter* protects activities aimed at "the amelioration of conditions of disadvantaged individuals or groups including those who are disadvantaged because of ... religion" in order to improve "the conditions of [that] specific and identifiable disadvantaged group" (*Kapp*). Hawerchuk's boys' soccer team does not aim to ameliorate the conditions of Orthodox Jewish boys. The MHSAA's eligibility rules indicate that Hawerchuk is not alone in offering separate boys' and girls' teams (Official Problem). Moreover, Hawerchuk is a public school where religion is not a condition for membership on the boys' soccer team.

Charter, *supra* para 5, s 15(2).
Kapp, *supra* para 8 at paras 33, 55.
Official Problem, *supra* para 2 at 4.

[12] The appropriate place to consider the Orthodox Jewish soccer players' sincere religious beliefs is not under subsection 15(2) of the *Charter*, but when balancing their subsection 2(a) religious freedoms with the Keigh sisters' equality rights.

Charter, *supra* para 5, ss 15(2), 2(a).

3. The School Division's decision was discriminatory.

[13] Excluding Tara and Tamara from the tryouts was discriminatory because it perpetuated arbitrary disadvantage. Under the second step of the *Kapp* test, distinctions that perpetuate arbitrary disadvantage are discriminatory and, therefore, infringe section 15 of the *Charter* (*Kapp*; *Kahkewistahaw*). The purpose of this step is to protect substantive equality, recognizing that "persistent systemic disadvantages have operated to limit the opportunities available to certain groups in society" (*Kahkewistahaw*; *Andrews*; *Kapp*). The distinction made by the School Division's decision was discriminatory because it violated the norm of substantive equality by perpetuating arbitrary disadvantage.

Kapp, *supra* para 8 at paras 14–15.
Charter, *supra* para 5, s 15.
Kahkewistahaw, *supra* para 8 at paras 16, 18, 17.
Andrews v The Law Society of British Columbia, [1989] 1 SCR 143 at 171, 56 DLR (4th) 1 [*Andrews*].

[14] As the Supreme Court explained in *Kahkewistahaw*, a decision creates a distinction that perpetuates arbitrary disadvantage when (1) the distinction "fails to respond to the actual capacities and needs of the members of the group"; and (2) it has the effect of "reinforcing, perpetuating or exacerbating their disadvantage." This decision perpetuated disadvantage by first failing to respond to Tara and Tamara's actual needs and capacities, and second perpetuating pre-existing disadvantages women face in sport.

Kahkewistahaw, *supra* para 8 at para 20.

a) The decision failed to respond to Tara and Tamara's athletic abilities.

[15] While distinctions that reflect a person's "merits and capacities" will rarely constitute discrimination, a distinction is discriminatory where it fails to respond to a person's actual capacities (*Kahkewistahaw*). The MHSAA rules indicate that a girl's athletic capacities and merits, reflected in a "successful try-out," should generally determine whether she plays on a boys' team (Official Problem). Principal Vandalay acknowledged the sisters' capacities, explaining on cross-examination that "there was 'not a doubt in his mind' that both Tamara and Tara would have qualified for the boys' soccer team at Hawerchuk from an athletic perspective" (Official Problem). The decision to exclude Tara and Tamara from the tryouts was not based on their abilities and denied them the opportunity to be "judged on basis of their personal merit" (*Pasternak*).

Kahkewistahaw, *supra* para 8 at para 20.
Official Problem, *supra* para 2 at 4, 6.
The Manitoba High Schools Athletic Association Inc v Pasternak, 2008 MBQB 24 at para 67, [2008] 10 WWR 729 [*Pasternak*].

b) The decision failed to respond to Tara and Tamara's need for belonging.

[15] As students at a new high school, Tara and Tamara desperately desired to belong at Hawerchuk (Official Problem). Humans have a fundamental need to belong. This includes belonging to one's school community. As Tamara mentioned in her affidavit, the opportunity to play on an established sports team for Hawerchuk would have been "a big part" of belonging at her new school (Official Problem). Tamara further explained that "help[ing] bring a championship home to [her] own school" as a member of the highly competitive soccer team would have helped the sisters feel like part of the Hawerchuk community (Official Problem).

Official Problem, *supra* para 2 at 5.

[16] The School Division's decision failed to respond to Tara and Tamara's need for a sense of belonging at their new school. A decision that does not respond to a claimant's needs is discriminatory (*Kahkewistahaw*). The decision made Tara and Tamara feel unworthy and inferior, as if they had been "banished" from their own school's soccer program because they were less important than the boys' religious beliefs (Official Problem). For three years, Tara and Tamara were forced to travel to another school to play soccer where, Tamara explained, "[i]t was hard to feel like [they] were really part of the team" (Official Problem).

Kahkewistahaw, *supra* para 8 at para 20.
Official Problem, *supra* para 2 at 5, 10.

c) The decision perpetuated pre-existing disadvantages facing women.

[17] Women and girls in Canada have historically experienced disadvantage in sport. Pre-existing disadvantage is "probably the most compelling factor" suggesting *Charter*-infringing discrimination because at the root of section 15 is an "awareness that certain groups have been historically discriminated against, and that the perpetuation of such discrimination should be curtailed" (*Law*; *Kahkewistahaw*). In *Beacon Hill Little League*, BC Human Rights Tribunal Member Marlene Tyshynski took "notice of the fact that females have not had the same opportunities as males to participate fully in sport." As Dr. Foley noted in her affidavit, there exists a "notion that sport is not biologically or socially appropriate for females" (Official Problem). Appellants request that this Court also take notice of the pre-existing disadvantages facing women in sport.

Law v Canada (Minister of Employment and Immigration), [1999] 1 SCR 497 at para 63, 170 DLR (4th) 1 [*Law*].
Kahkewistahaw, *supra* para 8 at para 20.

Hawkins obo Beacon Hill Little League Major Girls Softball Team – 2005 v Little League Canada (No 2), 2009 BCHRT 12 at para 344 [*Beacon Hill Little League*].
Official Problem, *supra* para 2 at 7.

[18] The School Division's decision widens the gap between women and men in sports. Decisions that "widen the gap" between "a historically disadvantaged group and the rest of society are discriminatory" (*Kahkewistahaw*). Dr. Chaudry aptly stated in her expert affidavit that, "[u]nlike boys, girls are often deterred from pursuing sport at an elite level" (Official Problem). She further noted that such discouragement produces fewer women who aspire to collegiate or professional sports (Official Problem). The School Division's decision perpetuated these pre-existing disadvantages by (1) limiting opportunities for women to access sport; and (2) devaluing female athletes.

Kahkewistahaw, *supra* para 8 at para 20, citing *Quebec (AG) v A*, 2013 SCC 5 at para 332, [2013] 1 SCR 61 [*Quebec v A*].
Official Problem, *supra* para 2 at 8.

[19] First, the decision perpetuates historical disadvantages by limiting girls' access to opportunities to participate in sport. As the Supreme Court noted in *Kapp*, perpetuation of disadvantage is a "primary indicator" of discrimination. Justice Enright correctly observed in dissent that "[y]oung women have been forced to litigate for decades now simply to have equal opportunities in athletics at publicly-funded education institutions." The School Division effectively eliminated the opportunity for girls like Tara and Tamara to play high-level soccer at Hawerchuk—an opportunity available to their male peers.

Kapp, *supra* para 8 at para 23.
Official Problem, *supra* para 2 at 7.

[20] Second, the impugned decision also perpetuated pre-existing disadvantage by devaluing female athletes. Dr. Foley indicated in her expert affidavit that post-secondary

institutions facing limited funds are more likely to cut female athletic programs than male athletic programs (Official Problem). This indicates that female athletes are less valued than male athletes. As Justice Enright correctly suggested in dissent, the decision sent the message that women's equality in sports is "simply to have the ability to participate, and not to strive to excel or to be the very best at any sport" (Official Problem). This decision, Tamara stressed in her affidavit, communicated that she and her sister were "somehow dirty" and "not worthy" of playing on the elite soccer team that was available to their male peers simply because they are girls (Official Problem).

Official Problem, *supra* para 2 at 7, 10, 5.

B) The School Division's decision was unreasonable.

1. The standard of review is reasonableness.

[21] The School Division's decision was unreasonable because it improperly balanced the Keigh sisters' equality rights with the Orthodox Jewish boys' religious freedoms. Where an administrative decision implicates *Charter* rights, the decision-maker must: (1) identify the enabling statute's objectives; then (2) "proportionately balance" the severity of the *Charter* infringements with the relevant statutory objectives (*Doré*; *Loyola*). On judicial review, the decision is reasonable—allowing for a "range of possible, acceptable outcomes"—only if the decision-maker has "properly balanced the relevant *Charter* considerations with the statutory objectives" (*Dunsmuir*; *Doré*). Reviewing the School Division's decision in this way shows that (1) Principal Vandalay failed to properly consider the appropriate statutory objectives that ought to have guided his decision; and (2) the sisters' equality rights were not properly balanced with the boys' religious freedoms.

Doré v Barreau du Québec, 2012 SCC 12 at paras 55–56, 58, [2012] 1 SCR 395 [*Doré*] [emphasis added].
Loyola High School v Quebec (AG), 2015 SCC 12 at para 4, [2012] 1 SCR 613 [*Loyola*].
Dunsmuir v New Brunswick, 2008 SCC 9 at para 47, [2008] 1 SCR 190 [*Dunsmuir*].

2. The *Public Schools Act*'s objective is to provide a secular education.

[22] Principal Vandalay failed to take into account the statutory obligation to provide a non-sectarian education. The purpose of Manitoba's public school system is to provide the best educational opportunities to all students while responding to their diverse needs by providing them with a secular education. The preamble of the *Public Schools Act* (*PSA*) provides that:

> WHEREAS a strong public school system is a fundamental element of a democratic society;
>
> AND WHEREAS the purpose of a public school system is to serve the best educational interests of students;
>
> AND WHEREAS the public school system should contribute to the development of students' talents and abilities …

The preamble further provides that the school system encourages a "fair, compassionate, healthy and prosperous society" and must "take into account the diverse needs and interests of the people of Manitoba" (*PSA*). As Justice La Forest noted in *Ross*, public schools "must ... be premised upon principles of tolerance and impartiality so that all persons within the school environment feel equally free to participate" (*Ross*).

Public Schools Act, CCSM 2015, c P250, s 43.1(a), Preamble, paras 1–5 [*PSA*].
Ross v New Brunswick School District No 15, [1996] 1 SCR 825 at para 42, 133 DLR (4th) 1 [*Ross*].

[23] The Manitoba public school system aims to achieve these goals by explicitly providing a secular education. Subsection 84(1) of the *PSA* provides that: "[P]ublic

schools shall be non-sectarian." The Manitoba Court of Appeal has observed that the *PSA* was introduced in 1890 to abolish religious public schools in a case striking down provisions that allowed for exceptions to the secular nature of public schools (*Manitoba Association for Rights and Liberties*). There is a clear difference between publicly funded Catholic education, which the *PSA* abolished in 1890, and the accommodation of Orthodox Jewish students in public schools today. Nevertheless, both Manitoba's legislature and its Court of Appeal have affirmed that one purpose of Manitoba's public school system is to provide a non-religious education.

> *PSA*, *supra* para 22, s 84(1), emphasis added.
> *Manitoba Association for Rights and Liberties Inc v Manitoba*, 34 DLR (4th) 678 at para 6, [1992] 5 WWR 749 [*Manitoba Association for Rights and Liberties*].

[24] The School Division was required to consider its obligation to provide a secular education in accommodating Tara and Tamara. In *Chamberlain*, the Supreme Court held that the secular nature of British Columbia's public schools meant that the religious convictions of parents could not justify excluding non-traditional family structures from the curriculum. For Chief Justice McLachlin, the emphasis on secularism in BC's *School Act*, the equivalent of Manitoba's *PSA*, reflected the fact that "Canada is a diverse and multicultural society, bound together by values of accommodation, toleration, and respect for diversity" (*Chamberlain*). Like the Surrey School District in *Chamberlain*, the Winnipeg School Division was required to consider the secular nature of Manitoba's public school system in its decision.

> *School Act*, RSBC 1996 c 412 [*School Act*].
> *Chamberlain v Surrey School District No 36*, 2002 SCC 86 at para 21, [2002] 4 SCR 710 [*Chamberlain*].

[25] Principal Vandalay's letter of October 15, 2013, failed to even acknowledge that the *PSA* obligates Hawerchuk to provide a secular education despite its strong Orthodox Jewish population (Official Problem). Had Principal Vandalay turned his mind towards the obligation to provide a secular education, it ought to have been clear that it was unreasonable in a public school to cast aside the girls in the name of religious accommodation.

Official Problem, *supra* para 2 at 4.

3. The School Division improperly balanced competing rights.

[26] The School Division's decision is unreasonable because it reflects a disproportionate balance of the *Charter* rights engaged. In the words of Chief Justice Lamer, "a hierarchical approach to rights, which places some over others, must be avoided" (*Dagenais*). Proportionality is the guiding principle in balancing *Charter* rights in any context (*Doré*; *Dagenais*; *R v NS*). In the administrative context, Principal Vandalay's reasons must be examined for whether they strike a proportionate balance of the competing *Charter* rights in light of the statutory obligation to provide a secular education (*Doré*; *PSA*). Although the standard is reasonableness, it is a more exacting standard than general reasonableness review in administrative law because it must "properly" balance rights in a way that "align[s] with ... the *Oakes* context" (*Dunsmuir*; *Doré*; *Oakes*).

Dagenais v CBC, [1994] 3 SCR 835 at 877–78, 120 DLR (4th) 269 [*Dagenais*].
Doré, *supra* para 21 at paras 55–58 [emphasis added].
R v NS, 2012 SCC 72 at para 7, [2012] 3 SCR 726 [*R v NS*]
PSA, *supra* para 22, s 84(1).
Dunsmuir, *supra* para 21.
R v Oakes, [1986] 1 SCR 103, 26 DLR (4th) 200 [*Oakes*].

[27] Though not developed in the context of administrative law, the framework enunciated by the Supreme Court in *Dagenais* and refined in *R v NS* provides a useful structure for analyzing whether competing *Charter* rights were properly and proportionately balanced. Like the *Doré* framework, the *Dagenais*/*NS* framework reflects the "substance of the *Oakes* test" without strictly applying it and equates reasonableness with proportionality. Though *Dagenais* concerned the conflicting rights engaged by publication bans during trials, Chief Justice McLachlin acknowledged in *R v NS* that "its principles have broader application" and that the *Dagenais* framework should generally be used to balance conflicting rights. Consequently, the *Dagenais*/*NS* framework is helpful in assessing on judicial review whether the decision in question "reflects a proportionate balancing of the *Charter* protections at play" (*Doré*).

> *Dagenais*, *supra* para 26 at 877, 878.
> *R v NS*, *supra* para 26 at paras 7, 31.
> *Doré*, *supra* para 21 at paras 56, 57 [emphasis added].
> *Oakes*, *supra* para 26.

[28] In *R v NS*, Chief Justice McLachlin laid out four steps for assessing whether conflicting rights were proportionately balanced. Adapted to the facts and the legislative context of the present case, the steps are as follows:

1. Was it necessary to allow the Keigh sisters to try out for the boys' soccer team to protect their equality rights under section 15 of the *Charter*?
2. Was it necessary to ban the Keigh sisters from trying out for the boys' soccer team to protect the boys' religious freedoms under subsection 2(a) of the *Charter*?
3. If the answer to both (1) and (2) is yes, was there a way to accommodate both rights to avoid conflict between them?

4. If such an accommodation was not possible, did the salutary effects of the decision outweigh the deleterious effects in light of the *PSA*'s statutory obligation to provide secular education (*R v NS*; *Doré*)?

   R v NS, *supra* para 26 at paras 8–9.
   Charter, *supra* para 5, ss 2(a), 15.
   Doré, *supra* para 21 at paras 55–58.

[29] The remainder of this section will apply this test, demonstrating that (1) the decision to exclude Tara and Tamara from tryouts for the soccer team was not necessary to protect the boys' religious freedoms; (2) in the alternative, that reasonable accommodation was possible; and (3) as a further alternative, the deleterious effects of excluding the Keigh sisters from the soccer team outweighed the salutary effects of protecting the boys' religious freedoms in light of the *PSA*'s goal of providing secular education.

a) The boys' religious freedoms were not engaged.

[30] While allowing Tara and Tamara to try out for the soccer team was necessary to preserve their equality rights, it was unnecessary to protect the boys' religious freedoms. Tara and Tamara's section 15 *Charter* rights required that they be given the same opportunity as their male peers to try out for Hawerchuk's most competitive soccer team. Any accommodation that excluded the sisters from tryouts denied them a benefit available to all boys at Hawerchuk—the opportunity to try out—and imposed a burden that no male Hawerchuk students carried—the requirement to travel to another school to play soccer at the appropriate level.

Charter, *supra* para 5, s 15.

[31] As the boys' constitutionally protected religious freedoms do not extend to playing soccer without girls, it was unnecessary to exclude Tara and Tamara from tryouts to protect the boys' religious freedoms. In *TWU v BCCT*, the Supreme Court held that potential conflicts of *Charter* rights "should be resolved through the proper delineation of rights and values involved. In essence, properly defining the scope of rights avoids a conflict." Appellants do not contest that the boys' religious belief in the impermissibility of physical contact with girls is sufficiently sincere to warrant protection under subsection 2(a) of the *Charter* (*Big M Drug Mart*; *Amselem*; *R v NS*). Properly delineating the scope of the boys' religious freedoms averts a conflict with Tara and Tamara's right to equality under section 15 of the *Charter*. It does so by distinguishing between the boys' right to not be forced to touch girls and their desire to play soccer.

> *Charter*, *supra* para 5, s 2(a).
> *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295, 18 DLR (4th) 321 [*Big M Drug Mart*].
> *Syndicat Northcrest v Amselem*, 2004 SCC 47, [2004] 2 SCR 551 [*Amselem*].
> *R v NS*, *supra* para 26.
> *Trinity Western University v BC College of Teachers*, 2001 SCC 31 at para 29, [2001] 1 SCR 772 [*TWU v BCCT*].

[32] The content of the boys' protected religious freedoms is to not be forced to act contrary to their sincerely held religious beliefs. Writing for the Supreme Court in *Big M Drug Mart*, Justice Dickson (as he then was) held that subsection 2(a) of the *Charter* must be interpreted purposively, with an eye to the interest it seeks to protect. This interest is to entertain religious beliefs, declare them freely and without reprisal, and manifest these beliefs through worship, practice, teaching and dissemination (*Big M Drug Mart*). Freedom of religion, therefore, means that "no one is forced to act in a way contrary to his beliefs or conscience" (*Big M Drug Mart*). In *Amselem*, Justice Iacobucci

held that subsection 2(a) of the *Charter* protects the "freedom to undertake practice and harbour beliefs, having a nexus with religion ... in order to connect with the divine or as a function of his or her spiritual faith." Appellants do not dispute that avoiding physical contact with girls is a function of the boys' spiritual faith. They have a right to entertain, declare, and even manifest this belief and to not be forced to act contrary to it.

> *Big M Drug Mart*, *supra* para 31 at 344, 336, 337.
> *Amselem*, *supra* para 31 at para 46.
> *Charter*, *supra* para 5, s 2(a).

[33] This religious freedom does not, however, amount to a right to play soccer, and even less to a right to play soccer while dictating the gender make-up of the team. First, allowing girls on the team would not have denied the boys the opportunity to choose to try out for the team and be judged on their merits. They always had the choice to quit or not try out for the soccer team—an optional, extra-curricular activity—if they were uncomfortable playing with girls. They would still be free to declare their beliefs openly at school and to manifest them in all mandatory school activities, such as physical education classes (*Clarifications*). Second, at no point has the Respondent, the boys, or their parents suggested that playing soccer itself was a practice that warranted constitutional protection.

> Clarifications, *supra* para 6 at para 4.

[34] That the Orthodox Jewish boys played on Hawerchuk's boys' soccer team before Tara and Tamara arrived at Hawerchuk should not alter the scope of the boys' religious freedoms under subsection 2(a) of the *Charter*. Chief Justice Lamer instructed in *Dagenais* that there should be no hierarchy of rights under the *Charter*. When rights conflict, the order in which rights were engaged should not disturb the equality of rights.

That the Orthodox Jewish boys had benefited from an absence of girls asking to try out for the boys' soccer team before Tara and Tamara arrived at Hawerchuk does not allow them to expand the scope of their religious freedoms to include a right to play soccer without girls (Official Problem).

> *Dagenais*, *supra* para 26 at 877.
> Official Problem, *supra* para 2 at 3.

[35] The School Division's decision is unreasonable because it failed to properly delineate the scope of the boys' religious freedoms under subsection 2(a) of the *Charter* and consequently infringed Tara and Tamara's equality rights unnecessarily. As in *TWU v BCCT*, delineating the scope of the boys' constitutionally protected religious freedoms avoids a true conflict with Tara and Tamara's right to equality under section 15 of the *Charter*. The School Division's decision fails at the second step of the *Dagenais*/*NS* framework: permitting Tara and Tamara to try out for the boys' soccer team would not have infringed the boys' religious freedoms because they were never forced to play soccer. The School Division unnecessarily and, therefore, disproportionately and improperly infringed Tara and Tamara's right to equality under section 15 of the *Charter* (*Doré*). Its decision is unreasonable.

> *Charter*, *supra* para 5, s 2(a).
> *TWU v BCCT*, *supra* para 31.
> *Dagenais*, *supra* para 26.
> *R v NS*, *supra* para 26.
> *Doré*, *supra* para 21.

b) *A reasonable accommodation was available.*

[36] Even if the boys' religious freedoms were engaged, Principal Vandalay failed to adequately accommodate the two rights. The third step of the *R v NS* test requires that "once a judge is satisfied that both sets of competing interests are actually engaged on the

facts, he or she must try to resolve the claims in a way that will preserve both rights" through either accommodation or alternative measures. Justice Abbott correctly proposed such a reasonable accommodation: that the boys could "make a[n] ... exception strictly for the limited hours in which they play soccer every week" (Official Problem).

Official Problem, *supra* para 2 at 9.

[37] The majority of the Manitoba Court of Appeal was incorrect in suggesting that Justice Abbott conflated the strength of the boys' religious beliefs with their sincerity (Official Problem). In *R v NS*, Chief Justice McLachlin, writing for the majority, clarified that the strength of religious beliefs can be relevant when balancing religious freedom with competing *Charter* rights. As Justice Deschamps explained in *SL*, growing up in a pluralistic society necessarily entails confronting challenges to one's religious beliefs in the public school setting. In proposing her accommodation of the competing rights, Justice Abbott correctly considered the strength of the boys' religious beliefs, noting that "some of the boys do in fact interact on occasion with women socially" (Official Problem). Tim Stern, one of the soccer team's members, confirmed this in his affidavit, stating that he "obviously interact[s] with girls during the school day" (Official Problem). Moreover, though no Winnipeg public high schools had girls on their boys' soccer teams while the Keigh sisters were at Hawerchuk (*Clarifications*), the boys were willing to play in a league that permitted this. This willingness suggests that their religious beliefs were not sufficiently strong to make Justice Abbott's accommodation unreasonable.

Official Problem, *supra* para 2 at 9, 6.
R v NS, *supra* para 26 at paras 13, 77.
SL v Commission Scolaire des Chênes, 2012 SCC 7 at paras 39–40, [2012] 1 SCR 235.
Clarifications, *supra* para 6 at para 5.

[38] The School Division's decision was unreasonable because Principal Vandalay failed to consider a more reasonable accommodation. Justice Abbott correctly recognized this accommodation and properly considered the strength of the boys' religious beliefs. The Manitoba Court of Appeal was incorrect in overturning her decision.

c) The decision disproportionately harmed Tara and Tamara.

[39] Should the High Court decide that the boys' religious freedoms were engaged and that there was no alternative accommodation, the School Division's decision was unreasonable because it gave disproportionate weight to the boys' religious freedoms at the expense of the girls' equality rights. The final step of the *Dagenais*/*NS* framework, akin to the fourth branch of the *Oakes* test, requires assessing whether the salutary effects of the measure outweigh the deleterious effects (*R v NS*; *Dagenais*; *Oakes*). While acknowledging the challenging decision Principal Vandalay faced, the salutary effects of allowing the boys to play soccer did not outweigh the deleterious effects of denying Tara and Tamara an equal opportunity to try out for the boys' soccer team.

> *R v NS*, *supra* para 21 at paras 32–36.
> *Dagenais*, *supra* para 26 at 878.
> *Oakes*, *supra* para 26.

[40] There are three salutary effects of prohibiting Tara and Tamara from trying out for the boys' soccer team. The salutary effects should consider both the individual and societal effects of the measure (*R v NS*). First, as noted in Principal Vandalay's affidavit, at least twelve of the boys on the soccer team would have felt unable to continue if the girls were allowed to join, leaving the team with less than half its roster (Official Problem). The School Division's decision allowed those twelve boys to continue playing.

> *R v NS*, *supra* para 26 at para 38.
> Official Problem, *supra* para 2 at 5–6.

[41] Second, the decision prevented harm to the twelve boys that could have resulted in them quitting the soccer team to avoid playing with girls. As Tim Stern noted in his affidavit, it is challenging to "identify as a religious person these days" (Official Problem). Quitting the soccer team to uphold one's religious convictions would have made this more difficult.

Official Problem, *supra* para 2 at 6.

[42] Third, the decision avoided the "broader societal harms" that could have resulted from the message sent to religious minorities if the girls had been allowed to try out for the soccer team (*R v NS*). Dr. Matthew Widemeir's expert affidavit provides some evidence to this effect: the number of religious Canadians has dropped significantly over the past two decades, a trend more acute among younger people (Official Problem). Including Tara and Tamara on the soccer team may have further reinforced this trend—even if only symbolically—by sending a message that there is a price to being religious.

R v NS, *supra* para 26 at para 37.
Official Problem, *supra* para 2 at 8.

[43] These salutary effects are, however, outweighed by the harms of prohibiting Tara and Tamara from trying out for the boys' soccer team in light of the *PSA*'s requirement to provide a secular education. In considering the deleterious effects of a decision, the Court must look at the "harm that would be done" by limiting equality rights (*R v NS*). The School Division's decision produced both individual and societal harms.

PSA, *supra* 22, s 84(1).
R v NS, *supra* para 26 at para 36.

[44] Being prohibited from trying out for the boys' soccer team harmed Tara and Tamara individually in two ways. First, Tara and Tamara were denied a crucial sense of

belonging to their high school community. As Tamara noted in her affidavit, she and her sister did not feel that they were part of Oakwood's team, nor were they able to feel like part of the community at Hawerchuk by wearing Hawerchuk's colours on the soccer field (Official Problem). Second, they were made to feel "somehow dirty or not worthy" because they were girls—something no girl should have to feel in a country that celebrates gender equality (Official Problem).

R v NS, *supra* para 26 at para 36.
Official Problem, *supra* para 2 at 5.

[45] On a societal level, the School Division's decision also had two harmful effects. First, it sent a dangerous message about female participation in sport. Female athletes are disadvantaged. As Dr. Chaudry noted in her expert affidavit, girls are often deterred from pursing elite sports, with school sport participation dropping by over 25% when girls reach adolescence (Official Problem). Less than 40% of school aged adolescents in Canada can name a single female sports idol, and less than 15% of boys can name a single female athlete (Official Problem). Elite female athletes can contribute to remedying these disadvantages. As Dr. Foley explained, they can serve as role models for women in sport who can dispel the notion that "sport is not biologically or socially appropriate for females" (Official Problem). Justice Enright, in her dissent, correctly noted that upholding the School Division's decision sent a message that women need only "participate" in sport to be equal, leaving it to men to "strive to excel" (Official Problem). At a time when Canadian adolescents are sorely lacking female sports idols, the effect of sending a message that female athletes are second-tier is particularly harmful.

Official Problem, *supra* para 2 at 7, 8, 10.

[46] Second, the School Division's decision also sent a harmful message about gender equality and public education. To suggest that it is permissible for a Canadian public school to discriminate against women in the name of religious freedom will undermine the public's confidence in Manitoba's education system. Parents should feel confident that their daughters' will not be denied opportunities to develop their talents simply because they are girls. Together with the individual harm to Tara and Tamara, the harm to society produced by the messages that the School Division's decision sends is sufficiently harmful to outweigh its salutary effects.

[47] The insufficient weight given to Tara and Tamara's right to equality is particularly severe in light of the *PSA*'s objectives. On questions of judicial review engaging *Charter* values, administrative decision-makers must also take into account the purpose of their enabling statute when balancing rights (*Doré*). The School Division ignored its statutory objectives in two ways.

> *PSA*, *supra* para 22, Preamble.
> *Doré*, *supra* para 21 at paras 55–58.

[48] First, as the Manitoba Court of Appeal has affirmed, the *PSA* aims to ensure a "non-sectarian" public school system (*Manitoba Association for Rights and Liberties*). It is inappropriate for a deliberately secular school to place religious accommodation ahead of gender equality. The *PSA*'s objectives did require the School Division to take the diverse needs of the Orthodox Jewish community into account. As Chief Justice McLachlin noted in *Chamberlain*, however, secular education means that any consideration of religious views must show "equal recognition and respect to other members of the community." This includes women. Relying on the religious views of one part of Hawerchuk's community—the Orthodox Jewish boys—to cast aside Tara and

Tamara did not show "equal recognition and respect" for female students at Hawerchuk. This is inimical to the *PSA*'s objective of promoting secular education.

> *PSA*, *supra* para 22, s 84(1), Preamble.
> *Manitoba Association for Rights and Liberties*, *supra* para 23 at para 6.
> *Chamberlain*, *supra* para 24 at para 21.

[49] Second, the *PSA* requires the School Division to promote fairness and ensure that all students are able to develop their athletic talents. These objectives were largely ignored. As Justice Enright correctly noted in her dissent, the decision appears to be premised on an assumption that "equal opportunity" and fairness for women in sport simply means the right to participate, not the right to excel (Official Problem).

> *PSA*, *supra* para 22, Preamble.
> Official Problem, *supra* para 2 at 10.

[50] The High Court should take this case as an opportunity to send a message to principals and school boards across Canada that gender segregation has no place in secular, public schools in Canada in the 21st century. While school principals regularly make administrative decisions that engage competing *Charter* rights, they are not often reviewed by the High Court. As Justice Abbott correctly noted, "female students like Tara and Tamara Keigh should not be ... kept in segregation" (Official Problem). Principal Vandalay's decision was unreasonable because it disproportionately harmed Tara and Tamara. The Manitoba Court of Appeal erred in "sending a dangerous and unfortunate message" by upholding it (Official Problem). In recognizing these errors, the High Court can guide school principals in more appropriately balancing competing rights in a pluralistic society.

> Official Problem, *supra* para 2 at 9, 10.

C) Tara and Tamara should be awarded damages.

[51] Tara and Tamara should be awarded $5,000 each in damages. Remedies for *Charter* breaches available under subsection 24(1) of the *Charter* include damages where "appropriate and just" (*Ward*). Chief Justice McLachlin established the framework for awarding *Charter* damages in *Ward*. The first stage of the *Ward* framework is met: Tara and Tamara's section 15 *Charter* rights were unreasonably violated. Second, awarding damages to Tara and Tamara serves the three functions of *Charter* damages—compensation, vindication and deterrence (*Ward*; *Ernst*). Finally, countervailing factors do not militate against damages (*Ward*).

> *Charter*, *supra* para 5, s 24(1).
> *Vancouver (City) v Ward*, 2010 SCC 27 at paras 4, 25, [2010] 2 SCR 28 [*Ward*].
> *Ernst v Alberta Energy Regulator*, 2017 SCC 1 at paras 25, 27 [*Ernst*].

1. Damages are an appropriate and just remedy.

[52] Awarding damages will (1) compensate the Keigh sisters for personal loss; (2) vindicate section 15 *Charter* rights; and (3) deter future infringements of section 15. In order to award damages, this Court need only find that damages will fulfill at least one of these three functions.

a) Damages will compensate Tara and Tamara for personal loss.

[53] Damages will compensate Tara and Tamara for harm to their intangible interests related to the violation of their section 15 *Charter* rights. *Charter* damages compensate for personal losses, including "harm to the claimant's intangible interests" such as "distress, humiliation, embarrassment, and anxiety," even if there was no psychological injury *(Ward*; Charles).

> *Charter*, *supra* para 5, s 15.
> *Ward*, *supra* para 51 at paras 27, 64.

W H Charles, *Understanding Charter Damages: Judicial Evolution of a Charter Remedy* (Toronto: Irwin Law, 2016) at 82, 84–85 [Charles].

[54] As in *Ward*, where Mr. Ward's injury merited damages because the *Charter* violation was "inherently humiliating and degrading," Tara and Tamara warrant compensation for the personal losses they suffered upon being excluded from the soccer team tryouts because of their sex. The School Division's decision left them feeling embarrassed, humiliated and degraded. As Tamara's affidavit exemplifies, the Keigh sisters were made to feel "as though [they were] somehow dirty or not worthy of being part of the top team" (Official Problem). And as Justice Abbott noted in her reasons, the decision resulted in Tara and Tamara being "kept in segregation" and being "made to feel as though they [were] 'less than' their male peers" (Official Problem).

Official Problem, *supra* para 2 at 5, 9.

b) Damages will vindicate section 15* Charter *rights.

[55] Awarding damages to Tara and Tamara will reinforce public confidence in constitutional protection for equality rights. *Charter* damages serve the function of vindication "in the sense of affirming constitutional values" (*Ward*). Vindication "focuses on the harm the infringement causes society" (*Ward*). Awarding damages will demonstrate that section 15 of the *Charter* effectively protects against, as Tamara's affidavit describes, girls being "banished" from school sports teams simply "because [they] are girls" (Official Problem). Vindication requires damages in this case. Unlike in *Ward*, where the Supreme Court found damages unnecessary to vindicate an improper car seizure because the *Charter* violation was not serious, the violation of the sisters' section 15 *Charter* rights was sufficiently serious to warrant damages. The societal harm of condoning gender "segregation," to use Justice Abbott's words, is sufficiently severe to

warrant a strong message from this Court. Damages best serve this function. Without vindication, this violation would harm society by weakening public confidence in the "efficacy of constitutional protection" for gender equality (*Ward*; *Charles*).

> *Ward*, *supra* para 51 at paras 28, 77–78.
> Official Problem, *supra* para 2 at 5.
> Charles, *supra* para 51 at 85.

***c) Damages will deter future breaches of section 15 of the* Charter.**

[56] Awarding damages will deter school divisions from committing future breaches of female students' section 15 *Charter* rights. *Charter* damages serve the function of deterrence by "influencing government behaviour in order to secure state compliance with the *Charter* in the future" (*Ward*). Damages send a stronger message than a simple declaration would that gender segregation is not a reasonable way to accommodate religious beliefs in a public, secular school in a pluralistic society. Damages will deter school divisions from making decisions that, like this decision, infringe the equality rights of their female student athletes.

> *Ward*, *supra* para 51 at para 29.

2. No countervailing factors indicate that damages would be inappropriate or unjust.

[57] Countervailing factors do not militate against awarding damages to Tara and Tamara. Once a claimant demonstrates that *Charter* damages serve at least one of functions discussed above, the government "may establish that other considerations render s. 24(1) damages inappropriate or unjust" (*Ward*). There are no such considerations here.

> *Ward*, *supra* para 51 at paras 32–33.
> *Charter*, *supra* note 5, s 24(1).

[58] First, other available remedies do not adequately meet the need for compensation and deterrence (*Ward*). Legislative and private law remedies are not available in this case. As noted in *Ward*, a declaration may be an adequate remedy where there is no personal loss and no need for deterrence. A declaration is insufficient here, however, because it cannot compensate Tara and Tamara for the harm to their intangible interests, and there is a need to deter school boards from similarly infringing girls' equality rights in order to accommodate religious views.

Ward, *supra* para 51 at paras 34, 37, 27, 68.

[59] Second, good governance concerns are not engaged. Damages will not have a chilling effect on School Division's management of sports teams. Awarding damages in this case will not change the decision-making matrix facing school boards: Manitoba public schools need only comply with the MHSAA guidelines, to which they have agreed as members, in order to avoid committing similar violations (Official Problem). An award of $5,000 to each sister is not sufficiently high to "deplete the [School Division]'s resources" (*Ernst*). The good governance concerns raised in *Ernst v Alberta Energy Regulator*, where the Supreme Court declined to award *Charter* damages, do not arise as those concerns flowed from the Regulator's quasi-judicial nature. The School Division's trustees do not form a quasi-judicial body (*PSA*).

Official Problem, *supra* para 2 at 4.
Ernst, *supra* para 51 at paras 7, 47, 55.
PSA, *supra* para 22, ss 1(1), 48(1)–(8).

3. Tara and Tamara should be awarded $5,000 each in damages.

[60] Awarding $5,000 each in damages to Tara and Tamara Tara under section 24(1) of the *Charter* is appropriate and just. The seriousness of a *Charter* breach is "a principal

guide to the determination of quantum" (*Ward*). Appropriate awards "reflect what is required to functionally serve the objects of compensation, vindication of the right and deterrence of future breaches" (*Ward*). In *Ward*, the Supreme Court considered $5,000 to be sufficient to serve the functions of damages. The breach of Tara and Tamara's section 15 *Charter* rights was serious because it was humiliating, embarrassing and degrading.

[61] Awards of $5,000 correspond to what is required to compensate Tara and Tamara for their personal losses, vindicate section 15 *Charter* rights and deter school divisions from committing future breaches (*Ward*). Damages in these amounts are meaningful responses to the infringement of Tara and Tamara's equality rights. They send the clear message that it was an unreasonable violation of the *Charter* to deny Tara and Tamara the opportunity to try out for the most competitive soccer team at their secular, public school simply because they were girls (*Ward*).

Charter, *supra* para 5, s 24(1).
Ward, *supra* para 51 at paras 52, 57, 79, 72, 54

PART V – ORDER SOUGHT

[62] The Appellants request that the appeal be allowed and seeks an award of $10,000 in damages, to be split evenly between Tara and Tamara Keigh, under subsection 24(1) of the *Charter* for a breach of the sisters' equality rights under section 15 of the *Charter*

All of which is respectfully submitted this 26th day of January, 2017.

Team 9

Counsel of the Appellants

PART VI – LIST OF AUTHORITIES AND STATUTES

LEGISLATION	PARAGRAPHS
Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.	5, 8, 10, 11, 12, 28, 30, 31, 32, 35, 51, 53, 57, 60
Public Schools Act, CCSM 2015, c P250, s 43.1(a).	22, 23, 26, 43, 47, 48, 49, 59
School Act, RSBC 1996 c 412.	24
JURISPRUDENCE	**PARAGRAPHS**
Andrews v The Law Society of British Columbia, [1989] 1 SCR 143, 56 DLR (4th) 1.	13
Chamberlain v Surrey School District No 36, 2002 SCC 86, [2002] 4 SCR 710.	24, 48
Dagenais v CBC, [1994] 3 SCR 835, 120 DLR (4th) 269.	26, 27, 34, 35, 39
Doré v Barreau du Québec, 2012 SCC 12, [2012] 1 SCR 395.	21, 26, 27, 28, 35, 47
Dunsmuir v New Brunswick, 2008 SCC 9, [2008] 1 SCR 190.	21, 26
Ernst v Alberta Energy Regulator, 2017 SCC 1.	51, 59
Hawkins obo Beacon Hill Little League Major Girls Softball Team – 2005 v Little League Canada (No 2), 2009 BCHRT 12.	17
Kahkewistahaw First Nation v Taypotat, 2015 SCC 30, [2015] 2 SCR 548.	8, 13, 14, 15, 16, 17, 18
Law v Canada (Minister of Employment and Immigration), [1999] 1 SCR 497, 170 DLR (4th) 1.	17
Loyola High School v Quebec (AG), 2015 SCC 12, [2012] 1 SCR 613.	21
Manitoba Association for Rights and Liberties Inc v Manitoba, 34 DLR (4th) 678, [1992] 5 WWR 749.	23, 48
Quebec (AG) v A, 2013 SCC 5, [2013] 1 SCR 61.	18
Ross v New Brunswick School District No 15, [1996] 1 SCR 825,	22