IN THE HIGH COURT OF THE DOMINION OF CANADA

(ON APPEAL FROM THE MANITOBA COURT OF APPEAL)

B E T W E E N:

TAMARA AND TARA KEIGH (BY THEIR LITIGATION GUARDIAN VALERIE KEIGH)

Appellant

-AND-

WINNIPEG SCHOOL DIVISION

Respondent

FACTUM OF THE APPELLANT

COUNSEL FOR THE APPELLANT

TEAM 11

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PART I – OVERVIEW

[1] Religious accommodation in public schools becomes unreasonable where it requires the exclusion of an historically disadvantaged group. The Keigh sisters are elite female athletes who had the potential to become champions and role models at their high school. Instead, they were excluded because of their gender by the very institution they wanted to represent.

[2] The School Division excluded the Keigh sisters from their high school's soccer team because of the religious convictions of their fellow students. This decision discriminated against the Keigh sisters because it exacerbated the disadvantage of female athletes, a group that already faces significant barriers accessing sport and achieving recognition. The Keigh sisters were forced to choose between playing on a team that was commensurate with their skill level or playing on a team that allowed them to represent their school. Unlike their male peers, the Keigh sisters could not have both.

[3] The School Division's decision was unreasonable because it failed to consider the importance of soccer to the Keigh sisters and the unique barriers faced by women in sport. The Keigh sisters' career ambitions, self-identity, and sense of belonging are all intimately tied up with the game of soccer. In attempting to balance the *Charter* guarantees, the School Division gave undue weight to religious freedom and unjustifiably excluded the Keigh sisters from playing soccer at Hawerchuk. This decision was inconsistent with the School Division's statutory duty as a public institution to create an inclusive and non-discriminatory environment for all students.

[4] The Keigh sisters graduated without ever playing soccer for their own school. Damages are the only remedy that would adequately vindicate the Keigh sisters' equality rights and compensate them for the sense of banishment and humiliation they have experienced.

PART II – STATEMENT OF FACTS

1. Factual background

a) The Appellants are committed and passionate soccer players

[5] Tara and Tamara Keigh ("the Keigh sisters") are twin sisters who have devoted their lives to competitive soccer. In grade nine, the sisters played for the boys' soccer team at their local high school in Toronto. They were the only girls on the team but fostered positive relationships with their male teammates and cultivated reputations for being talented athletes.

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

[6] In the summer of 2013, the Keigh sisters relocated with their family to Winnipeg, Manitoba, and enrolled at Hawerchuk Secondary School ("Hawerchuk"). Hawerchuk is a public school with 1100 students, 60 percent of whom are Orthodox Jews. The Winnipeg School Division ("the School Division") takes a number of steps to accommodate the religion of its Jewish population. The school cafeteria obeys kosher dietary rules, and teachers refrain from giving substantive lessons on Jewish holidays. The curriculum, however, is secular, as at other public schools in the School Division.

Official Problem, *supra* para 5 at 1, paras 3, 5, 7.

[7] The Keigh sisters were eager to integrate into Hawerchuk's community and hoped that soccer would help ease their transition to a new school. Hawerchuk has an exceptional boys' soccer team that often advances to the city finals. The Keigh sisters planned to try out for that team. The girls' team was only in its second year at the time and was not a well-established or competitive program. The Keigh sisters thought the boys' team would better allow them to improve their skills and get scouted by university programs.

Official Problem, *supra* para 5 at paras 12, 19.

[8] Hawerchuk participates in the interschool sports competitions organized by the Manitoba High Schools Athletic Association ("the MHSAA"). Although membership in the MHSAA is voluntary, schools that participate agree to "provide equal opportunities for students" and "ensure that female and male students are given equal opportunities and access to sports teams." The MHSAA generally allows girls to try out and play for boys' teams.

Official Problem, *supra* para 5 at paras 14, 15.
Manitoba High Schools Athletic Association, "2016/2017 MHSAA Handbook," Rules & Regulations at s. II.(q).

b) The School Division barred the Keigh sisters from trying out for the boys' team

[9] In September 2013, the Keigh sisters showed up to the boys' team tryout. Coach Jay Bala denied them the opportunity, citing the religious views of some of the boys on the team. Many Orthodox Jews hold the view that there should be no physical contact between unrelated males and females. Coach Bala directed the Keigh sisters to seek permission directly from the school principal, Arthur Vandalay.

Official Problem, *supra* para 5 at para 13.

[10] Principal Vandalay decided that the sisters could not try out for the boys' soccer team. He accepted that the Keigh sisters would have made the team had they tried out. However, twelve boys stated that they would not remain on the team if the Keigh sisters joined due to the potential for impermissible physical contact. Instead, Principal Vandalay gave them the option of joining either the girls' team at Hawerchuk or the girls' team at Oakwood High School ("Oakwood"), a neighbouring school with a competitive sports program for girls. He presented his decision as a "compromise" between the "religious rights" of the Orthodox team members and the desire of the Keigh sisters to play soccer and be scouted. Principal Vandalay's decision was affirmed by a

vote of the School Division. Given the options presented to them, the Keigh sisters chose to play for Oakwood.

Official Problem, *supra* para 5 at paras 11, 17-19.

[11] The Keigh sisters were unable to feel a full sense of community at either school. They found it difficult to get to know or interact with the other players on the Oakwood girls' team. The arrangement made them feel as if they were "banished" due to their sex and that they were "somehow dirty or not worthy of being part of the top team." Further, because Oakwood is a 15-minute bus-ride away, the Keigh sisters were routinely forced to rush out of class and return home late. The Keigh sisters travelled to Oakwood for the entire duration of their high school careers, a period of three years.

Official Problem, *supra* para 5 at para 19.

[12] Today, they play at the University of California, Los Angeles, and hope to win a World Cup for Team Canada in the future. They graduated from Hawerchuk without ever playing on their school's soccer team.

Official Problem, *supra* para 5 at 10.

c) Women face unique barriers in sport

[13] Affidavit evidence filed in this application shows that aspiring female athletes face a number of challenges. Adolescent girls are often deterred when trying to pursue sports at an elite level. Female participation in sport drops drastically at the beginning of adolescence from 59% to 33%. The female athletes who do choose to pursue athletics at the collegiate level face a higher likelihood of cuts to programs and resources than their male counterparts.

Official Problem, *supra* para 5 at paras 26, 27.

[14] Female athletes receive less recognition than male athletes. A majority of school-aged adolescents in a recent survey were unable to name a single female sports star. An overwhelming majority of boys could not even name a single female athlete. There is also a negative stereotype that sport is not "biologically or socially appropriate for females." Elite female athletes can help to dispel this notion. They are integral in "providing high profile role models and advocates for women in sport."

Official Problem, *supra* para 5 at para 26.

2. Procedural history

[15] After the School Division's decision, the Keigh sisters filed an application for judicial review on the basis that it infringed their section 15 equality rights under the *Charter*. In May 2015, Justice Abbott of the Manitoba Court of Queen's Bench allowed the Keigh sisters' application, holding that the School Division's decision violated section 15(1) when it denied the Keigh sisters a benefit on the basis of their sex. The School Division's decision did not proportionately balance the Keigh sisters' equality rights against the boys' freedom of religion in the context of a public school.

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*].
Official Problem, *supra* para 5 at 8-9.

[16] A majority of the Manitoba Court of Appeal granted a stay to prevent the Keigh sisters from trying out for the Hawerchuk boys' team and subsequently overturned Justice Abbott's decision. In her dissenting opinion, Justice Enright stressed the importance of equal opportunities in athletics at publicly funded institutions. She referred to the majority's opinion as a "dangerous message" to the Keigh sisters and to aspiring female athletes across the nation.

Official Problem *supra* para 5 at 10.

PART III – STATEMENT OF POINTS IN ISSUE

[17] This appeal raises the following constitutional questions:

1. **Did the School Division's decision infringe Tara and Tamara's rights under section 15 of the *Charter*?**

   The School Division's decision created a distinction based on the enumerated ground of sex. The distinction was discriminatory under the test laid out in *Quebec* and *Taypotat*. The School Division's decision was not ameliorative under section 15(2).

2. **If the answer to question 1 is yes, did the decision properly balance Tara and Tamara's rights under section 15 of the *Charter* with the boys' rights under subsection 2(a) of the *Charter*?**

   The School Division's decision was unreasonable because it did not proportionately balance competing *Charter* rights in making its decision. The School Division failed to investigate reasonably available alternatives that could have accommodated both rights. In weighing the competing *Charter* rights, the School Division gave undue weight to the religious freedom of the Orthodox team members and therefore infringed the Keigh sisters' equality rights more than was necessary.

3. **If the answer to question 2 is no, should Tara and Tamara be awarded damages under subsection 24(1) of the *Charter* for the breach of their rights under section 15?**

   Damages are a just and appropriate remedy under section 24(1) of the *Charter* to compensate the non-pecuniary psychological losses of the Keigh sisters and to vindicate their section 15(1) rights. The countervailing factors of alternative remedies and good governance concerns do not negate the functional justifications for section 24(1) damages.

PART IV – ARGUMENT

[18] The parties agree that the standard of review is reasonableness. For its decision to be reasonable, the School Division was required to proportionately balance the competing *Charter* values at play in light of its statutory objectives.

> *Doré v Barreau du Québec*, 2012 SCC 12 at paras 36, 45, 1 SCR 395 [*Doré*].
> *Dunsmuir v. New Brunswick*, 2008 SCC 9 at paras 53, 54, 55, 1 SCR 190 [*Dunsmuir*].

[19] Under *Doré,* courts first consider the administrative body's statutory objectives and then inquire as to how any *Charter* values at issue may best be protected in light of these objectives. Here, the two "values" at issue have been enshrined in the *Charter* and have long jurisprudential histories. The values of religious freedom and equality "underpin each right and give [them] meaning" (*Loyola*). Accordingly, while *Charter "*values" inform administrative decision-making and judicial review, the ultimate inquiry here is whether a decision infringes the *rights* of the individuals affected (*Law Society of British Columbia*).

> *Doré*, *supra* para 18 at para 56.
> *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 at para 36, 1 SCR 613 [*Loyola*].
> *Trinity Western University v Law Society of British Columbia*, 2016 BCCA 423 at para 80, CarswellBC 3008 [*Law Society of British Columbia*].

[20] When two *Charter* rights are in conflict, the *NS* framework should inform the *Doré* analysis. Under this approach, the inquiry involves three steps: (1) whether both *Charter* rights are engaged, (2) whether there is a way to accommodate both rights and avoid the conflict between them, and (3) if no mutual accommodation is possible, which right should prevail on balance. This approach addresses clashes between rights "by reconciling the rights through accommodation if possible [and] if a conflict cannot be avoided, by a case-by-case balancing."

> *Doré*, *supra* para 18 at paras 7, 36.
> *R v NS*, 2012 SCC 72 at paras 9, 52, 3 SCR 726, McLachlin CJC [*NS*].

Issue 1: The School Division's decision infringed Tara and Tamara's rights under section 15 of the Charter

[21] The School Division's decision created a distinction based on the enumerated ground of sex. The distinction was discriminatory. In *Quebec* and *Taypotat*, the Supreme Court held that a discriminatory distinction is one that both fails to respond to the actual capacities and needs of the members of the claimant group and instead denies them a benefit in a way that reinforces, perpetuates, or exacerbates their disadvantage. It would be a serious departure from the Supreme Court's section 15(2) jurisprudence to recognize the School Division's decision as ameliorative.

> *Quebec (AG) v A*, 2013 SCC 5 at paras 331-332, 1 SCR 61, Abella J [*Quebec*].
> *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at paras 18-20, 2 SCR 548 [*Taypotat*].

1. The distinction created by the School Division discriminated against the Keigh sisters

[22] The School Division's decision denied the Keigh sisters the benefit of representing their school on a first-rate soccer team, a benefit that boys at Hawerchuk were granted. Once the state provides a benefit, "it is obliged to do so in a non-discriminatory manner" (*Eldridge*). The government must ensure that individuals, and especially disadvantaged groups, benefit equally from government services. Public schools are financed by the government; the programs they provide to students are government services. Under section 48(1) of the *Public Schools Act* ("the Act"), the school boards "supervise and direct sports and games during school terms or vacation."

> *Eldridge v British Columbia (AG)*, [1997] 3 SCR 624 at para 77, 151 DLR (4th) 577 [*Eldridge*].
> *The Public Schools Act*, CCSM c P250, s 48(1) [*Public Schools Act*].

a) The School Division's decision denied the Keigh sisters the equal benefit of representing their school on a first-rate soccer team

[23] Being a member of a high school soccer team is not just a matter of playing a 90-minute soccer match. Students identify with the schools that they attend and feel a desire to represent those schools through sports activities or artistic expression. This sentiment cannot be replaced by competing on behalf of another school. The Keigh sisters would have made the team had they been allowed to try-out. Team-members received two discrete benefits:

1. The benefit of playing on a team that was more or less commensurate with their skill level; and
2. The benefit of representing their school and taking part in the school's communal life

[24] These benefits aligned with the Keigh sisters' short-term and long-term goals. In the short-term, they hoped to achieve recognition within their community and among their peers by representing Hawerchuk through soccer. They also sought to develop strong ties with their teammates by representing the school together. In the long-term, they wished to attain athletic scholarships to elite universities in order to pursue soccer professionally and represent Team Canada at the World Cup.

Official Problem, *supra* para 5 at para 19.

[25] The School Division's decision forced the Keigh sisters to choose one of these goals at the expense of the other. They were given the option either to play on the Oakwood team, which was more or less commensurate with their skill level. Alternatively, they were given the option to play on the Hawerchuk girls' team, where they could represent their school and take part in its communal life. Both options deprived them of a significant benefit. The boys at Hawerchuk, on the other hand, received both benefits: the benefit of playing on a first-rate team and the benefit of representing their school on that team.

[26] Section 15(1) asks "how any member of the majority, reasonably informed, would feel in the shoes of the claimant experiencing the effects of the [decision]" (*Gosselin*). The majority in *Kapp* held that "human dignity is an essential value underlying the section 15 equality guarantee" (*Kapp*). The School Division's decision had a serious impact on the Keigh sisters. They felt as if they were "not worthy of being part of the top team" at Hawerchuk and that they did not belong at Oakwood due to their limited interaction with teammates. This feeling was reinforced every time they had soccer practice since they had to "rush out of class" at the end of the day and take a 15-minute bus ride to get to Oakwood on time. The effects of the School Division's decision were profoundly troubling in light of the Keigh sisters' deep commitment to the sport and the historic disadvantages faced by female athletes.

Gosselin v Quebec (AG), 2002 SCC 84 at para 245, 4 SCR 429 [*Gosselin*].
R v Kapp, 2008 SCC 41 at para 21, 2 SCR 483 [*Kapp*].
Official Problem, *supra* para 5 at para 19.

b) The School Division's decision failed to correspond to the actual capacities and needs of the Keigh sisters as female athletes

[27] A distinction is not discriminatory if it corresponds to the capacities and needs of the claimant group. Unlike the welfare scheme in *Gosselin*, the School Division's decision failed to reflect "the overall needs and circumstances" of female athletes because it exacerbated existing barriers that female athletes face in achieving recognition and access to sport.

Gosselin, *supra* para 26 at para 55.

[28] Sport is a male-dominated space. The history of women in sport is a history of struggle against that norm. Human rights jurisprudence establishes that female athletes deserve equal sporting opportunities. In some cases, this requires that women should be allowed to play for men's teams.

Pasternak v Manitoba High Schools Athletics Association, 2008 MBQB 24, 222 Man R

(2d) 288 [*Pasternak*].
Blainey v Ontario Hockey Association (1986), 54 OR (2d) 513, 26 DLR (4th) 728 [*Blainey*].
Casselman v Ontario Soccer Association (1993), 23 CHRR D/397 (Ont Bd Inq) [*Casselman*].
Hawkins v Little League Canada, 2009 BCHRT 12, 65 CHRR D/429 [*Hawkins*].

[29] Substantive equality "recognizes that persistent systemic disadvantages [operate] to limit the opportunities available to members of certain groups in society" (*Taypotat*). Justice Enright explained in her dissenting judgment that women have been "forced to litigate for decades...simply to have equal opportunities in athletics" (Official Problem). In *Pasternak*, a similar case where twin sisters were barred from trying out for a men's hockey team, the Manitoba Board of Adjudication referred to high school girls in Canada as the "historically disadvantaged" class. Similar language runs through the jurisprudence in the United States. In *Cohen*, for example, the court, referred to female athletes as a "historically disadvantaged sex."

Taypotat, *supra* para 21 at para 17.
Official Problem, *supra* para 5 at 10.
Pasternak, *supra* para 28 at 26.
Cohen v Brown University, 879 F Supp 185 at 32 (DRI 1995).

[30] Dr. Foley's expert evidence shows us that women face two distinct barriers in Canada with respect to sports. First, they struggle with equal access to sports programs. Their athletic programs are disproportionately underfunded, under-resourced, and more likely to be cut. Second, they are consistently unrecognized by their communities. This results in society's lack of exposure to female athletes and makes it difficult for them to achieve recognition.

Official Problem, *supra* para 5 at para 26.

[31] These disadvantages are consistent with the benefits denied to the Keigh sisters. If they chose the option to remain at Hawerchuk, they would have had to play on a team that was not commensurate with their skill level. This would have undermined their training and development

for three years and potentially precluded the possibility of continuing with post-secondary soccer. The Keigh sisters, however, chose to play for Oakwood. While the girls' team at Oakwood provided them with a sufficient level of play, the Keigh sisters found themselves in a situation where they could not represent their school.

[32] The School Division's decision failed to reflect the needs of female athletes by forcing the Keigh sisters to endure one disadvantage or the other. Where recognition of female athletes is a persistent issue in Canada, public schools must ensure that female athletes obtain access to the same benefits as male athletes in order to lessen the gap between the two groups. The Keigh sisters are elite female athletes who had the potential to become well-known athletic representatives of Hawerchuk by playing for the school at city-finals (which Hawerchuk consistently participates in). Although "perfect correspondence between a benefit program and the actual needs and circumstances of the claimant group is not required" (*Withler*), the School Division's accommodation scheme should not exacerbate significant barriers that female athletes face in sport.

> *Withler v Canada (Attorney General)*, 2011 SCC 12, at para 67,1 SCR 396 [*Withler*].

c) The School Division's decision denied the Keigh sisters a benefit that perpetuated their disadvantage

[33] Female athletes face two distinct disadvantages in sport: gaining equal access to sports programs and achieving recognition in their communities. The presence of pre-existing disadvantage is "most likely to reveal whether there is discrimination, understood as an infringement of substantive equality" (Mendes & Beaulac). Underlying section 15 is "our awareness that certain groups have been historically discriminated against, and that the perpetuation of such discrimination should be curtailed" (*Quebec*). The School Division's

decision exacerbated the second disadvantage outlined above and perpetuated stereotypes about female athletes.

> Lynn Smith & William Black, "The Equality Rights" in Errol Mendes & Stéphane Beaulac, *Canadian Charter of Rights and Freedoms*, 5th ed (Markham: LexisNexis, 2013) 951 at 1003 [Smith & Black].
> *Quebec*, *supra* para 21 at para 332.

[34] The Keigh sisters failed to achieve recognition within their community at Hawerchuk, thereby reinforcing the existing disadvantage female athletes face in achieving recognition. The distance between the schools limited the ability of their peers at Hawerchuk to support them. By playing for Oakwood, they lost the opportunity to gain exposure and become role models at their own school.

[35] The School Division's decision also perpetuated stereotypes about female athletes. Stereotyping is a disadvantaging attitude. It is one that "attributes characteristics to members of a group regardless of their actual capacities" (*Quebec*). By carving out a limited space for the Keigh sisters where their successes were unnoticed by their peers, the School Division's decision perpetuated the view that female athletes are unable to integrate in and represent their institutions. The impugned decision was reasonably capable of perpetuating a view amongst female athletes at Hawerchuk that they are less worthy of recognition by the school, and are not equally deserving of the chance to participate in sports programs in a meaningful way (*Miron*). Thus, even though the School Division's decision was not based in stereotypes about female athletes, it still perpetuated them.

> *Quebec*, *supra* para 21 at para 326.
> *Miron v Trudel*, [1995] 2 SCR 418 at para 110 [*Miron*].

2. The School Division's decision was not ameliorative under section 15(2)

[36] The Respondents cannot rely on section 15(2) to "save" the distinction created by the School Division's decision (*Cunningham*). It was not an affirmative action program under section 15(2) for three reasons. First, there is no support for the proposition that the decision of an administrative board is a "program" or "activity." The jurisprudence suggests that a "program" or "activity" within the meaning of section 15(2) should be planned and proactive, rather than unplanned and reactive. Second, the School Division's decision made no mention of an ameliorative purpose and no authority suggests that we may impute such intent without a richer factual record. Third, the School Division's decision was not "ameliorative" within the meaning of section 15(2) because it was inconsistent with section 15(2)'s purpose.

> *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37 at paras 44, 2 SCR 670 [*Cunningham*].

a) The School Division's decision is not a "program" or "activity" within the meaning of section 15(2)

[37] The decision of an administrative board is not a "program" or "activity" within the meaning of section 15(2). The Respondents cannot rely on the Ontario Superior Court of Justice's decision in *OFAH* to support the proposition that it is. In *OFAH*, the Minister of Natural Resources implemented a policy that was considered an ameliorative program. A ministerial decision does not equate to a school principal or School Division's decision because ministers hold more accountability.

> *Ontario Federation of Anglers and Hunters v Ontario (Minister of Natural Resources and Forestry)*, 2016 ONSC 2806, 131 OR (3d) 223 [*OFAH*].

[38] The creation of ameliorative programs under section 15(2) should be made by ministers or their representatives in the Ministry. The School Division acts pursuant to the powers outlined in section 48 of the Act. None of these powers suggest that the legislator intends the School Division to enact ameliorative programs with a single reactive decision and without consultation from the government.

Public Schools Act, *supra* para 22 at s 48(1).

[39] The School Division's decision was reactive and unplanned, unlike the "First Nations Fund" in *Lovelace*, the communal fishing license in *Kapp*, and the Interim Enforcement Policy ("IEP") in *OFAH*. The common thread in these initiatives is that they were planned and calculated. The First Nations Fund in *Lovelace* and the communal fishing licence in *Kapp* were also proactive. The School Division's decision, in stark contrast, was reactive and relatively unplanned. Principal Vandalay implemented the program in reaction to the Keigh sisters' request to try-out for the team. It was also put into effect in a relatively short amount of time with no resources supporting its development.

Lovelace v Ontario, 2000 SCC 37, 1 SCR 950 [*Lovelace*].
Kapp, *supra* para 26.
OFAH, *supra* para 37.

b) The School Division's decision did not specify an ameliorative purpose

[40] A program falls under the scope of section 15(2) if it has an ameliorative purpose and targets a disadvantaged group identified by the enumerated grounds. According to the Supreme Court in *Kapp*, the program's "goal...[is] the paramount consideration" (*Kapp*). Section 15(2) requires an intent-based analysis, and yet Principal Vandalay's written reasons made no mention of an ameliorative purpose.

Kapp, *supra* para 26 at para 44.

[41] In section 15(2) jurisprudence, the legislative intent is always derived from a rich factual record. In *Lovelace,* the Supreme Court detailed a long and complicated history of the First Nation Fund to determine its ameliorative purpose. In *Kapp*, the Court looked to the stated objectives of the Aboriginal Fishing Strategy to identify the ameliorative purpose of the commercial fishing license. In *Pratten,* the British Columbia Court of Appeal considered the legislative history of the *Adoptions Act* to find an ameliorative purpose in the impugned provision.

> *Pratten v British Columbia (Attorney General)*, 2012 BCCA 480, 357 DLR (4th) 660 [*Pratten*].
> *Lovelace*, *supra* para 39 at paras 9, 11, 14, 27, 32.

[42] Not one of these approaches allows us to identify an ameliorative purpose from Principal Vandalay's reasons. First, there is no historical record before the court showing the principal's intent to create an ameliorative program. Instead, he specifically stated that his main concern was to balance the competing rights at play. Second, the principal's decision was not made against the backdrop of a larger project with stated objectives to scrutinize. Attempting to find an ameliorative purpose in the principal's reasons is retroactive justification.

> Official Problem, *supra* para 5 at para 17.

c) The School Division's decision was not "ameliorative" within the meaning of section 15(2)

[43] The purpose of section 15(2) is to ensure that governments can freely implement affirmative action programs without the charge of "reverse discrimination" (*Cunningham*). Reverse discrimination refers to challenges made by relatively advantaged groups that special benefits conferred on historically disadvantaged groups are discriminatory. Section 15(2) "reinforce[s] the important insight that substantive equality requires *positive* [emphasis added] action to ameliorate...conditions" (*Sheppard*). The Supreme Court's decision in *Kapp* was

consistent with this purpose: "it insulated an ameliorative program targeting a disadvantaged group from a claim of "reverse discrimination" by a relatively more advantaged group" (*McGill*).

> *Cunningham*, *supra* para 36 at para 41.
> Colleen Sheppard, *Litigating the Relationship Between Equity and Equality* (Toronto: Ontario Law Reform Commission, 1993) at 28 [*Sheppard*].
> Jena McGill, "Section 15(2), Ameliorative Programs and Proportionality Review" (2013) 63 SCLR 521 at 532 [*McGill*].

[44] The facts before us did not involve reverse discrimination. High school female athletes are historically disadvantaged in relation to their male counterparts with respect to exposure, recognition, funding, and access to sports programs. The School Division's decision excluded the Keigh sisters in order to benefit male athletes.

[45] Our courts have never legitimized a program that benefits one group at the expense of the claimant group where the latter is relatively disadvantaged in the particular context being considered by the court. There are two patterns in Canada's section 15(2) jurisprudence. Either the claimant challenges the fact of targeting itself (*Kapp*, *Ontario Federation of Anglers and Hunters*), or the claimant alleges discrimination within the ameliorative scheme (*Lovelace*, *Cunningham*, and *Pratten*). *Kapp*-style "reverse-discrimination" claims are contextually different than *Cunningham*-style "under-inclusion" claims.

> *Kapp*, *supra* para 26.
> *OFAH*, *supra* para 37.
> *Lovelace*, *supra* para 39.
> *Cunningham*, *supra* para 36.
> *Pratten*, *supra* para 41.

[46] The existing authorities do not provide guidance for section 15(2)'s application to these circumstances. The Keigh sisters do not make a conventional *Kapp*-style reverse discrimination claim because female athletes are relatively disadvantaged in relation to male athletes.

Benefitting the male Orthodox Jewish players at the expense of the Keigh sisters in the context of a sports program is dissimilar from either pattern in the jurisprudence.

Issue 2: The School Division's decision did not proportionately balance the Keigh sisters' section 15(1) rights against the Orthodox team members' subsection 2(a) rights

[47] The School Division's decision was unreasonable because it did not proportionately balance the competing *Charter* rights as issue and therefore infringed the Keigh sisters' equality rights more than was necessary. First, the decision did not engage the Orthodox team members' religious freedom under section 2(a) of the *Charter* and therefore there were no competing rights that would justify infringement of the Keigh sisters' equality rights. Second, even if the decision engaged competing *Charter* rights, the School division failed to accommodate both rights as much as possible (*NS*). Third, the School Division did not reasonably consider its statutory objectives when balancing the competing rights (*Doré*, *Loyola*). Finally, even if no reasonable accommodation of both rights was possible, the School Division failed to proportionately balance the Keigh sisters' equality rights against the Orthodox team members' religious freedom.

Doré, *supra* para 18 at para 55.
Loyola, *supra* para 19 at para 37.
NS, *supra* para 20 at para 9.

1. Allowing the Keigh sisters to try out would not have constrained the Orthodox team members' religious freedom

[48] The School Division's decision did not engage the religious freedom of the Orthodox team members. Although the boys have a sincere belief regarding physical contact that has a nexus with religion, the alternative decision to allow the Keigh sisters to try out for the Hawerchuk boys' team would not have been a substantial or non-trivial burden on this religious belief.

Syndicat Northcrest v Amselem, 2004 SCC 47 at paras 46, 59, 2 SCR 551 [*Amselem*].

Multani v Commission scolaire Marguerite-Bourgeoys, 2006 SCC 6 at paras 4, 34, 1 SCR 256 [*Multani*].

[49] No right or freedom under the *Charter* is absolute (*Amselem*). Religious freedom is primarily about freedom from state interference or constraint (*Big M*). In *Big M*, the Court held that "freedom means that, subject to such limitations as are necessary to protect . . . the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience." Freedom from constraint does not include the right to conform a soccer program at a public, non-sectarian school to the requirements of a religion, particularly when doing so would result in the exclusion of a disadvantaged group (*des Chênes*, *Loyola*). The scope of religious freedom must be interpreted in light of section 28 of the *Charter*, which guarantees all rights and freedoms equally to male and female persons.

Amselem, *supra* para 48 at para 61.
R v Big M Drug Mart Ltd., 1985 SCC 69 at para 95, 1 SCR 295 [*Big M*].
SL v Commission scolaire des Chênes, 2012 SCC 7 at para 36, 131 OR (3d) 113 [*des Chênes*].
Loyola, *supra* para 19 at para 80.
Charter, *supra* para 15 at s 28.

[50] In the public school context, religious freedom prevents the state from forcing individuals to choose between attending school and living in accordance with their religious beliefs. In *Multani*, the Court held that the appellant's religious freedom was infringed because he was forced to choose between complying with his sincere belief that he had to wear a ceremonial dagger at all times and complying with his school's prohibition on weapons. He was unable to even enter his school while living in accordance with his beliefs. This effectively "deprived [Multani] of his right to attend a public school."

Multani, *supra* para 48 at paras 4, 41.

[51] In contrast, the Orthodox team members would not be forced to choose between obeying their religious convictions and enjoying the benefits of public school education. It is not necessary to play soccer in order to experience the benefits of public education at Hawerchuk.

Official Problem, *supra* para 5 at para 17.

[52] Unlike in *Law Society of Upper Canada*, the decision to attend and play soccer at Hawerchuk is not "fundamentally a religious one." In the education context, the core of religious freedom is the freedom to participate in a private, sectarian educational community of like-minded believers (*Loyola, Law Society of Upper Canada*). Unlike the private university at issue in *Law Society of Upper Canada*, whose mission was to "develop godly Christian leaders," Hawerchuk is a public and secular institution that exists to serve "the broadest possible cross-section of the population" (*Hamilton-Wentworth*).

Loyola, *supra* para 19 at para 33.
Trinity Western University v Law Society of Upper Canada, 2016 ONCA 518 at paras 20, 91-92, 131 OR (3d) 113 [*Law Society of Upper Canada*].
T(E) v *Hamilton-Wentworth District School Board*, 2016 ONSC 7313 at para 106, CarswellOnt 18389 [*Hamilton-Wentworth*].
Official Problem, *supra* para 5 at paras 3, 7.

[53] Religious freedom does not allow adherents of a particular religion to constrain the choices of other individuals in the public sphere. The School Division turned the Orthodox team members' "negative" freedom from constraint under section 2(a) of the *Charter* into a "positive" entitlement to play soccer in accordance with their religious beliefs. Like the appellants in *des Chênes*, whose appeal was denied by the Supreme Court, the Orthodox team members were seeking to conform a public, non-sectarian school to their own particular religious beliefs. Worse, they were seeking to exclude an historically disadvantaged group in the process.

des Chênes, *supra* para 49 at paras 40, 41.

2. If religious freedom was engaged, accommodation of both rights was possible without excluding the Keigh sisters from the Hawerchuk boys' team

[54] Even if this Court were to find that the religious freedom of the Orthodox team members was engaged by the decision, the School Division could have accommodated both the boys' religious freedom and the Keigh sisters' equality rights. A mutual accommodation of the two rights at issue would have "give[n] effect as fully as possible to the *Charter* protections at stake" in light of the School Division's statutory objectives. Instead, the School Division unreasonably decided that it had to engage in a winner-take-all contest between the two rights, which resulted in excluding the Keigh sisters entirely. This resulted in an unjustifiable infringement of the Keigh sisters' equality rights.

Loyola, *supra* para 19 at para 39.

[55] The School Division chose not to investigate a number of "reasonably available alternative measures" which could have allowed the Keigh sisters to try out for the team while still respecting the Orthodox team members' beliefs. For example, the Keigh sisters could have practiced separately from the Orthodox team members and played on different shifts in games. Alternatively, the School Division could have asked the Keigh sisters whether they would have been willing to play in positions that create less or no risk of impermissible physical contact, such as defender or goaltender.

NS, *supra* para 20 at para 32.

[56] These alternative arrangements could have reduced the amount of interaction between the Keigh sisters and the Orthodox team members to the level of ordinary interaction at school, which is permissible for the Orthodox team members. These options would have allowed both the Keigh sisters and the Orthodox team members to benefit from the same sense of community, skills training, and exposure to scouting.

Official Problem, *supra* para 5 at para 23.

3. If no mutual accommodation was possible, the School Division did not proportionately balance the competing *Charter* values in light of its statutory objectives

[57] Even if a mutual accommodation was not possible, the School Division failed to reasonably consider its statutory objectives, which include its duty as a public institution to create an inclusive and non-discriminatory environment for all students. As a result, the School Division gave disproportionate weight to the section 2(a) interests of the Orthodox team members and insufficient weight to the Keigh sisters' equality rights.

NS, *supra* para 20 at para 9.
Doré, *supra* para 18 at para 55.

a) The School Division did not reasonably consider its statutory objectives

[58] Before determining how best to protect the competing *Charter* rights at issue, the School Division failed to reasonably consider its statutory objectives in light of the provisions of the *Public Schools Act* ("the Act") and its duties as a public, secular school.

Doré, *supra* para 18 at paras 55-56.

[59] The School Division has a broad mandate under the Act to provide public education that promotes a fair society, accounts for diversity, and responds to local circumstances. These statutory objectives require the School Division to promote gender equality, address challenges faced by female student athletes, and maintain an inclusive, secular space for public education. When considered reasonably, these objectives should have resulted in striking a balance in favour of the of the Keigh sisters' equality rights for three reasons.

Public Schools Act, *supra* para 22 at Preamble.

[60] First, the Act codifies a commitment to gender equality. It requires schools to have a code of conduct prohibiting "discriminating unreasonably on the basis of any characteristic" set out in

the *Human Rights Code*, including sex. Therefore, the *Public Schools Act* imposes a duty to ensure equal opportunities for both male and female students at public schools. The School Division's decision to exclude the Keigh sisters was inconsistent with this duty.

Public Schools Act, *supra* para 22 at s 47.1(2)(b)(ii).

[61] Second, the School Division failed to take into account the unique challenges and inequalities faced by female athletes such as the Keigh sisters. Female athletes face barriers when seeking to play sports at an elite level, and girls are often deterred from pursuing elite athletics during their adolescent years. Hawerchuk itself has taken steps to address these inequities and is voluntarily a member of the Manitoba High School Athletic Association (MHSAA). The MHSAA Rules require each member school to "ensure that female and male students are given equal opportunities and access to sports teams."

Official Problem, *supra* para 5 at paras 14-15, 26-27.
Manitoba High Schools Athletic Association, "2016/2017 MHSAA Handbook," Rules & Regulations at s. II.(q).

[62] The School Division's decision to exclude the Keigh sisters was inconsistent with this gender equality policy. The inconsistency is analogous to that in *Law Society of Upper Canada*, where the Ontario Court of Appeal held that the Law Society's decision to accredit Trinity Western University's proposed law school would have been inconsistent with ongoing efforts to "remove obstacles based on considerations . . . other than ones based on merit" when setting bar admissions standards.

Law Society of Upper Canada, *supra* para 52 at para 109.

[63] Finally, the School Division's decision was inconsistent with its statutory requirements as a secular institution under the Act, which states that "public schools shall be non-sectarian." Non-sectarian public schools must "respect the views of all members of the school community

[and] promote respect and tolerance for all the diverse groups" that they serve (*Chamberlain*). The School Division's decision violated the duty of state neutrality by creating a "preferential public space" that promoted the religious freedom of the Orthodox team members over competing *Charter* rights (*Saguenay*). Further, section 28 of the *Charter* guarantees all rights and freedoms equally to male and female persons, and this limits the School Division's ability to protect religious freedom to the exclusion of gender equality. The School Division's mandate to be "responsive to local needs and conditions," including the religious customs of Winnipeg's Orthodox Jewish community, cannot displace its responsibility to protect the equality rights of the Keigh sisters and female student athletes in general.

Mouvement laïque québécois v. Saguenay (City), 2015 SCC 16 at para 76, 2 SCR 3 [*Saguenay*].
Chamberlain v Surrey School District No. 36, 2002 SCC 86 at para 25, 4 SCR 710 [*Chamberlain*].
Public Schools Act, *supra* para 22 at Preamble, s 84(1).
Charter, *supra* para 15 at s 28.
des Chênes, *supra* para 49 at para 32.

b) The School Division gave undue weight to the Orthodox team members' religious freedom

[64] In weighing the competing *Charter* rights, the School Division gave undue weight to the religious freedom of the Orthodox team members. Any constraints on the boys' religious freedom from allowing the Keigh sisters to try out would have been minimal and reasonable in a public, secular institution such as Hawerchuk. The proper scope of religious freedom must be measured in relation to the Keigh sisters' equality rights and in light of the "underlying context" of public education in a society that values state neutrality and secularism.

Amselem, *supra* para 48 at para 62.

[65] Although the presence of the Keigh sisters on the Hawerchuk boys' team may have prevented some Orthodox team members from remaining on the team, it would not have stopped

them from living in accordance with their beliefs in other spheres of their lives, or from observing religious custom in other ways in a public setting while at Hawerchuk.

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

[66] Playing soccer at a public, non-sectarian school would not have enhanced the religious experience of the Orthodox team members (*Law Society of Upper Canada*). Unlike the Catholic school at issue in *Loyola,* the Hawerchuk boys' soccer team was not necessary to give effect to the Orthodox team members' religious beliefs.

Loyola, *supra* para 19 at para 33.
Law Society of Upper Canada, *supra* para 52 at para 92.

[67] Further, the decision to allow the Keigh sisters to try out would not have forced the Orthodox team members to violate their sincere religious beliefs regarding physical contact. A decision allowing the Keigh sisters to try out would be different in kind from the administrative decision in *Loyola,* which constrained religious freedom by requiring the appellants to teach their own religion from a perspective not their own.

Loyola, *supra* para 19 at paras 3, 70.
Official Problem, *supra* para 5 at paras 8, 13.

c) The School Division gave insufficient weight to the Keigh sisters' equality rights

[68] In contrast, the negative impacts of the School Division's decision on the Keigh sisters' equality rights under section 15(1) were severe. The ability to play soccer at an elite level in public school was far more central to the Keigh sisters' equality rights than it was to the Orthodox team members' religious freedom. Therefore, it was unreasonable for the School Division to exclude the Keigh sisters on the basis of religious freedom alone.

[69] The Keigh sisters' sense of belonging and self-identity were intimately tied up with the ability to play elite soccer at their own school. Soccer itself formed a "big part" of their ability to

feel at home in the Hawerchuk community after their relocation from Toronto. The School Division's decision excluded the Keigh sisters from competing at the highest possible level while representing their own school. Further, the sisters' short- and long-term goals all revolved around soccer. The School Division's decision unjustifiably interfered with these ambitions.

Official Problem, *supra* para 5 at paras 1, 19-20, 27.

[70] Finally, the School Division did not demonstrate that it was "conscious of the fundamental importance of *Charter* values" in making its decision (*Doré*). Its reasons fail to make explicit reference to the equality rights of the Keigh sisters or show that the School Division was "alive to the question at issue," which was the proper balance of two competing *Charter* rights (*Newfoundland Nurses*). Principal Vandalay's reasons state that "the religious rights of the boys' [team] players will be respected, while both Tara and Tamara will be able to play soccer." The Keigh sisters' equality rights go beyond simply the opportunity to "play soccer." Equality includes the right not to be forced to receive something less simply because of one's sex.

Doré, *supra* para 18 at para 54.
Official Problem, *supra* para 5 at para 17.
Newfoundland and Labrador Nurses' Union v Newfoundland & Labrador (Treasury Board), 2011 SCC 62 at para 16, 3 SCR 708 [*Newfoundland Nurses*].

Issue 3: Damages are a just and appropriate remedy under section 24(1) of the *Charter*

[71] The Manitoba Court of Queen's Bench Rules allow a judge to order certain remedies on judicial review of an administrative decision. Although damages are not listed among the available remedies, the Keigh sisters are seeking a remedy under section 24(1) of the *Charter*, which "commands a broad and purposive interpretation" and confers "the widest possible discretion on a court to craft remedies for violations of *Charter* rights" (*Dunedin*). In this case, damages are a just and appropriate remedy.

Man Reg 553/1988, s 68.01.
Vancouver (City) v Ward, 2010 SCC 27, at para 21, 2 SCR 28 [*Ward*].
R v 974649 Ontario Inc., 2001 SCC 81, at para 18 [*Dunedin*].

1. Section 24(1) damages serve the functions of compensation and vindication of the Keigh sisters' equality rights

[72] Damages are just and appropriate to compensate the Keigh sisters for the psychological and non-pecuniary harms they have suffered and to vindicate their equality rights.

Ward, *supra* para 71 at paras 27-28.

a) Damages compensate for non-pecuniary and psychological harms

[73] Compensable intangible interests include distress, humiliation, embarrassment, and anxiety. The unjustified infringement of the Keigh sisters' section 15(1) rights has caused them to feel "banished" on the basis of their sex and "dirty or not worthy" of playing on the Hawerchuk boys' team. The Keigh sisters lost their sense of community at Hawerchuk.

Ward, *supra* para 71 at para 27.
Official Problem, *supra* para 5 at paras 20, 25, 27.

[74] Unlike the appellant in *Ward*, whose section 8 rights were infringed on one occasion through an unnecessary strip search, the Keigh sisters experienced a sense of unworthiness and banishment over the course of their entire high school career at Hawerchuk. This was a period of almost three years during their adolescence, when girls are particularly susceptible to the social pressure not to pursue sports at elite levels.

Ward, *supra* para 71 at para 62.
Official Problem, *supra* para 5 at paras 27-28.

b) Damages vindicate the Keigh sisters' equality rights

[75] Second, *Charter* damages would serve to vindicate the Keigh sisters' rights and help to remedy the impact of the School Division's decision on societal attitudes towards women in sport. The vindication function should weigh more heavily in equality cases such as this, where

there is a need to counter the "dangerous message" that aspiring female athletes do not deserve the chance to "strive to excel or to be the very best at any sport."

Official Problem, *supra* para 5 at paras 26-28.
Ward, *supra* para 71 at paras 28, 30, 66.

2. The countervailing factors of alternative remedies and good governance do not negate the functional justifications for section 24(1) damages

[76] The School Division is unable to meet its burden of showing that there are alternative remedies or good governance concerns that negate the functional justifications for *Charter* damages.

Ward, *supra* para 71 at para 61.

a) There are no meaningful alternative remedies

[77] "A meaningful remedy must be relevant to the experience of the claimant and must address the circumstances in which the right was infringed or denied" (*Doucet-Boudreau*). No alternative remedies exist that would meaningfully vindicate the rights of the Keigh sisters in a way that is relevant to their particular experience of being excluded from the Hawerchuk boys' team. Absent an award of damages, the "legally desirable goals of compensation for wrong [and] vindication . . . elaborated in *Ward* will be unrealized" (*Henry*).

Ward, *supra* para 71 at paras 20, 34-35.
Doucet-Boudreau v Nova Scotia (Department of Education), 2003 SCC 62 at para 55, 3 SCR 3 [*Doucet-Boudreau*].
Henry v. British Columbia (Attorney General), 2015 SCC 24, at para 134, 2 SCR 214 [*Henry*].

[78] It is too late for the "corrective action" of judicial review and an order to permit the Keigh sisters to try out (*Ernst*). The Keigh sisters have already graduated from high school without ever having had the chance to play for the Hawerchuk boys' team. They have now gone

on to attend university. A declaration of a *Charter* breach may assist future female student athletes, but it would not compensate the Keigh sisters.

> *Ernst v Alberta Energy Regulator*, 2017 SCC 1 at para 35, Cromwell J [*Ernst*].
> Official Problem, *supra* para 5 at para 28.

[79] The equitable remedy of directing the School Division to provide soccer instruction or support to the Keigh sisters would do nothing to further the goals of compensation because the Keigh sisters have suffered non-pecuniary and psychological harms, not a "loss of skills" due to their inability to play on the Hawerchuk boys' team.

> *Pasternak*, *supra* para 28 at para 117 .
> Official Problem, *supra* para 5 at para 19.

b) Damages will not interfere with good governance

[80] The School Division is also unable to meet its burden of showing that good governance concerns negate the functional justifications for *Charter* damages (*Ward*). First, compliance with and respect for *Charter* rights, including the Keigh sisters' equality rights, is itself "a foundational principle of good governance" regardless of the particular role of the decision-maker (*Ward*, *Ernst*).

> *Ward*, *supra* para 71 at para 38.
> *Ernst*, *supra* para 78, Cromwell J at para 177, McLachlin CJC, dissenting.

[81] Second, governance concerns are minimal because the Keigh sisters are not launching a "collateral attack" on the School Division's decision outside the normal process of judicial review. The damages claim is not a separate cause of action directly against the School Division, but is rather the culmination of a normal judicial review process. Therefore, allowing damages would not "distort the appeal and review process" for administrative decision-making.

> *Ernst*, *supra* para 78 at paras 54, Cromwell J, 169, McLachlin CJC, dissenting.
> Official Problem, *supra* para 5 at para 1.

PART V – ORDER SOUGHT

[82] The Appellants request that the appeal be allowed. The Appellants also request that this Court remand this matter to the Manitoba Court of Queen's Bench for determination of the proper quantum of damages to be awarded.

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

Team 11

Counsel for the Appellant

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