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

Appellants

-AND-

WINNIPEG SCHOOL DIVISION

Respondent

FACTUM OF THE APPELLANTS

COUNSEL FOR THE APPELLANTS

TEAM #8

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PART I – OVERVIEW

[1] Tara and Tamara Keigh are exceptional soccer players with dreams to play for Team Canada. The Winnipeg School Division ("Division") denied Tara and Tamara the opportunity to try out for the boys' soccer team, the only competitive soccer team, at their public high school, Hawerchuk Secondary School ("Hawerchuk"). The sole basis for the Division's decision was the religious belief of some players on the boys' team, which bars physical contact between unrelated females and males. Tara and Tamara could not play for the team of their choice because of their sex, even though the Division expressly acknowledged their merit. This made them feel as though they were "dirty or not worthy of being part of the top team."

[2] The Division's decision constitutes sex discrimination contrary to s. 15(1) of the *Charter* because it exacerbated the systemic disadvantage girls and women already face in sport, did not respond to their needs and capacities, perpetuated prejudice and false stereotypes, and harmed their dignity. Accommodating the Orthodox Jewish team members was not ameliorative under s. 15(2) of the *Charter* because there is no evidence that this group faced disadvantage in sports.

[3] The Division's decision was unreasonable under the *Doré* framework. The Division frustrated its own mandate under the *Public Schools Act* ("*PSA*"), which requires it to promote secularism, equality, diversity, inclusivity, personal merit, and skills development in public schools. This mandate precludes the Division from imposing discriminatory barriers to participation in school programs based on religious doctrine and from violating state neutrality.

[4] The Division's reasons do not reveal it considered its mandate, Tara and Tamara's equality rights, or reasonable alternatives that would reconcile the rights at stake. To achieve a proportionate balance that gives effect as fully as possible to the engaged *Charter* rights, a reasonable decision had to allow the sisters to try out for the Hawerchuk boys' team.

PART II – STATEMENT OF FACTS

a. Factual Background

[5] Tara and Tamara Keigh are twin sisters and elite soccer players. Their passion for the sport is evident: they have been "in love" with soccer ever since they can remember, to the point that they "live and breathe" it. Both sisters aspire to play soccer professionally and ultimately hope to win a World Cup for Team Canada.

Official Problem, Wilson Moot 2017 at para 19 [Official Problem].

[6] In grade nine, Tara and Tamara qualified for starting positions on the boys' soccer team at their Ontario high school. Prior to grade ten, the sisters' family relocated to Winnipeg, Manitoba. Tara and Tamara enrolled at Hawerchuk, a public school. They sought to join the school's first-rate boys' soccer team, because it was established, offered an excellent opportunity for skills development, and would allow them to play for their own school. In September 2013, the sisters attended the boys' soccer team tryouts. The team's coach, Coach Bala, informed the sisters that they would be unable to try out because some of the team's Orthodox Jewish members held the belief that males cannot come into physical contact with unrelated females.

Official Problem, *supra* para 5 at paras 1-3, 7-8, 10-13.

[7] Tara and Tamara took up the issue with Hawerchuk's principal, Principal Vandalay. In a letter dated October 15, 2013, Principal Vandalay acknowledged that Tara and Tamara would have been excellent additions to Hawerchuk's highly-regarded team, but nonetheless barred them from trying out. This decision was rendered despite Hawerchuk's requirement under the *PSA* to remain secular and the Manitoba High Schools Athletic Association's ("MHSAA") rule requiring that girls have equal athletic opportunities and be permitted to try out for boys' teams.

Official Problem, *supra* para 5 at paras 14, 17-19, 21.
The Public Schools Act, RSM 1987, c P250 s 84 [*PSA*].

[8] Principal Vandalay's decision was affirmed on October 22, 2013 by the Division, which adopted the principal's reasons in whole. Consequently, the sisters were unable to play soccer at a competitive level at their own school. Instead, they were offered spots on the girls' team at Oakwood High School ("Oakwood"). Playing for Oakwood placed burdens on Tara and Tamara, who had to take a fifteen-minute bus ride to reach the school, did not get home until late in the evening, and did not feel part of a team outside their school community. It also made them feel "dirty," "not worthy," and "banished" from Hawerchuk's soccer program due to their sex. Tara and Tamara commenced an application for judicial review of the decision on the basis that it discriminated against them because of their sex, contrary to s. 15 of the *Charter*.

> *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, s 15 [*Charter*].
> Clarifications to the 2017 Wilson Moot Problem at para 6 [Clarifications to Problem].
> Official Problem, *supra* para 5 at paras 18-19.

b. Procedural History

[9] Justice Abbott allowed Tara and Tamara's application. She held that the sisters' equality rights were infringed, and that the Division's decision did not reflect a proportionate balancing of the *Charter* rights at stake. Justice Abbott emphasized that allowing girls to play on boys' sports teams achieves substantive equality. Moreover, there was no evidence to suggest that the team would have been in jeopardy had Tara and Tamara been allowed to play. Despite the unique demographics at Hawerchuk, it was nonetheless a publically-funded school. The sisters should not have been made to feel as though they were "less than" their male peers in this environment.

> Official Problem, *supra* para 5 at para 28.

[10] A majority of the Manitoba Court of Appeal allowed the Division's appeal. Justice Lau noted that permitting Tara and Tamara to participate on Oakwood's team was a "reasonable alternative." He found that Justice Abbott did not properly consider the s. 2(*a*) rights of the boys

on the team or the unique circumstances in which Hawerchuk operates. Justice Lau also expressed concern that granting the sisters' request to try out for the boys' team may have placed the team in jeopardy. In dissent, Justice Enright raised the continued disadvantage that young female athletes face. She stressed that equality is not limited to equal opportunity to participate, but extends to equal opportunity "to strive to excel or to be the very best at any sport."

Official Problem, *supra* para 5 at para 28.

PART III – STATEMENT OF POINTS IN ISSUE

[11] The present appeal raises the following constitutional questions:

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

The Division's decision created a distinction on the enumerated ground of sex that discriminated against Tara and Tamara by perpetuating disadvantage, stereotypes, and prejudice, and harming the sisters' dignity. Section 15(2) does not apply because there is no evidence that the decision had an ameliorative purpose or that the religious boys faced discrimination in accessing sports.

2. If the answer to question 1 is "yes," did the Division properly balance Tara and Tamara's equality rights with the boys' freedom of religion?

The Division's decision is unreasonable because there is no evidence that the Division gave due regard to the statutory context within which it operates or to Tara and Tamara's equality rights. The decision also does not reflect a proportionate balancing of the equality rights and religious freedoms at stake because it did not give full effect to both rights, denied a benefit on the basis of a religious doctrine, violated state neutrality, and did not consider reasonable alternatives.

3. If the answer to question 2 is "yes," should Tara and Tamara be awarded damages under subsection 24(1) of the *Charter*?

Damages are an appropriate and just remedy because they compensate the sisters, vindicate the right to equality, and deter the Division from committing similar *Charter* breaches in the future.

PART IV – ARGUMENT

[12] Administrative decision-makers must consider *Charter* rights and values in exercising their discretion. The standard of review applicable to the Division's decision is reasonableness. In *Doré* and *Loyola*, Justice Abella articulated a three-part framework to guide judicial review of the reasonableness of administrative decisions that engage the *Charter*. According to this approach, this Court should consider: (i) whether the Division's decision infringed a *Charter* right; (ii) the statutory mandate of the Division; and (iii) whether the Division's decision represents a proportionate balancing of the *Charter* rights at stake with the statutory mandate.

> Clarifications to Problem, *supra* para 8 at para 2.
> *Doré v Barreau du Québec*, 2012 SCC 12 at paras 55-58, [2012] 1 SCR 395 [*Doré*].
> *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 at paras 37-39, [2015] 1 SCR 613 [*Loyola*].
> *Trinity Western University v Law Society of Upper Canada*, 2016 ONCA 518 at para 79, 131 OR (3d) 113 [*TWU* (ONCA)].

Issue 1: The Division Limited Tara and Tamara's Rights Under Section 15 of the *Charter*

[13] The two-stage test for establishing a breach of s. 15(1) was laid out in *Quebec v A* and *Taypotat*. First, did the Division create a distinction on the basis of an enumerated or analogous ground? Second, did the distinction perpetuate arbitrary or discriminatory disadvantage?

> *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at paras 19-21, [2015] 2 SCR 548 [*Taypotat*].
> *Quebec (Attorney General) v A*, 2013 SCC 5 at paras 323-333, [2013] 1 SCR 61 [*Quebec v A*].

a. The Division's Decision Drew a Distinction on the Enumerated Ground of Sex

[14] By excluding Tara and Tamara from the Hawerchuk boys' team, the team of their choice, the Division's decision created a distinction based on Tara and Tamara's sex. If Tara and Tamara were boys, they would have been allowed to try out on their merits.

[15] Tara's and Tamara's acceptance of the offer to play on the comparable Oakwood team does not mean there was no differential treatment. A distinction is created when a female is denied the opportunity to try out for her preferred team. The jurisprudence indicates that "the right to equal treatment … means that in sports girls and women have access to the team of their choice, provided they can make the grade athletically" (*Casselman*). A player only needs "honestly held" reasons for preferring one team over another (*Casselman*; *Pasternak*; *Blainey*). The orders made in *Casselman*, *Pasternak*, and *Blainey* that girls can try out for their team of choice were not conditional on the non-availability of equally competitive opportunities.

> *Blainey v Ontario Hockey Assn*, 9 CHRR D/4549 at paras 15, 25, 1987 CarswellOnt 2553 (OBI) [*Blainey* (1987)].
> *Blainey v Ontario Hockey Assn*, 9 CHRR D/4972 at para 3, 1988 CarswellOnt 3317 (OBI) [*Blainey* (1988)].
> *Casselman v Ontario Soccer Assn*, 23 CHRR D/397 at 10, 11, 13, 15, 1993WL1447043 (OBI) [*Casselman*].
> Hilary A Findlay, "Sex Discrimination in Sport" (2009) 5:1 Centre for Sport and Law Newsletter at 8 [Findlay].
> *Pasternak v Manitoba High Schools Athletics Assn*, 58 CHRR D/70 at paras 188, 193, (MBA) 2006 CarswellMan 506 [*Pasternak* (MBA)].
> Paul T Clarke, "Canadian High School Athletics and the Saga of Continuing Gender Discrimination" (2013) 22:1 Int'l J of Ed Reform 49 at 70 [Clarke].

[16] Tara and Tamara had honestly held reasons for preferring Hawerchuk: the team was at their own school, was highly competitive, and did not impose burdensome travel and scheduling. Denying them the opportunity to try out for their preferred team created a distinction, regardless of the Division's perception of Oakwood as a reasonable alternative.

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

b. The Distinction Created by the Division's Decision Was Arbitrary and Discriminatory

[17] To breach s. 15(1), a distinction must also be arbitrary or discriminatory. The inquiry is flexible and focused on adverse impacts. Disadvantage is assessed by examining contextual factors on a case-by-case basis, with the goal of identifying whether substantive equality has

been violated. Section 15(1) promotes substantive equality by targeting government conduct that reinforces systemic burdens limiting the opportunities of disadvantaged groups.

Quebec v A, supra para 13 at paras 331-332.
Taypotat, supra para 13 at paras 17, 21.

[18] Government conduct that perpetuates historical disadvantage, prejudice, or stereotyping is discriminatory. If the impugned conduct imposes burdens on a group in a manner that does not respond to their actual individual capacities, it is arbitrary. Additionally, courts have identified the protection of human dignity as "an underlying objective of the whole *Charter*" (*Quebec v A*). Evidence of affronts to human dignity "may also be one of several relevant factors in determining whether the distinction has created or perpetuated disadvantage" (*HG*).

Catholic Children's Aid Society of Hamilton v H(G), 2016 ONSC 6287 at para 55, [2016] WDFL 5984 [*HG*].
Law v Canada (Minister of Employment & Immigration), [2013] 1 SCR 61 at para 83, 170 DLR (4th) 1 [*Law*].
Quebec v A, supra para 13 at para 329.
Taypotat, supra para 13 at paras 20-21.

[19] The Division breached s. 15(1) for four reasons: 1) it perpetuated the disadvantage of female athletes; 2) it did not respond to Tara and Tamara's actual capacities; 3) it perpetuated stereotypes and prejudices regarding women in sports; and 4) it undermined the sisters' dignity.

i. The Division perpetuated historical disadvantage facing women in sport

[20] Perpetuating historical disadvantage occurs when a government decision widens the gap between a disadvantaged group and the rest of society.

Quebec v A, supra para 13 at para 332.

[21] Excluding Tara and Tamara from the boys' team exacerbated systemic disadvantage girls already face in sports. Justice Abbott accepted the evidence of Dr. Dana Foley, an expert on female sport, and Dr. Marla Chaudry, a sports psychologist. Their evidence indicates that girls,

unlike boys, are often deterred from playing elite-level sports. Attrition begins in high school, when female participation in sports drops by 26%. In some provinces, participation is further hampered because girls are consigned to all-female teams even where athletic talent would merit positions on boys' teams. Disadvantage continues at post-secondary institutions, which prioritize male sports programs over female ones. There are also few high-profile female athletes to act as positive role models and advocate for women in sport. In a recent survey, 61% of teenagers could not name a female sports idol, and 87% of boys could not name a single female athlete.

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

[22] The imposition of any burden can further deter female participation in sport, which exacerbates the disadvantage that females experience in pursuing elite athletics. Despite the competitive opportunity at Oakwood, Tara and Tamara did not feel part of the team, especially because they wanted to represent their own school. They had to rush out of class, take a fifteen-minute bus ride to get to their practices, and often did not get home until after seven p.m.

[23] A girl's right to try out for a boys' team is not tempered by the presence of competitively comparable opportunities. The present case is analogous to *Pasternak*. The Pasternak sisters were denied a tryout for their high school boys' team. Instead, they had the choice of playing for their high school girls' team or a team in a local league. Neither alternative was satisfactory. The girl's high school team, like Hawerchuk's girls' team, was beginner-level and did not offer the competition the Pasternaks sought. The local league team was sufficiently competitive, but imposed similar burdens to those Tara and Tamara experienced by playing at Oakwood: inconvenient scheduling and extra travel. As in *Pasternak*, only the boys' team offered Tara and Tamara the desired combination of competition and convenience.

Official Problem, *supra* para 5 at para 19.
Pasternak v Manitoba High Schools Athletics Assn., 2008 MBQB 24 at paras 103, 119,

[2008] 10 WWR 729 [*Pasternak* (MBQB)].
Pasternak (MBA), *supra* para 15 at paras 166-168, 188, 200.

[24] Female players are entitled to play on the team of their choice. In *Blainey*, the claimant preferred to play on a team in a male league. Although the Board of Inquiry acknowledged that teams in the female league "could have provided her with an even more competitive" opportunity, it held that denying her request to try out for the male league was discriminatory. It gave weight to the claimant's personal reasons for preferring to play in the male league. Even if the Oakwood girls' and Hawerchuk boys' teams were equally competitive, this cannot override Tara and Tamara's *own* assessments of whether a sports team met their needs.

Blainey (1987), *supra* para 15 at para 15.
Dean M Beaubier, et al, "The Pasternak Case and American Gender Equity Policy: Implications for Canadian High School Athletics" (2011) 120 Can J of Edu Admin & Pol 1 at 22-23 [Beaubier].

[25] In addition to preferring the Hawerchuk boys' team for its competitiveness and better scheduling, Tara and Tamara wanted to represent their own school. It was important for them to "wear Hawerchuk's colours and help bring a championship home." Playing for Oakwood was not the same. While players at Oakwood were welcoming, it was hard for Tara and Tamara to feel part of the team, as they had little opportunity to interact with Oakwood girls outside of soccer. Individual schools are subject to Manitoba's *Human Rights Code* ("*MHRC*"). Equal access to competitive teams for both sexes must exist within each school, not simply across the Division as a whole. The sisters were therefore entitled to play competitive soccer at Hawerchuk.

Official Problem, *supra* note 5 at para 19.
The Human Rights Code, SM 1987-88, c 39, ss 1, 13 [*MHRC*].

[26] A girl's ability to achieve high-level success in sports does not negate the disadvantage she had to overcome along the way. In *Beacon Hill*, the female claimants' softball team aimed to reach the World Series of their division. The team was denied the benefit of a travel fund, which

was provided exclusively to all-male teams. The court held that it was irrelevant that the claimants were ultimately able to play in the World Series, because denying the female players a travel fund imposed burdens that male players were not subject to. In this case, Tara and Tamara's discriminatory experience is not erased by their receipt of partial scholarships to play soccer at UCLA. The fact that Tara and Tamara persevered does not justify the burdens imposed on them along the way. Moreover, the sisters' partial scholarships are not illustrative of the full potential they may have achieved if not for the lost opportunity to play at Hawerchuk.

Beacon Hill Little League Major Girls Softball Team - 2005 v Little League Canada, [2009] BCWLD 2092 at paras 317-326, 2009 CarswellBC 74 [*Beacon Hill*].
Official Problem, *supra* note 5 at para 28.

ii. The Division did not respond to the actual capacities of Tara and Tamara

[27] The Division acknowledged that Tara and Tamara's athletic talents would have earned them starting positions on the boys' soccer team at Hawerchuk. Despite possessing the requisite merit, the sisters were categorically barred from trying out because they are girls. The Division's decision was arbitrary because it did not respect Tara and Tamara's actual capacities. As Justice McKelvey held in *Pasternak*, "being treated on the basis of an individual's personal merit, as opposed to personal characteristics such as gender, is the essence of substantive equality."

Official Problem, *supra* para 5 at para 22.
Pasternak (MBQB), *supra* para 23 at para 67.

[28] The Division's decision had the effect of excluding Tara and Tamara from the boys' team, a benefit to which they were entitled on the basis of merit. Because s. 15(1) remedies the discriminatory impact of government conduct, the purpose behind the Division's decision—its desire to accommodate the boys' religious beliefs—has no bearing on this stage of the inquiry, and should be left for the proportionality analysis under the *Doré* framework.

Clarke, *supra* para 15.

Quebec v A, supra para 13 at paras 318, 319, 323.

iii. The Division perpetuated prejudice and false stereotyping

[29] Prejudice is a pejorative attitude based on views of the appropriate capacities of individuals founded on their membership in a group. Stereotyping attributes characteristics to members of a group regardless of their actual capacities. State conduct that *perpetuates* prejudice and stereotype violates s. 15(1), whether or not it is *motivated* by prejudice and stereotype.

Quebec v A, supra para 13 at para 326.

[30] In this case, the Division's decision perpetuated prejudice: it advanced the idea that women do not belong in elite sports, and that when it comes down to a choice between male and female athletes, it is women that must concede. The decision also promoted the false stereotype that girls and women are not able to compete on the same level as their male peers, and therefore must be relegated to all-female teams. This further undermined the pursuit of substantive equality for females in sports, because elite female athletes, like Tara and Tamara, help dispel the notion that sport is not biologically or socially appropriate for females. It is also notable that Hawrchuk and the Division not offer the sisters an opportunity to try out for another boys' soccer team and defaulted to the existing arrangement with Oakwood. The Division's decision therefore reinforced "flawed assumptions about social realities" (Clarke).

Beaubier, *supra* para 24 at 16.
Clarke, *supra* para 15 at 65-67, 70.
Official Problem, *supra* para 5 at para 26.

iv. The Division harmed the dignity of Tara and Tamara

[31] Another factor that supports a finding of discrimination is that the Division's decision harmed the dignity of all females, and quite simply, "it hurt[]" (*TWU* (ONCA)). The Division perpetuated the demeaning view that girls' interests in elite sports are inferior to those of boys.

As Justice Abbott found, the decision had the effect of making Tara and Tamara feel "less than" their male peers and subjected them to segregation. Tamara Keigh also noted in affidavit evidence that she and her sister felt banished from Hawerchuk's soccer program because of their sex, and "as though [they] [we]re somehow dirty or not worthy of being part of the top team."

> Official Problem, *supra* para 5 at paras 19, 28.
> *TWU* (ONCA), *supra* para 12 at para 119.

c. The Division's Decision Was Not Ameliorative Under Section 15(2)

[32] Government actors may combat discrimination by developing "laws, programs or activities" aimed at alleviating disadvantage. Section 15(2) shields such programs from s. 15(1) challenge if the government can satisfy the two-stage *Kapp/Cunningham* test. The Division must first show that its decision was genuinely directed at ameliorating disadvantage. It must then prove a correlation between the decision and the disadvantage suffered by the religious boys.

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

[33] Neither of these steps is satisfied. The Division's decision had no ameliorative purpose. Even if an ameliorative purpose is proven, there is no evidence that the religious boys on the team faced disadvantage in accessing sport.

i. The Division's decision did not have an ameliorative purpose

[34] For a program to qualify for s. 15(2) protection, its purpose must be genuinely ameliorative. A "naked declaration" of a program's ameliorative purpose is insufficient. A court should examine whether, on the evidence, the declared purpose is genuine.

> *Cunningham*, *supra* para 32 at para 44.

[35] There is no evidence on the record that the Division's decision to protect the boys' religious freedom by excluding Tara and Tamara had an ameliorative purpose. Principal

Vanadalay's reasons failed to identify the boys as a disadvantaged group and did not identify amelioration as the purpose of the decision. Rather, the stated purpose of the decision was to find a solution for the rights conflict between the religious boys and Tara and Tamara, not to address a disadvantage faced by the boys. Thus, the decision is not insulated by s. 15(2).

ii. The Division's decision did not correlate to any disadvantage faced by the boys

[36] Even if this Court accepts that the Division's decision had an ameliorative purpose, there is no evidence that satisfies the Division's burden of demonstrating that Orthodox Jewish individuals have faced disadvantage in accessing athletic opportunities in the Winnipeg school system or even public schools more broadly. Indeed, to the extent that the evidence addresses this issue, it suggests that Hawerchuk is an inclusive environment for people of the Jewish faith.

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

[37] Although the Jewish boys on the team were protected by the enumerated ground of "religion," the Division has not established that the boys experienced indicia of disadvantage like "vulnerability, prejudice and negative social characterization" (*Kapp*). The support for Judaism at Hawerchuk indicates that any concerns about the boys' vulnerability to cultural assimilation are unfounded. There is also no evidence of prejudice or negative social characterization experienced by religious groups at Hawerchuk. Therefore, a correlation between the decision and any alleged disadvantage suffered by the religious boys on the team has not been proven.

Official Problem, *supra* para 5 at para 28.
R v Kapp, 2008 SCC 41 at para 55, [2008] 2 SCR 483 [*Kapp*].

Issue 2: The Division Did Not Proportionately Balance the Right to Equality Under Section 15 of the *Charter* with Religious Freedom Under Subsection 2(*a*) of the *Charter*

a. The Division's Statutory Mandate Includes Secularism, Equality, Diversity, Inclusivity, Merits-Based Access, and Skills Development

[38] There are a number of sources that inform the Division's statutory mandate:

- The *PSA*, which sets out the role and responsibilities of the Division;
- The Diversity and Equity Education Policy ("Policy"), to which the Division and Hawerchuk must give effect pursuant to s. 41(1)(b.2) of the *PSA*;
- The *MHRC*, to which the Division and Hawerchuk are subject;
- The eligibility rules of the MHSAA, of which Hawerchuk is a member; and
- MB Reg 155/2005, which requires schools to accommodate all students' needs.

Appropriate Educational Programming, MB Reg 155/2005, s 3 [MB Reg 155].
MHRC, *supra* para 25.
Official Problem, *supra* para 5 at para 15.
PSA, *supra* para 7.
Winnipeg School Division, "Policy IGAB: Diversity and Equity Education" (1 June 2015), online: *WSD Policies* <https://www.winnipegsd.ca> [Policy].

i. The Division's mandate is rooted in the Public Schools Act

[39] In reviewing whether the Division properly balanced the s. 15 and s. 2(*a*) *Charter* protections, the objectives of the Division's enabling legislation should be considered. Absent a purpose statement, a statute's preamble is a key indicator of legislative intent. Preambles set out a statute's governing principles, and are a useful starting point for determining its objectives.

R v Moriarity, 2015 SCC 55 at para 31, [2015] 3 SCR 485 [*Moriarity*].
Ruth Sullivan, *Statutory Interpretation*, 2d (Toronto: Irwin, 2007) at 138-141 [Sullivan].
The Interpretation Act, CCSM c I80, s 13.

[40] The Manitoba *PSA* provides the following overarching principles relevant to this appeal:

> And whereas the public school system should contribute to the development of students' talents and abilities;
> And whereas public schools should contribute to the development of a fair, compassionate, healthy and prosperous society;
> And whereas the public school system must take into account the diverse needs and interests of the people of Manitoba;
> And whereas democratic local school divisions and districts play an important role in providing public education that is responsive to local needs and conditions;
>
> *PSA*, *supra* para 7, preamble [emphasis added].

[41] Preambles, like the one above, often include numerous, unranked goals, and are not

determinative of legislative intent. To pinpoint statutory purpose, it is helpful to analyze the relationship of the *PSA*'s preamble to other provisions of the *Act* and related legislation.

> *Quebec (Attorney General) v Moses*, 2010 SCC 17 at para 101, [2010] 1 SCR 557 [*Moses*].
> Sullivan, *supra* para 39 at 197-198.

[42] Section 84 of the *PSA* is highly relevant to the Division's decision because it mandates that public schools remain "non-sectarian." Originally, s. 84 required religious exercises in public schools but allowed students to opt-out. The Manitoba Court of Queen's Bench has since struck down parts of this provision as unconstitutional. The remaining text of the provision states that public schools are "non-sectarian," but allows interested students to opt-in to religious exercises. The current provision exemplifies the appropriate role for religion in public schools: religious beliefs and practices are accommodated but are not imposed on all students.

> *Manitoba Assn for Rights & Liberties v Manitoba*, [1992] 5 WWR 749, [1992] MJ No 391 (MBQB) [*Manitoba Assn*].
> *PSA*, *supra* para 7, s 84.

[43] In 2013, the *PSA* was amended to help foster safe and inclusive school environments. School divisions must now establish and enforce policies that promote inclusivity, acceptance, and respect for others in accordance with the *MHRC*. School divisions are also required to support pupils seeking to establish organizations that promote gender equity.

> Bill 18, *The Public Schools Amendment Act (Safe and Inclusive Schools)*, 2nd Sess, 40th Leg, Manitoba, 2012.
> *PSA*, *supra* para 7, ss 41(1)(b.4), 41(1.8).

ii. The Division's Policy and the Human Rights Code inform the statutory context

[44] The Division is subject to the *MHRC* by virtue of ss. 1 and 13 of that statute. The *MHRC* therefore informs how the Division pursues its statutory mandate and is highly relevant to decisions made by the Division that engage the right to equality.

MHRC, *supra* para 25, ss 1, 13.

[45] The *MHRC*, when read in conjunction with the PSA, highlights the importance of promoting equality principles that treat people in accordance with their merits. The *MHRC*'s preamble, like that of the *PSA*, emphasizes that Manitobans must be treated "solely on the basis of their personal merits" and "be accorded equality of opportunity with all other individuals." Section 9 prohibits differential treatment on the basis of an individual's membership in a group, "rather than on the basis of personal merit." Section 58 recognizes the paramountcy of the *MHRC* over all other substantive rights and obligations flowing from Manitoba statutes.

MHRC, *supra* para 25, preamble (a), ss 9, 58.

[46] The Division's Policy also requires it to prioritize equality in its decision-making processes. The Policy affirms the Division's commitment to equality by aiming to provide students with opportunities to "develop a positive self-image" and to ensure they "enjoy equal rights in a diverse, safe, positive and inclusive learning environment."

Policy, *supra* para 38, ss 1.1-1.2.

iii. The eligibility rules of the MHSAA allow girls to play on boys' sports teams

[47] The MHSAA regulates high school athletic programs in Manitoba. Most Manitoba public high schools, including Hawerchuk, are members of the MHSAA. Given the MHSAA's role in overseeing high school athletics, the Division also had to consider the MHSAA's rules in the context of its decision regarding Tara and Tamara. These rules were amended after *Pasternak* to more closely align with obligations under the *MHRC* enshrining merits-based decision-making.

Beaubier, *supra* para 24 at 12.

[48] The MHSAA's rules explicitly permit girls to play for a boys' team after a successful tryout. Member schools must also ensure that female and male students are given "equal

opportunities and access to sports teams." The rules thus reinforce the Division's obligation to allow girls access to teams of their choice and provide equal developmental opportunities.

Official Problem, *supra* para 5 at para 15.

b. The Division's Limitation of Tara and Tamara's Section 15 Rights is Not Reasonable

[49] Once a court has found that an administrative decision limits a *Charter* right, it must then assess whether the decision reflects a proportionate balance between the breached right and other implicated rights. A proportionate balance is one that "gives effect, as fully as possible to the *Charter* protections at stake" in light of the decision-maker's statutory mandate and the factual context (*Loyola*). This third step of the *Doré* framework applies the same "justificatory muscles" required under s. 1 of the *Charter* (*Doré*). Deference doctrine therefore cannot be used to circumvent a robust review of administrative actions that infringe *Charter* rights.

Doré, *supra* para 12 at paras 5, 43-45, 57.
Loyola, *supra* para 12 at 4, 37-39.

[50] The Division failed to conduct a proportionate balancing of the *Charter* interests at stake in light of the legislative context for five reasons: 1) the Division did not consider its mandate or Tara and Tamara's equality rights in reaching its decision; 2) the Division promoted discrimination by excluding Tara and Tamara from a public benefit on the basis of a religious belief; 3) the Division violated its duty of state neutrality; 4) the Division did not "give effect as fully as possible" to both rights; and 5) there is no evidence that the Division considered reasonable alternatives to reconcile the rights of the sisters and the religious team members.

i. There is no evidence that the Division considered its statutory mandate or Tara and Tamara's equality rights

[51] The Division's decision was unreasonable because there is no evidence that it considered the factors central to its statutory mandate in exercising its discretion. Taken as a whole, the

statutory context in which the Division operates indicates that it had to prioritize secularism, equality, diversity, inclusivity, personal merit, and skills development in making its decision.

[52] In *TWU* (ONCA), Trinity Western University ("TWU") argued that the Law Society of Upper Canada ("LSUC") failed to balance TWU's religious freedom with LSUC's statutory objective. The court rejected this submission. LSUC's decision-making process exhaustively canvassed the engaged *Charter* rights with specific reference to the statutory objective.

TWU (ONCA), *supra* para 12 at paras 121-122.

[53] In contrast, the Division's decision does not reflect any consideration of its mandate under the *PSA* or the *MHRC*, or binding documents like the Policy. None of these sources are mentioned in the written decision. Similarly, the words "secular," "equality," "diversity," "inclusivity," and "merit" do not appear in the written decision, despite their centrality to the objective of the *PSA*. Therefore, the Division did not reasonably balance the *Charter* rights at stake *in light of* its statutory mandate. Its decision does not demonstrate a consideration of the statutory context, let alone how best to balance the engaged rights in reference to it.

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

[54] There is also no evidence that the Division considered Tara and Tamara's equality rights. An administrative decision-maker cannot properly balance competing *Charter* rights under the *Doré* framework if it fails to identify all of the rights engaged by its decision. The Division's written decision does not mention Tara and Tamara's equality rights, in stark contrast to its repeated recognition that the boys' freedom of religion was engaged. Principal Vandalay's affidavit similarly signals his overt concern that the boys' freedom of religion be protected, with no parallel concern directed at protecting Tara and Tamara's equality rights.

Official Problem, *supra* para 5 at paras 17, 21.

[55] Instead of emphasizing the importance of protecting equality rights, the Division focused on Tara and Tamara's "future soccer ambitions," "sense of personal competition," and "desire to be scouted." While those interests were engaged, there was no acknowledgement by the Division that its decision would also limit Tara and Tamara's s. 15 rights under the *Charter*. The Division's decision could not amount to a proportionate balancing when there is no evidence that it even turned its mind to one of the two *Charter* rights at stake.

Official Problem, *supra* at para 1 at para 17.

[56] The Division made the same error as the British Columbia College of Teachers ("BCCT") in *TWU* (SCC). In that case, the Supreme Court held that BCCT did not weigh the rights engaged because it considered equality, but disregarded the impact of its decision on the religious freedom of the members of TWU. As a result, BCCT's decision was unreasonable.

Trinity Western University v British Columbia College of Teachers, 2001 SCC 31 at paras 32-33, [2001] 1 SCR 772 [*TWU* (SCC)].

ii. The Division denied a public benefit on a discriminatory basis to protect a religious belief

[57] No *Charter* right is absolute. However, religious freedom must be understood in the "context of a secular, multicultural and democratic society with a strong interest in protecting dignity and diversity [and] promoting equality" (*Loyola*). Courts have recognized that religious freedom cannot "trump" core national values like equality, and that government decision-makers should protect equality to the extent it is limited by religious beliefs in secular contexts.

Chamberlain v Surrey School District No 36, 2002 SCC 86 at paras 58, 66, 71, [2002] 4 SCR 710 [*Chamberlain*].
Loyola, *supra* para 12 at paras 43-47.
Mouvement Laïque Québécois v Saguenay, 2015 SCC 16 paras 74-75, [2015] 2 SCR 3 [*Saguenay*].
TWU (ONCA), *supra* para 12 at paras 133-135, 138.
TWU (SCC), *supra* para 56 at paras 36-37.
Benjamin Berger, "The Limits of Belief: Freedom of Religion, Secularism, and the Liberal State" (2002) 17:1 CJLS 39 at 57-62, 67-68 [Berger].

[58] Courts have upheld administrative decisions protecting religious freedom at the proportionality stage only where religious beliefs did not manifest in discriminatory conduct. For example, in *TWU* (SCC) and *TWU* (BCCA), the courts affirmed the principle that an administrative decision protecting religious freedom is reasonable only insofar as there is no evidence of "actual harm." In both cases, the courts concluded that *Charter* protection for religious beliefs forbidding intimacy between same-sex couples was justified because there was no evidence that the beliefs fostered acts of discrimination. In contrast, in *TWU* (ONCA), the court determined that LSUC would have promoted *actual discrimination* had it given effect to the full exercise of the religious freedom of TWU students. It was therefore reasonable for LSUC to deny TWU a public benefit in order to safeguard against discrimination.

> Carl F Stychin, "Faith in the Future: Sexuality, Religion and the Public" (2009) 29:4 729 at 744-745 [Stychin].
> Jena McGill, "Now it's My Rights Versus Yours" Equality in Tension with Religious Freedoms" (2016) 53:3 Alberta L Rev 583 at 593-594 [McGill].
> *Trinity Western University v Law Society of British Columbia*, 2016 BCCA 423 at para 190, 272 ACWS (3d) 2 [*TWU* (BCCA)].
> *TWU (*ONCA*), supra* para 12 at paras 133-138.
> *TWU* (SCC), *supra* para 56 at paras 36-38.

[59] The above three cases demonstrate that while it may be reasonable for an administrative decision-maker to protect a discriminatory religious belief, it is not reasonable to protect a religious practice in a manner that results in discrimination. The Division was obliged to follow this principle, particularly given the emphasis on equality and diversity provided by the Division's statutory mandate. Excluding Tara and Tamara from a public benefit on the basis of the boys' belief that physical contact between unrelated women and men is forbidden gave rise to actual discrimination and therefore cannot be justified as proportionate.

> Alex Fielding, "When Rights Collide: Liberalism Pluralism and Freedom of Religion in Canada" (2008) 13:1 Appeal 28 at 37-38, 41, 47 [Fielding].

Berger, *supra* para 57 at 62, 67-68.

iii. The Division's decision violated state neutrality

[60] State neutrality further supports the conclusion that any reasonable decision open to the Division had to allow Tara and Tamara to play for the Hawerchuk boys' soccer team. The Division must act in a neutral manner when exercising its discretion with regards to the place of religion in secular public schools. In *Adler*, Justice Sopinka observed that state neutrality in secular public schools is a constitutional guarantee flowing from s. 2(*a*) of the *Charter*. The Division's non-sectarian mandate under the *PSA* explicitly recognizes this obligation.

Adler v Ontario, [1996] 3 SCR 609 at para 181, 30 OR (3d) 642 [*Adler*].

[61] State neutrality prohibits government actors from "promot[ing] the participation of certain believers or nonbelievers in public life to the detriment of others" (*Saguenay*). State neutrality is violated when the state condones religious activities that create an exclusion impairing the right to full and equal recognition of others. Public services like those provided by secular public schools must be delivered in an inclusive manner free from discrimination.

Saguenay, supra para 57 at paras 63-64, 74-78.

[62] Secular public schools must be cautious when accommodating particular religious beliefs or practices to avoid creating an environment where students do not "feel equally free to participate" (*Ross*). *Exposing* public school students to religious doctrines is permitted, but *imposing* such doctrines is not. The Division may consider and address the views of religious students and parents. But secularism rules out "any attempt to use the religious views of one part of the community to exclude from consideration the values of other members" (*Chamberlain*).

Bonitto v Halifax Regional School Board, 2015 NSCA 80 at para 88, 256 ACWS (3d) 600 [*Bonitto*].

Canadian Civil Liberties Assn v Ontario (Minister of Education) (1990), 71 OR (2d) 341 at para 72, 19 ACWS (3d) 355 (CA) [*Civil Assn*].

Chamberlain, *supra* para 57 at para 19.
Ross v New Brunswick School District No 15, [1996] 1 SCR 825 at para 42, 133 DLR (4th) 1 [*Ross*].
SL v Commission Scolaire des Chênes, 2012 SCC 7 at para 54, [2012] 1 SCR 235 [*SL*].
Zylberberg v Sudbury (Bd of Education) (1998), 65 OR (2d) 641, 11 ACWS (3d) 368 (CA) [*Zylberberg*].

[63] The Division crossed the line of state neutrality by shaping the boys' soccer team in accordance with Orthodox Jewish beliefs to the exclusion of Tara and Tamara. Although Hawerchuk is popularly regarded as a "Jewish school," it is just as much Tara and Tamara's school. The sisters rightfully expected the opportunity for full and equal participation in a religiously-neutral school. Instead, the Division excluded the sisters from the team because of the beliefs of the religious majority at Hawerchuk, undermining the school's secular character.

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

[64] The Division was obliged to exercise its discretion in a manner that preserved the Hawerchuk boys' team as open equally to all, without unilateral exclusion of some based on religious convictions. This is all the more true given the Division's legal obligations under the *MHRC* to promote equality and to treat individuals solely on the basis of their personal merits.

[65] The Division committed the same error as the School Board under review in *Chamberlain*. In that case, the Supreme Court held that a statute that mandated secularism and equality in public schools prevented the Board from making a decision based on an exclusionary, religiously-grounded philosophy. The Board's accommodation of religious beliefs regarding the morality of same-sex relationships excluded same-sex parented children from receiving equal recognition and respect in public schools, and was therefore unreasonable.

Chamberlain, *supra* para 57 at paras 25, 58.

[66] Allowing the sisters to try out for the Hawerchuk boys' team would not send a "chilling message" that "only those who can afford to enter private spheres" may enjoy religious freedom.

Including Tara and Tamara on the team would uphold the principle of equal treatment according to individual merit. It would also affirm the secular nature of public schools and demonstrate that religious freedom does not entail a right to engage in conduct that violates the rights of others.

Fielding, *supra* para 59 at 47-48.
Official Problem, *supra* para 5 at para 28.
SL, *supra* para 62 at para 54.
Stychin, *supra* para 58 at 730-731.

[67] Hawerchuk's other accommodations for Jewish students align with the principles of the *MHRC* and respond in a reasonable way to "local needs and conditions" as required by the *PSA*. Providing kosher food ensures that all students benefit equally from the school cafeteria. Not teaching on Jewish holidays ensures that religious observances do not compromise the learning of Jewish students. These valuable steps promote the full and equal participation of Jewish students at Hawerchuk without violating the rights of others, undermining state neutrality, or subverting the Division's mandate of equality and diversity.

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

iv. The Division did not give effect as fully as possible to both rights at stake

[68] Proportionality under *Doré* requires "giving effect, as fully as possible" to all rights at stake. To satisfy this test, the Division had to allow Tara and Tamara to play on the Hawerchuk boys' team. This would have protected the sisters' right to equality while simultaneously preserving the boys' rights to hold and act in accordance with their religious beliefs.

Loyola, *supra* para 12 at para 39.

[69] Professor Jena McGill observes that when reconciling rights that appear to collide, the impact of each right on the other must be carefully analyzed. For example, in *Marriage Reference*, it was held that marriage commissioners could not deny services to same-sex couples on the basis of religion. According to Professor Patricia Hughes, this outcome was justified

because same-sex marriage does not force others to renounce their religious views, but refusing to marry a same-sex couple on religious grounds denies their equality rights. Similarly, in *TWU* (ONCA), the court noted that LSUC's decision not to accredit TWU was reasonable because it did not prevent the practice of a religious belief. It merely denied a public benefit because of the discriminatory impact of that religious belief on others.

> *Kisilowsky v Manitoba*, 2016 MBQB 224 at para 56, 273 ACWS (3d) 299 [*Kisilowsky*].
> McGill, *supra* para 58 at 604.
> Patricia Hughes, "The Reconciliation of Legal Rights" in Shaheen Azmi, et al, eds, *Balancing Competing Human Rights Claims in a Diverse Society: Institutions, Policy, Principles* (Toronto: Irwin Law, 2012) 271 at 283 [Hughes].
> *Reference re: Marriage Commissioners appointed under The Marriage Act, 1995 (Sask)*, 2011 SKCA 3, 327 DLR (4th) 669 [*Marriage Reference*].
> *TWU* (ONCA), *supra* para 12 at para 138.

[70] In the present case, denying Tara and Tamara an opportunity to try out for the Hawerchuk boys' team breached their equality rights. The alternative outcome—allowing the sisters to try out and play—would not have forced the boys to renounce their religious belief barring physical contact between unrelated women and men. Rather, it would have placed a reasonable limit on the exercise of this belief, without preventing its practice. The boys may face barriers to participating in the soccer program on the basis of this belief. But this would be a function of the belief itself, not the school's infringement of religious freedom.

> *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 95, [2009] 2 SCR 567 [*Hutterian Brethren*].

[71] Therefore, had Tara and Tamara played for Hawerchuk, the boys' freedom of religion would not have been infringed. At worst, the boys would have been prompted to decide if they could reconcile their beliefs with playing alongside the sisters. This does not amount to compelling the boys to make a religious statement. The courts in *Manitoba Association* and *Zylberberg* prohibited public schools from compelling students to participate in mandatory,

religious exercises on the basis that non-participation amounts to making a religious statement. However, these cases are distinguishable: soccer is neither mandatory nor a religious exercise.

Manitoba Association, supra para 42.
Zylberberg, supra para 62.

[72] Avoiding the "worst-case outcome," as Justice Lau asserts, is not the test an administrative decision-maker is required to meet. Proportionality under *Doré* does not mean optimizing the outcome for the largest number of people. In any event, Justice Lau's concern for the continuation of the boys' team as a practical matter was not raised by the Division itself. Moreover, this concern could have been mitigated by considering ways to accommodate all rights at stake or by recruiting additional players from Hawerchuk's student population of 1,100.

Official Problem, *supra* para 5 at paras 5, 28.

v. There is no evidence that Division considered reasonable alternatives to reconcile both rights

[73] In resolving conflicts between competing *Charter* rights, a decision-maker must consider "reasonably available alternative measures" that satisfy each party and encourage reconciliation (*NS*). The Division therefore should have considered whether any reasonable alternatives existed that would maximize participation on the team by both affected groups.

R v NS, 2002 SCC 72 at para 32, [2012] 3 SCR 726 [*NS*].

[74] For example, in *Multani,* the Supreme Court reconciled a student's religious practice of wearing a kirpan (a religious dagger) with a school's concerns for the safety of other students. The religious student was permitted to wear the kirpan, but had to secure it in a wooden sheath and wrap it in cloth sewn under his clothes. Similarly, in *Loyola,* the Supreme Court held that it was reasonable for an administrative decision-maker to allow Loyola High School, a private Catholic institution, to teach Catholic morals from a Catholic perspective on one hand, while requiring the high school to objectively teach ethical codes of other world religions on the other.

Loyola, *supra* para 12 at para 31.
Multani v Commission scolaire Marguerite-Bourgeoys, 2006 SCC 6 at paras 3, 8 [2006] 1 SCR 256 [*Multani*].

[75] It was incumbent on the Division to canvas options and entertain creative solutions that might allow reconciliation. In *Bryson*, a university could not justify its discrimination against female hockey players because there was no evidence that it had considered reasonable alternatives that would have mediated between the interests of male and female players. Similarly, there is no evidence that the Division considered any reasonable alternatives that encouraged compromise from the sisters and the religious boys. For example, the Division could have considered redesigning team activities to minimize the risk of physical contact between the two groups. Potential approaches include emphasizing non-contact drills, strategically assigning positions, and substituting players during games based on the players' religious observances.

Bryson and University of New Brunswick, Re, 83 CHRR D/144 at paras 233-234, 247, 2016 CarswellNB 74 (NBLEB) [*Bryson*].

Issue 3: Awarding *Charter* Damages Under Subsection 24(1) is Appropriate and Just

[76] The Division violated Tara and Tamara's equality rights by not conducting a proportionate balancing of the *Charter* rights at issue in the statutory context. Damages pursuant to s. 24(1) of the *Charter* are the most appropriate and just remedy in this case

[77] The approach to awarding damages under s. 24(1) of the *Charter* was articulated by the Supreme Court in *Ward* and *Ernst. Charter* damages are "appropriate and just" when they serve one or more of the following functions: compensation, vindication, and deterrence. The state has the burden of proving that countervailing factors apply to defeat a damage award.

Ernst v Alberta Energy Regulator, 2017 SCC 1 at para 26, 2017 CarswellAlta 32 [*Ernst*].
Vancouver (City) v Ward, 2010 SCC 27 at paras 23-52 [2010] 2 SCR 28 [*Ward*].

a. Damages Provide Compensation, Vindication, and Deterrence in this Case

[78] Damages are appropriate and just because in this case, as in "most cases," compensation, vindication, and deterrence are furthered by a damages award (*Ward*). Damages would reinforce the principle that a "right ... is only as meaningful as the remedy." (*974 Ont Inc*).

> *R v 974649 Ontario Inc*, 2001 SCC 81 at para 63, [2001] 3 SCR 575 [*974 Ont Inc*].
> *Ward*, *supra* para 77 at para 30.

[79] Compensation seeks to remedy the personal loss experienced by an individual due to a breach of their *Charter* rights. Compensation aims to place the claimant in the same position he or she would have been in had there been no *Charter* infringement. Losses can be physical, pecuniary, and psychological, including distress, humiliation, embarrassment, and anxiety.

> *Ward*, *supra* para 77 at para 27.

[80] Awarding damages to Tara and Tamara serves the function of compensation. It is the only way to remedy the violation of their equality rights by the Division. Tara and Tamara no longer attend Hawerchuk. Therefore, allowing girls to play for Hawerchuk boys' teams going forward would not compensate the sisters for the personal losses they experienced.

[81] Compensation would address the indignity Tara and Tamara suffered as a result of the Division's decision, such as their feeling "dirty" and "not worthy." It would address the loss the sisters' experienced from not being allowed to play on their preferred team. In *Casselman,* $3,500 in damages was awarded to the claimants for a similar loss of choice.

> *Casselman*, *supra* para 15 at 13.
> Official Problem, *supra* para 5 at para 19.
> *Ward*, *supra* para 77 at paras 27, 65.

[82] Compensation would also reimburse Tara and Tamara for the costs and extra time they incurred traveling to soccer practices and games with the Oakwood team. These are costs that they would not have incurred had they been allowed to try out for their team of choice.

Moore v British Columbia (Ministry of Education), 2012 SCC 61 at para 56, [2012] 3 SCC 360 [*Moore*].

[83] Tara and Tamara's tenacity in achieving some of their goals does not eliminate the need for compensation for the harms they suffered. As held in *Ward*, those who overcome the harms of a rights violation and move forward with their lives should not be penalized. In *Beacon Hill*, the fact that the members of a girls' softball team attainted their athletic goal of playing at their league's World Series did not bar a damages award totaling $13,000. In *Pasternak*, the sisters were awarded $7,000, even though they "continued to do well in school, played other high school sports, and did not require counselling to assist with any alleged damage to their dignity." Tara and Tamara's success in obtaining partial soccer scholarships is a testament to their personal resilience, but it does not negate the harms caused by the breach of their *Charter* rights.

Beacon Hill, *supra* para 26 at paras 390-392.
Pasternak (MBQB), *supra* para 23 at paras 114-115.
Ward, *supra* para 77 at para 27.

[84] Vindication prevents erosion of *Charter* rights by recognizing that violations of the *Charter* can undermine public confidence. Awarding damages to the sisters would vindicate the equality rights of women in a context where women continue to face significant discrimination.

Kent Roach, "A Promising Late Spring for Charter Damages: *Ward v. Vancouver*" (2011) 29: 2 NJCL 135 at 155 [Roach].
Ward, *supra* para 77 at para 28.

[85] Deterrence recognizes that damages deter future breaches by state actors. Awarding damages to Tara and Tamara would help ensure that administrative decision-makers exercise their discretion in a manner that complies with their obligations under the *Charter* and *Doré.*

Ward, *supra* para 77 at para 29.

b. There Are No Countervailing Factors That Negate Damages

[86] The countervailing factor of alternative remedies does not apply. Tara and Tamara have

no concurrent claims pending and the existence of any potential claims does not bar *Charter* damages. Additionally, no other *Charter* remedy serves the tripartite functions of compensation, vindication, and deterrence. Only damages can compensate Tara and Tamara for the breach of their *Charter* rights, because they have graduated from Hawerchuk and cannot benefit from an order allowing girls to try out for the boys' soccer team. Finally, the failure to seek judicial review raised in *Ernst* as a countervailing factor is inapposite in this case.

Ernst, *supra* para 77 at paras 26, 32-35.
Ward, *supra* para 77 at paras 35-36.

[87] Similarly, the countervailing factor of good governance does not apply. Good governance may prevent a damages award based on the chilling effect that can constrict the behaviour of state actors. In *Ernst*, this factor prevented damages from being awarded against an administrative body. The concerns raised in *Ernst* do not apply to this case for two reasons.

Ernst, *supra* para 77 at paras 26, 45.

[88] First, the decision under review in *Ernst* was not challenged for non-compliance with the *Charter*. In contrast, the Division failed to proportionately balance *Charter* rights in light of its statutory mandate. Awarding damages in this case will not fetter administrative discretion as long as it is exercised in accordance with *Doré*. As Raj Anand highlights, the spectre of chilling the effectiveness of government action does not apply to conduct that is non-compliant with the *Charter*. Where damages prevent unconstitutional action, "that is a good thing" (Anand).

Raj Anand, "Damages for Unconstitutional Actions: A Rule in Search of a Rationale" (2009) 27 NJCL 159 at 173 [Anand].
Roach, *supra* para 84 at 160-161.

[89] Second, the Division is already bound to comply with the *MHRC*, and is thus exposed to damage awards if it acts in a discriminatory manner in delivering education services. As *Moore* demonstrates, awards of general and special damages are routine in the statutory human rights

context. Public schools and divisions are frequently ordered to pay such awards, with no apparent negative consequences on good governance. There is no reason to protect public school divisions that face damage awards in the statutory context from damages in the *Charter* context.

Moore, supra para 82.

PART V – ORDER SOUGHT

[90] The Appellants request that the appeal be allowed. They seek a declaration permitting female students to try out for male sports teams at Hawerchuk on the basis of merit, and damages under s. 24(1) of the *Charter* to remedy the Division's violation of their equality rights.

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

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Team 8

Counsel for the Appellants

PART VI – LIST OF AUTHORITIES AND STATUTES

JURISPRUDENCE	PARAGRAPHS
Adler v Ontario, [1996] 3 SCR 609, 30 OR (3d) 642.	60
Alberta (Aboriginal Affairs and Northern Development) v Cunningham, 2011 SCC 37, [2011] 2 SCR 670.	32, 34
Alberta v Hutterian Brethren of Wilson Colony, 2009 SCC 37, [2009] 2 SCR 567.	70
Beacon Hill Little League Major Girls Softball Team - 2005 v Little League Canada, [2009] BCWLD 2092, 2009 CarswellBC 74.	26, 83
Blainey v Ontario Hockey Assn, 9 CHRR D/4549, 1987 CarswellOnt 2553 (OBI).	15, 24
Blainey v Ontario Hockey Assn, 9 CHRR D/4972, 1988 CarswellOnt 3317 (OBI).	15
Bonitto v Halifax Regional School Board, 2015 NSCA 80, 256 ACWS (3d) 600.	62
Bryson and University of New Brunswick, Re, 83 CHRR D/144, 2016 CarswellNB 74 (NBLEB).	75
Canadian Civil Liberties Assn v Ontario (Minister of Education) (1990), 71 OR (2d) 341, 19 ACWS (3d) 355 (CA).	62
Casselman v Ontario Soccer Assn, 23 CHRR D/397, 1993WL1447043 (OBI).	15, 81
Catholic Children's Aid Society of Hamilton v H(G), 2016 ONSC 6287, [2016] WDFL 5984.	18
Chamberlain v Surrey School District No. 36, 2002 SCC 86, [2002] 4 SCR 710.	57, 62, 65
Doré v Barreau du Québec, 2012 SCC 12, [2012] 1 SCR 395.	12, 49
Ernst v Alberta Energy Regulator, 2017 SCC 1, 2017 CarswellAlta 32.	77, 86, 87
Kahkewistahaw First Nation v Taypotat, 2015 SCC 30, [2015] 2 SCR 548.	13, 17, 18
Kisilowsky v Manitoba, 2016 MBQB 224, 273 ACWS (3d) 299.	69

Trinity Western University v Law Society of Upper Canada, 2016 ONCA 518, 131 OR (3d) 113.	12, 31, 52, 57, 58, 69
Vancouver (City) v Ward, 2010 SCC 27, [2010] 2 SCR 28.	77, 78, 79, 81, 83, 84, 86
Zylberberg v Sudbury (Bd of Education) (1998), 65 OR (2d) 641, 11 ACWS (3d) 368 (CA).	62, 71

LEGISLATION	**PARAGRAPHS**
Appropriate Educational Programming, MB Reg 155/2005.	38
Bill 18, *The Public Schools Amendment Act (Safe and Inclusive Schools)*, 2nd Sess, 40th Leg, Manitoba, 2012.	43
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.	8
The Human Rights Code, SM 1987-88, c 39.	25, 38, 44, 45
The Interpretation Act, CCSM c I80.	39
The Public Schools Act, RSM 1987, c P250.	7, 38, 40, 42, 43

SECONDARY SOURCES	**PARAGRAPHS**
Anand, Raj, "Damages for Unconstitutional Actions: A Rule in Search of a Rationale" (2009) 27 NJCL 159.	88
Beaubier, Dean M, et al, "The Pasternak Case and American Gender Equity Policy: Implications for Canadian High School Athletics" (2011) 120 Can J of Edu Admin & Pol 1.	24, 30, 47
Berger, Benjamin, "The Limits of Belief: Freedom of Religion, Secularism, and the Liberal State" (2002) 17:1 CJLS 39.	57, 59
Clarke, Paul T, "Canadian High School Athletics and the Saga of Continuing Gender Discrimination" (2013) 22:1 Int'l J of Ed Reform 49.	15, 28, 30
Fielding, Alex, "When Rights Collide: Liberalism Pluralism and Freedom of Religion in Canada" (2008) 13:1 Appeal 28.	59, 66
Findlay, Hilary A, "Sex Discrimination in Sport" (2009) 5:1 Centre for Sport and Law Newsletter.	15

Hughes, Patricia, "The Reconciliation of Legal Rights" in Shaheen Azmi, Lorne Foster & Lesley A Jacobs, eds, *Balancing Competing Human Rights Claims in a Diverse Society: Institutions, Policy, Principles* (Toronto: Irwin Law, 2012) 271.	69
McGill, Jena, "Now it's My Rights Versus Yours" Equality in Tension with Religious Freedoms" (2016) 53:3 Alberta L Rev 583.	58, 69
Roach, Kent, "A Promising Late Spring for Charter Damages: *Ward v. Vancouver*" (2011) 29: 2 NJCL 135.	84, 88
Stychin, Carl F, "Faith in the Future: Sexuality, Religion and the Public" (2009) 29:4 729.	58, 66
Sullivan, Ruth, *Statutory Interpretation*, 2d (Toronto: Irwin, 2007).	39, 41
Winnipeg School Division, "Policy IGAB: Diversity and Equity Education" (1 June 2015), online: *WSD Policies* <https://www.winnipegsd.ca>.	38, 46

OFFICIAL WILSON MOOT SOURCES	**PARAGRAPHS**
Clarifications to the Official Problem, Wilson Moot 2017.	8, 12
Official Problem, Wilson Moot 2017.	5, 6, 7, 8, 9, 10, 16, 21, 23, 25, 26, 27, 30, 31, 36, 37, 38, 48, 53, 54, 55, 63, 66, 67, 72, 81