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 RESPONDENT

Counsel for the Respondent

Team #8

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PART I - OVERVIEW

[1] Public schools have a responsibility to ensure that all students flourish. To that end, the School Division is bound by its statutory obligations under the Manitoba *Public School Act* and the Manitoba High School Athletics Association ("MHSAA") to consider diversity and respond to local needs.

Public School Act, RSM 1987 c P250, Preamble, ("*PSA*").
The 2017 Wilson Moot Problem, at para 15.

[2] The School Division's decision ("the Decision") properly balanced the religious freedoms of the Orthodox Jewish members of the school community with the equality rights of Tara and Tamara Keigh ("the Appellants"). The Decision was in line with the School Division's statutory obligations and was reasonable in the factual context of the issue. It is owed deference.

[3] But for the Decision, the Appellants would have been denied a benefit. Over half of the Hawerchuk boys' team would have quit if the Appellants had joined, citing the religious belief that contact between unrelated males and females is impermissible. Such an outcome would have reduced the quality of the team. Nevertheless, the Appellants did not experience disadvantage, as they achieved their athletic goals.

The 2017 Wilson Moot Problem, at paras 17, 28.

PART II - FACTS

1. Factual Background

[4] The Manitoba *Public Schools Act* requires public schools in Manitoba to promote the development of all students, while contributing to a fair, compassionate, healthy and prosperous society. Schools must take into account the diverse needs and interests of the people of Manitoba and respond to the needs and conditions of their respective local communities.

PSA, *supra* para 1 at Preamble.

[5] Hawerchuk Secondary School ("Hawerchuk") is situated in a predominantly Jewish neighborhood. Where only 1.1% of Manitoba's population identifies as Jewish, four out of five Hawerchuk students identify as Jewish. Of these students, three quarters identify as Orthodox.

The 2017 Wilson Moot Problem, at paras 4, 8.

[6] In accordance with the *PSA*, Hawerchuk must continually take into account the needs of this large Jewish community. Hawerchuk strives to be an inclusive environment for Jewish students who wish to express their religious identity within the public school system. The school provides kosher meals in the cafeteria and teachers generally refrain from teaching substantive lessons on Jewish holidays, when many students are absent from school. However, the school's curriculum is the same as other Manitoba public schools.

The 2017 Wilson Moot Problem, at para 7.

[7] Hawerchuk has a soccer program fielding a well-established and highly competitive boys' team. In 2012, sufficient interest from female students warranted establishing a girls' team. Since 2012, Hawerchuk has also had a successful arrangement with Oakwood High School ("Oakwood"), which offered female students at Hawerchuk the opportunity to play on a highly competitive girls' team. 16 Hawerchuk students have elected this option. The Oakwood girls' team is well-regarded by university scouts.

The 2017 Wilson Moot Problem, at paras 10-11, 20.

[8] Many in the Orthodox Jewish community believe that it is not permissible for unrelated males and females to come into physical contact. Over half of the members of the Hawerchuk boys' team identify as Orthodox Jewish and hold this belief.

The 2017 Wilson Moot Problem, at para 8.

[9] The Appellants, fraternal twin sisters, requested to try-out for the Hawerchuk boys' team in September 2013. The Appellants' goals were to get scouted, obtain scholarships to the best university soccer program possible, and ultimately play soccer for Team Canada. They believed that playing for an established and highly competitive high school team would help them achieve their goals.

The 2017 Wilson Moot Problem, at paras 12, 19.

[10] Foreseeing the probable conflict with the religious beliefs of many of the team's members, head coach Jay Bala told the Appellants they could try out only with permission from Hawerchuk's principal, Arthur Vandalay.

The 2017 Wilson Moot Problem, at para 13.

[11] Principal Vandalay consulted with the Appellants, Coach Bala, and 18 members of the boys' team to understand the nature of the interests involved and make an informed decision. He received submissions from the Appellants and Coach Bala, and conducted interviews. He found that more than half of the members of the boys' team would be unable to play if the Appellants were permitted to play. While acknowledging the Appellants' desire of fulfilling their personal sense of competition as well as to be scouted, Principal Vandalay decided to not allow the Appellants to try out for the boys' team; he provided written reasons for his decision on October 15, 2013. Principal Vandalay noted that the Appellants had been provided with the opportunity to play on the Oakwood girls' team, which he believed would offer the means to fulfill their goals. The School Division affirmed Principal Vandalay's decision on October 22, 2013.

The 2017 Wilson Moot Problem, at paras 16, 17, 18.

[12] The Appellants elected to play on the Oakwood girls' team. They played as starters the entire time they were enrolled at Hawerchuk. The Appellants have been admitted to the University of California at Los Angeles on a partial scholarship to play soccer.

The 2017 Wilson Moot Problem, at para 28.

2. Procedural History

[13] The Appellants commenced an application for judicial review of the School Division's decision on the basis that it constituted sex discrimination contrary to s. 15 of the *Charter*. Justice Abbott allowed the application in May 2015. She found that the School Division's decision infringed the Appellants' s. 15 rights and Principal Vandalay's decision did not reflect a proportionate balancing of the *Charter* rights in issue. In March 2016, the Manitoba Court of Appeal allowed the School Division's appeal.

The 2017 Wilson Moot Problem, at para 28.

PART III - STATEMENT OF POINTS IN ISSUE

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

1. **Did the School Division's decision infringe the Appellants' rights under s. 15 of the *Charter*?**
   The Decision did not infringe the Appellant's rights under s. 15. The Decision did not create a distinction on an enumerated or analogous ground. If a distinction were to be found, the Decision was an ameliorative program or activity protected by s. 15(2). In the alternative, the Decision did not amount to substantive discrimination.

2. **If the answer to question 1 is yes, did the decision properly balance the Appellants' rights under section 15 of the *Charter* with the boys' rights under subsection 2(a) of the *Charter*?**
   The Decision properly balanced the Appellants' rights under s. 15 with the boys' rights under s. 2(a). The Decision was in line with the School Division's statutory mandate and represented a reasonable solution that should be given deference.

3. **If the answer to question 2 is no, should the Appellants be awarded damages under subsection 24(1) of the *Charter* for the breach of their rights under section 15?**
   The Appellants should not be awarded damages under s. 24(1) because damages in this case would not further the objectives of damage awards: compensation, vindication of the

right, and deterrence of future breaches. Moreover, countervailing good governance concerns militate against awarding damages.

PART IV - ARGUMENT

Issue 1: The School Division's decision did not infringe the Appellants' rights under s. 15

[15] To establish an infringement of s. 15, it is necessary to apply the three-step test set out by the Supreme Court of Canada ("Supreme Court") in *Kapp*, *Withler*, and affirmed in *Quebec v A* and *Taypotat*. First, the claimant must demonstrate that the impugned government conduct creates an adverse distinction on an enumerated or analogous ground.

> *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*].
> *R v Kapp*, 2008 SCC 41 at para 17, [2008] 2 SCR 483 [*Kapp*].
> *Withler v Canada (Attorney General)*, 2011 SCC 12 at paras 33-37, [2011] 1 SCR 396 [*Withler*].
> *Quebec (Attorney General) v A*, 2013 SCC 5 at paras 323-333, [2013] 1 SCR 61 [*Quebec v A*].
> *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at paras 19-21, [2015] 2 SCR 548 [*Taypotat*].

[16] Second, the government may invoke s. 15(2) to shield any "law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups" from further scrutiny. In *Kapp*, the Supreme Court required governments to demonstrate "that (1) the program has a genuinely ameliorative purpose; and (2) the program targets a disadvantaged group identified by the enumerated or analogous grounds." Only the purpose of the law, program or activity is examined. The ameliorative purpose need not be the sole purpose. In *Cunningham*, the Supreme Court additionally required that (3) there be "a correlation between the program and the disadvantage suffered by the target group." Only the purpose of the impugned law, program, or activity is considered.

> *Kapp, supra* para 15 at paras 41, 43, 44, 51.
> *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37 at

paras 44-45, [2011] 2 SCR 670 [*Cunningham*].

[17] If the government fulfills these requirements, the impugned law, program or activity does not contravene s. 15. If not, the claimant must demonstrate that the distinction constitutes substantive discrimination by showing that the "impugned law fails to respond to the actual capacities and needs of the members of the group and instead impose burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage."

Kapp, supra para 15 at para 17.
Withler, supra para 15 at paras 34-35.
Quebec v A, supra para 15.
Taypotat, supra para 15 at paras 19-20.

[18] The Decision did not create an adverse distinction based on sex. The Appellants were ensured access to a competitive soccer program which provided the means to achieve their goals. Furthermore, the Decision was an ameliorative activity under s. 15(2): its object was to ensure the Appellants access to a highly competitive soccer program; female athletes experience disadvantage in sport; and the Decision facilitated the Appellants' access to a top soccer team.

1. The Decision does not create a distinction on the basis of sex

[19] In *Quebec v A* and *Taypotat*, the Supreme Court set out that a claimant must demonstrate a distinction on an enumerated or analogous ground. In *Withler*, the Supreme Court explained that "distinction" means the claimant "is denied a benefit that others are granted or carries a burden that others do not by, reason of a personal characteristic that falls within the enumerated or analogous grounds of s. 15(1)." The Decision does not create a distinction as it ensured the Appellants access to an athletic program comparable to the boys' team.

Quebec v A, supra para 15 at para 323.
Taypotat, supra para 15 at paras 19, 324, 348.
Withler, supra para 15 at para 61.

[20] Each team may be viewed as offering a composite benefit whose value is comprised of factors including the combined skill level of the athletes, the quality of coaching, and its treatment by university scouts. The evidence suggests that neither team is inferior to the other. The Hawerchuk boys' team is described as a "first-rate" team. Similarly, the Oakwood girls' team is highly competitive in the "senior varsity division" and comprised of "very talented players." There is also no evidence to suggest the superiority of the quality of coaching on either team. Finally, opportunities to be scouted are present on both teams.

The 2017 Wilson Moot Problem, at paras 10-12, 17, 20.

2. The Decision was ameliorative under s. 15(2)

[21] The eligibility of administrative decisions for protection under s. 15(2) is required to give full effect to s. 15. Section 15(2) applies to "any law, program, or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups." Its purpose is to create a sphere of deference within which government can adopt a range of mechanisms designed to ameliorate the condition of disadvantaged Canadians, thus promoting substantive equality. The Decision constituted an ameliorative activity under s. 15(2). In the alternative, the arrangement between Hawerchuk and Oakwood whereby female athletes could participate on the Oakwood girls' team constitutes a program under s. 15(2).

Charter, *supra* para 15 s 15.
Cunningham, *supra* para 16 at para 49.
Kapp, *supra* para 15 at para 47.

[22] Courts afford governments leeway to adopt a variety of ameliorative mechanisms to account for the complexity of inequality. The Supreme Court in *Andrews* noted that "there will always be an infinite variety of personal characteristics, capacities, entitlements and merits among those subject to a law…" In *Kapp*, the Supreme Court noted that deference allows governments to adopt innovative and even experimental programs to proactively combat

inequality. A nimble decision-maker may be best situated to assess and address certain inequalities left uncontemplated by legislatures.

> *Andrews v Law Society (British Columbia)*, [1989] 1 SCR 143 at para 8, [1989] SCJ No 6 [*Andrews*].
> *Kapp, supra* para 15 at para 47.

[23] Courts have recognized that a broad range of mechanisms can qualify as ameliorative laws, programs or activities protected by s. 15(2). In her review of post-*Kapp* jurisprudence, Jena McGill found this includes provisions within legislation (*Pratten*), provisions within collective agreements (*IAFF*), the provision of healthcare services within schools (*Cooper*), and discrete decisions made within statutory frameworks (*Marsh*) as ameliorative mechanisms under s. 15(2). The use of discrete decisions to address the subtle nuances of inequality falls within the variety of ameliorative mechanisms recognized in s. 15(2) jurisprudence.

> Jena McGill, "Ameliorative Programs and the Charter: Reflections on the Section 15(2) Landscape Since *R v Kapp*" (2017) 95 Canadian Bar Review at 22-29.
> *Pratten v British Columbia (Attorney General)*, 2012 BCCA 480 at para 37, 37 BCLR (5th) 269 [*Pratten*].
> *IAFF, Local 268 v Adekayode*, 2016 NSCA 6 at para 133, 371 NSR (2d) 38 [*IAFF*].
> *Cooper v Ontario (Attorney General)*, 99 OR (3d) 25 at para 16, 311 DLR (4th) [*Cooper*].
> *R v Marsh*, 2014 BCPC 235 at paras 1, 47, 71, 117 WCB (2d) 172 [*Marsh*].

[24] The eligibility of administrative decisions accords with the words of the provision, judicial characterization of inequality, and s. 15(2) jurisprudence. The Decision is thus eligible for protection under s. 15(2).

a) The object of the Decision was ameliorative

[25] One of the objects of the Decision was to ensure the Appellants had equal access to a highly competitive soccer program. In determining the object of a law, program or activity, it is necessary to consider whether the government's genuine purpose in creating the distinction was

to improve the conditions of a disadvantaged group. *Cunningham* outlines that "The object of an ameliorative program must be determined as a matter of statutory interpretation"; a court may look to the declared purpose, its legislative context, or the history and social situation of the affected group. The Decision's object is derived from 1) Principal Vandalay's October 15, 2013 reasons; 2) the object of the Manitoba *Public Schools Act*; and 3) the MHSAA eligibility rule.

Kapp, *supra* para 15 at para 48.
Cunningham, *supra* 16 at para 61.

[26] In his October 15, 2013 reasons, Principal Vandalay acknowledged he was "aware of Tara and Tamara's desire to play on the boys' team - both to fulfil their personal sense of competition as well as to be scouted." He also knew that over half of the members of the boys' team would be unable to participate if the Appellants joined; thus, the viability and overall quality of the team would be severely jeopardized. Such an outcome would have the effect of imposing disadvantage on the Appellants in the form of a reduced-quality soccer program on the basis of sex. Principal Vandalay made his decision knowing the Appellants would have access to the Oakwood girls' team. The Decision respects the Appellants' interests and the MHSAA requirements by ensuring access to a highly competitive soccer program whose quality was unaffected by the boys' religious beliefs.

The 2017 Wilson Moot Problem, at para 17.

[27] Principal Vandalay's reasons are supplemented by the *PSA* and the MHSAA eligibility rules. The preamble of the *PSA* provides that in contributing to a prosperous society, public schools must take into account the diverse needs and interests of the people of Manitoba and should respond to local needs and conditions. 80% of Hawerchuk's students identify as Jewish; 75% of those students identify as Orthodox. Thus, the *PSA* requires Principal Vandalay and the

School Division to be responsive both to the needs of Jewish students at Hawerchuk and to the corresponding interests of students affected by such needs.

The 2017 Wilson Moot Problem, at para 5.

[28] As a member of the MHSAA, the eligibility rules stipulate that Hawerchuk "is responsible to ensure that female and male students are given equal opportunities and access to sports teams." In other words, the MHSAA requires equal access to comparable athletic opportunities regardless of a student's sex.

The 2017 Wilson Moot Problem, at para 15.

b) Female athletes experience disadvantage

[29] As per *Kapp*, disadvantage "connotes vulnerability, prejudice, and negative social characterization." The Decision targets the disadvantage faced by female athletes. The affidavits of Dr. Dana Foley, a kinesiologist who studies female sport, and Dr. Marla Chaundry, a sports psychologist, highlight that female athletes experience disadvantage. Female athletes face a stereotype that "sport is not biologically or socially appropriate for females." A recent study found that 61% of adolescents in Canada could not name a female sports idol.

The 2017 Wilson Moot Problem, at para 26.

[30] Female athletes also experience disadvantage in a school context. According a 2014 report for the Canadian Association for the Advancement of Women of Sport and Physical Activity, "59% of girls between the ages of 3 and 17 participate in sport, with school sport participation dropping by almost 26% when girls enter adolescence." Furthermore, post-secondary programs "are more likely to cut a female program rather than a male program if athletics are underfunded." The Appellants were faced with disadvantage in the form of a risk that the Hawerchuk boys' team would decline in quality if they joined the team.

The 2017 Wilson Moot Problem, at paras 26-27.

c) There is a correlation between the Decision and the Appellants' disadvantage

[31] In *Kapp*, the Supreme Court required "a correlation between the program and the disadvantage suffered by the target group." A distinction must generally serve or advance the object of the program. Moreover, Supreme Court in *Cunningham* reasoned it is "unnecessary to embark on a lengthy consideration of precisely what considerations may enter into the issue of how distinctions are made for ameliorative programs in different types of cases. The law is best left to develop on an incremental basis."

> *Kapp, supra* para 15 at para 9.
> *Cunningham, supra* para 16 at paras 44-55.

[32] The Decision had the object of providing the Appellants equal access to a highly competitive soccer program. 12 of the 23 members of the Hawerchuk boys' team would be "unable to participate on a team with female players based on their religious beliefs." As argued above in paragraph 20, the combined skill level of the athletes is a factor contributing to the quality of a team. The withdrawal of 12 athletes would severely jeopardize the quality and competitiveness of the team, thus leaving the Appellants with an inferior soccer program on the basis that they are female.

> *The 2017 Wilson Moot Problem*, at paras 17, 21.

[33] Justice Abbott noted that it is not certain that the boys' soccer team would be in jeopardy if the Appellants were permitted to play, explaining that is not clear why the boys could not make an exception to their belief for soccer. The reasons run contrary to *Amselem*, in which Justice Iacobucci stated that "courts should avoid judicially interpreting and thus determining, either explicitly or implicitly, the content of a subjective understanding of religious requirement." In noting it is "not evident why they could not make a similar exception strictly for

the limited hours in which they play soccer every week", Justice Abbott told the boys that the nature of their religious beliefs and requirements were different than what they thought.

Syndicat Northcrest v Amselem, 2004 SCC 47 at para 50, [2004] 2 SCR 551 [*Amselem*].
The 2017 Wilson Moot Problem, at para 28.

[34] Principal Vandalay took steps to satisfy himself regarding the sincerity of the boy's religious beliefs. The Supreme Court in *Amselem* held that inquiry into sincerity of belief should be minimal, requiring only a finding of an "honesty of belief." Justice Abbott casts doubt on the boys' sincerity, requiring the boys to provide more evidentiary support than is necessary.

Amselem, supra para 33 at para 52.

[35] Furthermore, the Supreme Court in *Dunsmuir* and *Dr. Q* affirmed that primary decision-makers are in an advantaged position to weigh and assess evidence before them, particularly in the case of *viva voce* evidence. Principal Vandalay was in an advantaged position compared to Justice Abbott, and his apprehension that the team would be in peril if the Appellants were permitted to try out must be respected.

The 2017 Wilson Moot Problem, at para 28.
Dunsmuir v New Brunswick, 2008 SCC 9 at para 53, 1 SCR 190 [*Dunsmuir*].
Dr. Q v College of Physicians and Surgeons of British Columbia, 2003 SCC 19 at para 38, 1 SCR 226 [*Dr. Q*].

[36] Given the nature of the boys' beliefs and the state of Hawerchuk girls' team, the only option that ensured that the Appellants had equal access to a highly competitive soccer program was to offer them the opportunity to play on the Oakwood girls' team.

3. The School Division's decision does not constitute substantive discrimination

[37] The Supreme Court in *Quebec v A* clarified that there is no rigid template for determining substantive discrimination; a flexible and contextual inquiry is required. Perpetuation of prejudice, false stereotyping and the *Law* factors, including ameliorative purpose or effects of the

distinction, are helpful in determining the existence of discrimination. *Withler* explained that, "[t]he analysis is contextual, not formalistic, grounded in the actual situation of the group and the potential of the impugned law to worsen their situation."

> *Law v Canada (Minister of Employment & Immigration),* [2013] 1 SCR 61 at paras 62-75, 170 DLR (4th) 1 [*Law*].
> *Quebec v A, supra* para 15 at paras 331, 418.
> *Kapp, supra* para 15 at para 23.
> *Withler, supra* para 15 at para 38.

a) The School Division's decision does not perpetuate disadvantage

[38] The Supreme Court in *Quebec v A* explained that, "[i]f the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory." The Decision did not "widen the gap" between male and female athletes; Hawerchuk has sought to close the gap by establishing the arrangement with Oakwood and establishing a girls' team in 2012.

> *Quebec v A, supra* para 15 at para 332.
> *The 2017 Wilson Moot Problem*, at para 11.

[39] The Appellants' personal goals were to obtain scholarships and play for the best university program possible. In 2016, the Appellants were admitted to the University of California at Los Angeles on partial athletic scholarships to play soccer.

> *The 2017 Wilson Moot Problem*, at paras 12, 28.

[40] Participation on the Oakwood girls' team facilitated the achievement of the Appellants' goals. First, the Oakwood girls' team is highly competitive. Oakwood coach Teresa Ross' affidavit indicates the team is comprised of very talented players. No evidence suggests the Oakwood girls' team is any more or less competitive than the Hawerchuk boys' team. Second, the team is well-regarded by university scouts, who regularly attend games. Third, the Appellants excelled on the team; they were on the starting roster throughout their time at Hawerchuk. Coach

Ross' affidavit indicates the Appellants were accepted by their teammates and were pushed to improve their abilities. Finally, there is no evidence that trying out for the Hawerchuk boys' team would have provided the Appellants with greater opportunities or greater chances of achieving their goals. To the contrary, Hawerchuk's team would have been in jeopardy if they had been allowed to try out.

> *The 2017 Wilson Moot Problem*, at paras 11, 20, 25, 28.
> *Clarifications to the Official Problem*, at para 7.

[41] The present situation is distinguishable from jurisprudence regarding sex equality in sport. In *Pasternak*, the Manitoba Court of Queen's Bench found the Pasternak sisters were discriminated against because they were denied the opportunity to try-out for a boys' high school hockey team. The finding turned on the fact that the competitiveness of the alternative girls' team "was in no way comparable to that offered by the men's team." As elite hockey players, only the boys' team could provide them with an experience suitable to their skill level. Two human rights tribunal cases also involved situations in which the boys' team provided superior experience. In *Blainey*, the boys' hockey team allowed body-checking where the girls' team did not; in *Casselman* there was no alternative girls' soccer team in the area. The Appellant's situation is distinguishable from the jurisprudence because they played for a highly competitive girls' team, comparable to the boys' team, which helped them develop and attain their goals.

> *Pasternak v Manitoba High Schools Athletic Assn.,* 2008 MBQB 24 at para 67, 10 WWR 729 [*Pasternak*].
> *Blainey v. Ontario Hockey Assn.*, 9 CHRR D/4549 at para 15, 1987 CarswellOnt 2553 [*Blainey*].
> *Casselman v Ontario Soccer Association,* [1993] 23 CHRR D/397 at 10 [*Casselman*].

[42] The Appellants' situation must be assessed beyond a formal equality perspective. The disadvantage experienced by the plaintiffs in *Blainey, Casselman,* and *Pasternak* was a ramification of not being able to try-out for the boys' team, such as having to play for a less

competitive team, not being able to play their desired sport at all, or deterioration of athletic skills. Justice McKelvey stressed that "[w]hat is important, however, was that the differential treatment operated to the Pasternaks' detriment." The Appellants' situation is distinguishable as, the Decision did not have detrimental consequences.

> *Pasternak, supra* para 41 at paras 67, 71, 92.
> *Blainey, supra* para 41 at para 25.
> *Casselman, supra* para 41 at page 10.

[43] Overall, the Decision responded to the Appellants' aspirations and provided an opportunity to pursue their athletic goals. To quote Justice Lau, "the Keigh sisters have not been stopped from playing soccer."

> *The 2017 Wilson Moot Problem*, at para 28.

b) The School Division's decision was not based on a stereotype

[44] The Supreme Court in *Quebec v A* defined stereotype as a disadvantaging attitude that "attributes characteristics to members of a group regardless of their actual capacities." *Taypotat* established that the analysis asks whether the impugned government conduct failed to correspond to the actual capacities and needs of the claimant.

> *Quebec v A, supra* para 15 at para 326.
> *Taypotat, supra* para 15 at para 20.

[45] There is no evidence that stereotypes about female athletes formed a basis for the Decision. Principal Vandalay indicated in cross-examination that "there was 'not a doubt in his mind' that both Tamara and Tara would have qualified for the boys' soccer team at Hawerchuk... and that they would be competitive with any of the team's current starters." The affidavit of one of the members of the Hawerchuk boys' team, Gabriel Leibowitz, indicates the Decision was made in an environment of respect for the Appellants' actual capacities: "Everyone knows that the Keigh sisters are great soccer players."

The 2017 Wilson Moot Problem, at paras 22, 24.

c) The School Division's decision had ameliorative effects

[46] The Supreme Court in *Quebec v A* confirmed that the s. 15(1) inquiry may include an assessment of the ameliorative purpose and effects of the government conduct. *Withler* requires the inquiry to focus "on the actual impact of the impugned law, taking full account of social, political, economic and historical factors concerning the group." As argued in paragraphs 27-38, the Decision gave the Appellants equal access to a competitive soccer program. It also counteracts social exclusion of religious minorities and promotes their cultural wellbeing.

Quebec v A, supra para 15 at para 331, 418.
Withler, supra para 15 at para 39.

[47] To borrow Justice L'Heureux-Dubé's words from *Adler*, the Orthodox boys on the team are part of an "insular religious minority [community] seeking to survive in a large, secular society." They experience disadvantage in the form of vulnerability to assimilation and exclusion from mainstream society. The Ontario Court of Appeal ("ONCA") in *Zylberberg* noted that in schools, members of religious minorities face "real and pervasive" peer pressure to conform to majoritarian practices. Only 1.1% of Manitobans identify as Jewish. The affidavit of Dr. Widemeir, a professor of religious studies, highlights that over the past two decades, the number of Canadians identifying as religious has decreased greatly. The number of teenagers identifying as religious has decreased even more. Tim Stern's affidavit speaks to the social exclusion of religious minorities: "It's really difficult to identify as a religious person these days – people automatically accuse you of being out of touch with modern times or being intolerant."

Adler v Ontario, [1996] 3 SCR 609 at para 86, 30 O.R. (3d) 642 [*Adler*].
Eaton v Brant (County) Board of Education, [1997] 1 S.C.R. 241 at para 46, 31 O.R. (3d) 574 [*Eaton*].
Ardoch Algonquin First Nation & Allies v Ontario, 2000 SCC 37 at para 70-73, [2000] 1 S.C.R. 950 [*Lovelace*].

Cunningham, *supra* para 16 at para 70.
Zylberberg v. Sudbury (City) Board of Education, (4th) 577, 65 O.R. (2d) 641 at para 38, 52 D.L.R. (4th) 577 [*Zylberberg*].
The 2017 Wilson Moot Problem, at paras 6, 23, 28.

[48] The Decision created a space where Orthodox boys could participate in their community while positively giving effect to their religious identity. Dr. Widemeir notes how religious identity can provide "a positive sense of being and self-worth." This is true for Stern, who wrote of his religion as "something that really is valuable to me and gives me great peace of mind."

The 2017 Wilson Moot Problem, at paras 23, 28.

[49] The effects of the Decision were consistent with the School Division's obligation of reasonable accommodation of religious belief under s. 3 of the Manitoba *Appropriate Education Programming Regulation*, s. 9(1)(d) of the Manitoba *Human Rights Code*, and by the Supreme Court in *O'Malley*. Section 11(a) of the *Human Rights Code* provides that it is not discriminatory to reasonably accommodate the needs of an individual or group. The effects were also consistent with s. 13 of the *Code*, which obligates schools to ensure equal access to educational services.

O'Malley v. Simpsons-Sears Ltd., [1985] 2 S.C.R. 536 at paras 22-23, 52 O.R. (2d) 799.
Human Rights Code, SM 1987-88, c 39, ss 9(1)(d), 11(a), 13.
Appropriate Educational Programming, MB Reg 155/2005, s 3.

Issue 2: The School Division's Decision properly balanced the Appellants' s. 15 rights with the boys' s. 2(a) rights within the statutory objective

[50] Administrative decision-makers must render decisions in accordance with the *Charter*. The Supreme Court in *Doré* set out a framework for both decision-makers when making decisions that implicate the *Charter*, and courts on judicial review of those decisions. The decision-maker must first properly identify the objective of the governing statute; second, the decision-maker must identify the *Charter* rights or values engaged by the decision and how severely the *Charter* rights or values are engaged. On judicial review, the decision must

proportionately balance the severity of the infringement of *Charter* rights or values with the statutory objective, while having regard to the nature of the decision and the statutory and factual context of the issue. The *Doré* framework requires the decision reached to be reasonable, recognizing that deference is owed to administrative decision-makers, particularly those with expertise like the School Division in this case. The Appellants have the burden of demonstrating that the Decision was unreasonable.

> *Doré v Barreau du Québec*, 2012 SCC 12 at paras 24, 55-58, [2012] 1 SCR 395 [*Doré*].
> *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 at para 37, [2015] 1 SCR 613 [*Loyola*].
> *Trinity Western University v Law Society of Upper Canada*, 2016 ONCA 518 at para 68, 131 OR (3d) [*TWU v LSUC*].
> *Trinity Western University v Law Society of British Columbia*, 2016 BCCA 423 at para 117, [2016] BCWLD 7422 [*TWU v LSBC*].

1. The School Division's statutory objectives require responsiveness to local needs

[51] As discussed above at paragraphs 27-28, the School Division's role and responsibilities are set out in the *PSA*, which provides that school divisions must respond to the diverse needs and conditions of its local communities. In this case, that involves ensuring that the Orthodox Jewish community is properly accommodated. The Decision is also guided by the MHSAA which aims, in part, to ensure equality and inclusion in high school athletics, and by the Manitoba *Human Rights Cod*e as discussed at paragraphs 28 and 49 above.

> *PSA*, *supra* para 1, Preamble.
> *The 2017 Wilson Moot Problem*, at para 15.

2. The School Division properly identified the *Charter* right engaged and the severity of the engagement

a) The reviewing court can consider implicit reasons for the School Division's decision

[52] The jurisprudence suggests that democratically elected administrative decision-makers that render decisions through democratic processes do not need to provide explicit reasons for a

decision that engages *Charter* values. Rather, the record as a whole and the decision itself can be evidence of proper consideration of the issue before the decision-maker.

[53] In *Newfoundland Nurses,* a unanimous Supreme Court interpreted *Dunsmuir* to hold that there is not always a duty to give reasons – there must only exist "justification, transparency and intelligibility within the decision-making process" and the decision must fall "within a range of possible, acceptable outcomes" defensible on the facts and law. In this case, the Decision's implicit reasons fulfil those requirements. While *Doré* requires attention to the *Charter* values in play, it does not create a new standard of the duty to give reasons.

> *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 12, [2011] 3 SCR 708 [*Newfoundland Nurses*].
> *Doré, supra* para 50 at paras 4, 45.

[54] In *TWU v LSUC,* ONCA cited the Supreme Court in *Catalyst Corp* in asserting that democratically elected decision-makers could provide limited reasons:

> To demand that councillors who have just emerged from a heated debate on the merits of a bylaw get together to produce a coherent set of reasons is to misconceive the nature of the democratic process that prevails in the council chamber.

It is unrealistic to expect explicit reasons given the democratic process inherent in reaching such a decision. The ONCA reasoned, "the same comments apply equally to the benchers. The LSUC's decision must be assessed from the record as a whole, not from individual speeches."

> *TWU v LSUC*, *supra* para 50 at para 127.
> *Catalyst Paper Corp. v North Cowichan (District)*, 2012 SCC 2 at para 29, [2012] 1 SCR 5 [*Catalyst Corp*].

[55] The ONCA's reasoning applies to the case at bar. Like the benchers, the School Division Trustees, who are democratically elected, considered the engagement of a *Charter* right and reached its decision through a democratic process: a vote. As such, the Trustees are under no duty to give full, extensive reasons for their decisions. Instead, the reviewing court must consider

the record as a whole to determine possible reasons for the decision, including any policies relied on, the actual deliberations, and the decision itself.

PSA, supra para 1 at ss 21.50, 25(1).
The 2017 Wilson Moot Problem, at para 18.

[56] The School Division's implicit or possible reasons must be given deference. The Supreme Court in *Alberta Teachers Association* held that for decisions attracting the reasonableness standard of review and where "limited reasons" are acceptable, courts should give "respectful deference" and "consider the reasons that could be offered for the decision."

Newfoundland Nurses, *supra* para 53 at para 11
Dunsmuir, *supra* para 35 at para 47.
Alberta v Alberta Teachers Association, 2011 SCC 61 at para 54, [2011] 3 SCR 654 [*Alberta Teachers Association*].
Catalyst Corp, *supra* at para 54 at para 29.

b) The record indicates that the School Division considered the Appellants' equality rights

[57] The record as a whole indicates that Principal Vandalay considered submissions from all stakeholders before making his decision, as required by school policy. Coach Bala and the Appellants provided written positions. Principal Vandalay also interviewed the Appellants, Coach Bala, and several players on both the boys' and girls' teams. This holistic process suggests Principal Vandalay was alive to myriad interests at stake in the decision including the *Charter* rights engaged and the severity of the engagement. As the Supreme Court observed in *Newfoundland Nurses*, "reasons are not to be reviewed in a vacuum - the result is to be looked at in the context of the evidence, the parties' submissions and the process." As the evidence was before Principle Vandalay, we can assume it was considered.

The 2017 Wilson Moot Problem, at para 16.
Newfoundland Nurses, *supra* para 53 at para 18.

[58] The fact that Principal Vandalay's reasons do not specifically refer to the Appellant's equality rights in play, such as with a reference to specific *Charter* language of "s.15(1) rights",

does not mean the decision was unreasonable. In *Ktunaxa Nation*, the claimants alleged that because the Minister did not explicitly refer to their s.2(a) rights, they could not have engaged in a proportionate balancing of their rights. The British Columbia Supreme Court rejected this argument, concluding that the decision addressed "the substance of the asserted Charter right", which implies acknowledgement of the right. Formalistic recitation of *Charter* language is pedantic and unnecessary. In this case, Principal Vandalay's acknowledgement of the MHSAA and the Appellants' desire to play on the boys' team suggest the substance of the Appellants' equality rights were before him and the School Division.

Ktunaxa Nation Council v British Columbia, 2014 BCSC 568 at para 721, [2014] 4 C.N.L.R. 143 [*Ktunaxa Nation*].
The 2017 Wilson Moot Problem, at para 17.

c) The School Division affirmed the Appellants' equality rights

[59] The School Division affirmed the Appellants' equality rights by facilitating their participation on an elite sports team in furtherance of the MHSAA's objective to protect women's equality rights in Manitoba athletics. The corollary of the MHSAA's objective is to facilitate girls' meaningful participation on elite high school sport teams. In his reasons, Principal Vandalay implicitly referred to the MHSAA policy by stating, "Manitoba is a province that generally permits girls to play for boys' teams." This suggests Principal Vandalay was familiar with the policy and aware of its purpose. While Principal Vandalay's reasons did not explicitly state the MHSAA's underlying goal of preventing discrimination based on sex, he explicitly underscored the MHSAA's corollary goal of including women in elite athletics by repeatedly noting the Appellants' desire to play on an elite team to fulfil their personal sense of competition and their "future soccer ambitions." The Decision is an implicit acknowledgement and endorsement of the MHSAA objective and therefore of the Appellants' equality rights.

The 2017 Wilson Moot Problem, at para 15, 17.

3. The School Division's decision properly balanced the *Charter* rights engaged with regard to the nature of the decision and the statutory and factual context of the issue

a) The School Division's decision followed principles of Charter *interpretation requiring a contextual balancing of rights*

[60] Three principles of *Charter* interpretation developed in the jurisprudence require all decision-makers dealing with a conflict of rights to make a decision that is responsive to the context of the issue. First, no *Charter* right is absolute. Second, there is no hierarchy of *Charter* rights. Third, the *Charter* must be interpreted as a unified whole. These principles suggest that this Honourable Court cannot follow by default a precedent which suggests that in the context of secular public schools or in the context of women's disadvantage in sport, equality rights must necessarily trump religious freedom. In *R v NS*, Chief Justice McLachlin writing for the majority reinforced the importance of focusing on the context of the particular issue during the balancing exercise and provided guidance on how to do so. McLachlin CJ cited the approach in *Dagenais*, which stipulated that the decision-maker must consider "reasonably available alternative measures" in the factual context that would respect both rights and avoid a conflict.

> Frank Iacobucci, "'Reconciling Rights' the Supreme Court of Canada's Approach to Competing Charter Rights" (2003) 20:6 The Supreme Court Law Review 137 at 138-140.
> *R v Mills*, [1999] 3 SCR 668 at para 61, 244 AR 201.
> *Dagenais v Canadian Broadcasting Corporation*, [1994] 3 SCR 835 at para 77, 20 OR (3d) 816 [*Dagenais*].
> *Trinity Western University v College of Teachers (British Columbia)*, 2001 SCC 31 at para 31, [2001] 1 SCR 772 [*TWU v BCCT*].
> *R v S(N)*, 2012 SCC 72 at para 32, [2012] 3 S.C.R. 726 [*R v NS*].

[61] The Decision is in line with the principles of *Charter* interpretation from the jurisprudence and the majority ruling in *R v NS* because it gives proper weight to the issue's factual context and the *PSA*'s objective. The Decision is not binary: instead of simply allowing or denying the Appellants a tryout on the boys' team, it provides them with a reasonable

alternative. The Decision is owed deference by this Court because the Principal and the School Division are most familiar with the context of the issue, and they are responsible for making these decisions pursuant to the *PSA.*

PSA, *supra* para 1 at Part 3.

b) The School Division had two available options

[62] Within the factual context of the issue, the School Division had two available solutions. The solution that the Division came to was reasonable and is owed deference by this Court unless the Appellants prove that it was unreasonable. The first available solution was that the Hawerchuk team could remain all-boys, completely protecting the boys' freedom of religion. This solution would allow for two reasonably available alternative measures to accommodate the Appellants' equality rights: 1) the Appellants could join the all-girls developmental Hawerchuk team; 2) the Appellants could play for the all-girls elite Oakwood girls' team.

[63] The second solution was for the Hawerchuk team to become co-ed. This solution would allow for three alternative measures to "accommodate" boys' freedom of religion: 1) the boys could refrain from playing soccer; 2) the boys would be asked to compromise their religious beliefs in order to play on a co-ed soccer team; 3) the boys could leave Hawerchuk High School to attend an all-boys private school. Each alternative is contrary to the statutory mandates of the School Division and unreasonable for the following reasons.

[64] The first alternative "accommodation" is unreasonable because it amounts to an "indirect [form] of control" – a form of coercion that Chief Justice Dickson described as contrary to freedom of religion in *Big M Drug Mart*. In that case, Dickson CJ held that the section 2(a) right to freedom of religion protects "more" than the right to "manifest religious belief by worship and practice or by teaching and dissemination":

> Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free.

A decision that would require the boys to give up participation in sport represents the kind of "coercion" prohibited by Dickson CJ. While Dickson CJ went on to hold that this freedom is not absolute, coercion cannot be justified if there are reasonable alternatives that avoid it.

> *R v Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at paras 336-337, 60 AR 161 [*Big M Drug Mart*].
> *The 2017 Wilson Moot Problem*, at para 21.
> *R v NS*, *supra* para 60.
> *TWU v BCCT*, *supra* para 60.

[65] The second alternative is also unreasonable. Justice Abbott suggested that the boys "make [an] exception" to their religious beliefs in order to continue playing soccer, since "some of the boys […] interact with women socially." This suggestion is contrary to the personal and autonomous nature of freedom of religion established in the jurisprudence. The subjective nature of the protected freedom allows the Orthodox Jewish boys to decide for themselves what kind of interaction with the opposite sex is appropriate. In *Saguenay*, Justice Gascon held that the state cannot compel individuals to change their decisions regarding religious beliefs:

> [F]reedom of conscience and religion protects the right to entertain beliefs, to declare them openly and to manifest them, while at the same time guaranteeing that no person can be compelled to adhere directly or indirectly to a particular religion or to act in a manner contrary to his or her beliefs.

> *The 2017 Wilson Moot Problem*, at para 28.
> *Amselem*, *supra* para 33 at para 42.
> *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16 at para 69, [2015] 2 SCR 3 [*Saguenay*].

[66] The final unreasonable alternative is for the Orthodox Jewish boys to attend a private all-boys school in order to participate in athletics. By excluding the boys from meaningful participation in their public school community, this alternative would deprive them of the right to

attend public school, similar to the situation in *Multani*. In *Multani*, the appellant decided to follow his religious convictions and attend private school instead of compromising his religious faith. The Supreme Court in that case found that therefore, "[the] prohibition against wearing his kirpan to school has therefore deprived him of his right to attend a public school."

PSA, *supra* para 1 s 259(1).
Multani c Marguerite-Bougeoys (Commission scolaire), 2006 SCC 6 at para 40, [2006] SCR 256 [*Multani*].

c) The alternative provided to the Appellants was reasonable

[67] Even if this Court finds that the alternatives offered to the boys through the second solution outlined above were reasonable, it should still defer to the Decision because that solution - the first solution outlined above - was reasonable. The first solution would offer the Appellants alternative measures that would reasonably protect their equality rights. The first reasonable alternative was for the Appellants to try out for the Hawerchuk developmental girls team. The second was to offer the Appellants a tryout on the Oakwood girls' team.

[68] The majority in *R v NS* suggested that it is not necessary for each party to agree that the reasonably available alternative measure satisfies their right in order for the measure to represent a reasonable balance between the rights engaged. McLachlin CJ cited *Multani* as an example of the Court finding a "just and appropriate balance between" the two rights engaged, yet in that case, the respondent school governing board did not agree that the proposed alternative measure was satisfactory. McLachlin CJ's citation of *Multani* in *R v NS* as an example of an appropriate alternative measure suggests that it is not necessary in the case at bar for the Appellants to agree that the alternatives are reasonable in order for them to actually be reasonable. An alternative measure may not be the "ideal" solution for one of the parties – it may still require some accommodation from that party.

R v NS, *supra* para 60 at para 46.

[69] While the two alternative measures in the case at bar were not the ideal situation for the Appellants, they are reasonable given the statutory and factual context of the issue. In fact, the alternative measures represented the fullest possible protection of the Appellants' rights within the factual context. If Hawerchuk had co-ed soccer teams, likely a significant portion of the team would quit. The team would no longer be comprised of the best players - the Appellants would not be able to achieve their goal of playing "for a more established and competitive team."

The 2017 Wilson Moot Problem, at para 12.

[70] The reasonable alternative of offering the Appellants to play on Oakwood girls' team ensured they would play on an elite team. In fact, the Appellants' participation on the Oakwood team elevated that team's level of play. Coach Teresa Ross stated in her affidavit: "…there is a real spirit of friendly competition among our players this year that is driving everyone to play her very best game." The School Division's reasonable alternative measure therefore elevated the level of competitive women's sport in the district, responding to concerns that women's sport suffered from historic disadvantage, and thus furthering women's equality rights.

The 2017 Wilson Moot Problem, at para 15.

[71] Moreover, the reasonable alternative of allowing the Appellants to join Hawerchuk's developmental team all-girls teams also responded to concerns about the disadvantage faced by women in sports. This alternative speaks to the School Division's commitment to invest in women's sports in the long run.

[72] The School Division's decision to keep Hawerchuk's soccer teams single-sex was reasonable because the Decision maximized the protection of both rights involved. If the School Division made the boys' team at Hawerchuk co-ed, the severity of the infringement with boys' freedom of religion could not have been mitigated through a reasonable alternative measure.

Moreover, that decision would have subverted the *PSA*'s goal of fostering an inclusive school environment with particular attention to the needs of the local community, the obligation under the Manitoba *Human Rights Code* to accommodate religious observance, and the MHSAA's goal of improving women's competitive sports programs. The Principal and School Division are uniquely familiar with the statutory objectives and the particular circumstances of the issue. Because their decision was reasonable, it is owed deference.

Issue 3: The Appellants should not be awarded damages under subsection 24(1) of the *Charter of Rights and Freedoms*

[73] Even if the Appellants establish a breach of their s. 15 rights, they should not be awarded damages because the functional justifications for damages – compensation, vindication and deterrence of future harm – would not be achieved in this case and countervailing good governance considerations render damages inappropriate and unjust.

[74] The test for awarding damages for an established *Charter* breach was articulated in *Ward* and *Ernst*. First, the claimant must demonstrate that damages would further the "general objects of the *Charter*" through offering compensation to the claimant, vindication of the right and deterrence of future breaches. Second, the court must assess whether countervailing considerations exist that render *Charter* damages inappropriate or unjust. Kent Roach notes that courts should order remedies that are "proportionate to the violation": remedies should be neither stronger nor weaker than necessary to rectify the violation.

> *Vancouver (City) v Ward*, 2010 SCC 27 at paras 23-52, [2010] 2 SCR 28 [*Ward*].
> *Ernst v Alberta Energy Regulator*, 2017 SCC 1 at para 26, 2017 CarswellAlta 32 [*Ernst*].
> Kent Roach, "Enforcement of the Charter - Subsections 24(1) and 52(1)" (2013) 62 Supreme Court Law Review (2d) 473 at 483.

[75] The first functional objective of damages – compensation – would not be achieved in this case because any personal loss suffered by the Appellants is negligible and has already been

rectified by the opportunities made available to them. The case at bar can be contrasted to *Pasternak*, where two sisters were denied the opportunity to try-out for and play in a high school men's hockey league. The adjudicator in that case found a violation of the Manitoba *Human Rights Code* and as part of the remedy ordered general damages of $3,500 each "for injury to self-respect and dignity" based on "evidence of the emotional impact that this has had on the twins, and the loss they have suffered in terms of the benefits of participation in high school sports." In that case the girls suffered significant loss: they felt left out, they were described as "despondent," their skills deteriorated, and they were unable to play on a comparable team for two years. In contrast, any violation of the Keigh sisters' equality rights did not cause them any concrete harms. They were able to play as starters on the Oakwood team throughout their time at Hawerchuk. This arrangement allowed them to thrive, improve their skills on a highly competitive team, and achieve their goals. Their experience is in sharp contrast to *Pasternak*, where the girls were left out of competitive hockey for two years.

> *Pasternak*, *supra* para 41 at paras 32-33, 199, 204.
> *The 2017 Wilson Moot Problem*, at 6-7, 10.

[76] The object of vindication is to affirm constitutional values in society. In this case, public confidence has not been adversely impaired even if the Appellants' s. 15 rights were breached because the School Division made a sincere effort to balance and accommodate all of the rights at issue in a very difficult situation. As stated above, the Hawerchuk team would likely not have been the elite team that the Appellants had hoped to join had it become co-ed. The Appellants' inclusion in elite sports was furthered more significantly by offering them a try-out on the Oakwood girl's team. In fact, the Appellants earned scholarships and are playing competitive college soccer. The impugned decision actively supported and furthered their athletic achievements. This is distinguishable from much of the *Charter* damages jurisprudence (e.g.

Ward, *Lamka*) where police violation of s. 8 rights clearly led to negative effects on the claimant. In those cases, police conduct did not in any way benefit the claimant, but was "inherently demeaning and degrading." In this case, from a societal perspective, there is no diminishment of the status of women in athletics.

> *Ward*, *supra* para 74 at para 28.
> *Lamka v Waterloo Regional Police Services Board*, 272 CRR (2d) 286 para 89, 223 ACWS (3d) 618 [*Lamka*].

[77] Damages would not serve the object of deterrence of future breaches because such deterrence would undermine the deference given to statutory decision-makers in interpreting their statutory mandate and considering *Charter* rights under *Doré*. The Supreme Court in *Ward* held that the purpose of deterrence is to "regulate government behaviour, generally, in order to achieve compliance with the Constitution." In this case, it is hard to conceive how a damages award would regulate government behaviour. The School Division engages in discretionary, context-specific balancing of competing rights considering the objectives of the PSA, the Manitoba *Human Rights Code*, and the MHSAA. Whether a result is constitutional will differ from case-to-case: different *Charter* values will be upheld depending on the context. In contrast, in *Ward*, the result – an unwarranted strip search – is always unconstitutional; a damages award reinforces this. Some courts have considered evidence of a "pattern of breaches" to determine the need to deter future government conduct. There is no evidence of such a pattern in this case.

> *Ward*, *supra* para 74 at para 29.
> *Abboud v Ottawa Police Services Board*, 2016 ONSC 1052 at para 49, 265 ACWS (3d) 238.

[78] If this Honourable Court finds that a damages award would further the objectives of compensation, vindication or deterrence, the good governance principle nevertheless prevents the Division's decision from attracting such an award. The good governance principle protects state actors including administrative decision-makers from damages awards that would create a

chilling effect on the exercise of their statutory duties. In *Ernst*, all three Supreme Court opinions underline the importance of adjudicative immunity as a good governance concern. Adjudicative immunity protects the impugned decision from attracting a damages award due to the quasi-judicial nature of Principal Vandalay and the School Division's process.

Ernst, *supra* at para 74 at paras 51-55, 117-122, 171-172.

[79] Principal Vandalay and the School Division followed an adjudicative process similar to a judicial decision. The Principal (and by extension the School Division) heard from all involved parties, gathered the relevant evidence, weighed the *Charter* values, came to a decision and issued reasons. The School Division should not be liable for its decision for the same reasons that judges are protected from liability while adjudicating – to do so would:

> distract it from its statutory duties, potentially have a chilling effect on its decision making, compromise its impartiality, and open up new and undesirable modes of collateral attack on its decisions.
>
> *The 2017 Wilson Moot Problem*, at paras 16-17, 21.
> *Ernst*, *supra* para 74 at para 55.

[80] Opening the Division to a damages award in this case would be inimical to good governance, as it would distract it from carrying out its statutory mandate. An award may deter the Division from reasonably balancing rights in future: it may err on the side of equality rights in situations where it might be reasonable to prioritize other rights.

PART V - ORDER SOUGHT

[81] The Respondents request that the appeal be dismissed.

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

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Team #8
Counsel for the Respondent

PART IV - LIST OF AUTHORITIES AND STATUTES

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