IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Sagen v. Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games,*** 2009 BCSC 942

Date: 20090710
Docket: S083619
Registry: Vancouver

Between:

Annette Sagen, Daniela Iraschko, Jenna Mohr, Lindsey Van, Jessica Jerome, Ulricke Grassler, Monika Planinc, Marie-Pierre Morin, Karla Keck, Nathalie De Leeuw, Katherine Willis by her Litigation Guardian Jan Willis, Jade Edwards, Zoya Lynch by her Litigation Guardian Sarah Lynch, Charlotte Mitchell by her Litigation Guardian Miriam Mitchell and Meaghan Reid by her Litigation Guardian Nina Hooper-Reid

Plaintiffs

And

Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games

Defendant

Before: The Honourable Madam Justice Fenlon

Reasons for Judgment

Counsel for the Plaintiffs:	D. R. Clark, Q.C. J. D. Horswill
Counsel for the Defendant:	G. K. Macintosh, Q.C. T. Dickson E. Walker
Place and Date of Hearing:	Vancouver, B.C. April 20 – 24, 2009
Place and Date of Judgment:	Vancouver, B.C. July 10, 2009

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INTRODUCTION

[1] The plaintiffs are highly-ranked women ski jumpers, young women who want to become world class ski jumpers, and retired highly-ranked women ski jumpers. They assert that female ski jumpers are being excluded from competing at the 2010 Winter Olympic Games (the "2010 Games") because of their sex, in violation of their equality rights under s. 15 of the *Canadian Charter of Rights and Freedoms* [the *Charter*].

[2] The defendant Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games ("VANOC") is a federally incorporated non-profit

corporation responsible for staging the 2010 Games. It plans to host three ski jumping events for men during the 2010 Games, but none for women.

[3] The plaintiffs, who come from Canada, Norway, Germany, Slovenia, and the United States, ask the Court for the following declaration:

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

[4] VANOC asserts that it is sympathetic to the plaintiffs' situation, but it says that they have named the wrong defendant; only the International Olympic Committee (the "IOC") has the right to decide which events qualify as Olympic events. VANOC says that, as a consequence, it cannot host Olympic ski jumping events for women unless the IOC adds those events to the Olympic Programme.

[5] The plaintiffs acknowledge that VANOC does not have the authority to add Olympic ski jumping events for women to the Olympic Programme. They agree that if the declaration is granted, the only way that VANOC could comply with the Court's decision would be to refuse to host the men's ski jumping events.

[6] The plaintiffs contend that cancellation of the men's events is unlikely because, faced with this undesirable alternative, the IOC would authorize VANOC to host women's ski jumping events. They say that this would remove the source of the discrimination and ensure that the 2010 Games proceed "in a spirit of fairness and equality to all."

CONCLUSION

[7] In my view, the exclusion of women's ski jumping from the 2010 Games is discriminatory. Many of the men the plaintiffs have trained with and competed against as peers will be Olympians; the plaintiffs will be denied this opportunity for no reason other than their sex. But not every act of discrimination is a breach of the

Charter. For the reasons that follow, I find that VANOC is not in breach of the *Charter*. I am, therefore, unable to grant the declaration the plaintiffs seek.

BACKGROUND

[8] Before turning to the issues in this case, it is necessary to identify the parties and contracts involved in the staging of the 2010 Games.

[9] The early push to bid for the 2010 Games was led by the Mayor of Vancouver, British Columbia's Minister of Small Business, Tourism and Culture, and a local businessman. They formed the Vancouver/Whistler 2010 Bid Society and approached the City of Vancouver for support. A brief history of the bid process follows:

- In February 1998, Vancouver City Council approved in principle the regional concept for the 2010 Games.

- In November 1998, British Columbia and Vancouver entered into a participation agreement under which British Columbia agreed to indemnify Vancouver for costs or liabilities arising as a result of the bid.

- On December 1, 1998, the Canadian Olympic Committee (the "COC") chose Vancouver/Whistler as Canada's bid city for the 2010 Games (both Calgary and Quebec City also submitted domestic bids to the COC). Subsequently, the COC, Vancouver, and the Bid Society signed the Bid City Agreement, which was dated as of December 1, 1998.

- On June 11, 1999, Bid Corp was incorporated for the purpose of preparing and submitting the international bid to the IOC for the 2010 Games. Bid Corp's budget was approximately $34 million. Canada and British Columbia each contributed $9.1 million to the bid; the rest of the budget came from private sources.

- The shortlist of candidate cities was announced on August 29, 2002. That list included Vancouver, Bern, Salzburg, and Pyeongchang. Bid Corp submitted its bid book and guarantee file in January 2003.

- Bid Corp's guarantee file contained letters of support and covenants from Canada, British Columbia, Vancouver, and the Resort Municipality of Whistler. The covenants included the contributions that each of these governments would provide VANOC, which did not yet exist and was referred to in the covenants by the standard Olympic term "OCOG" (which stands for organizing committee for the Olympic Games).

- On November 14, 2002, Bid Corp, Canada, British Columbia, Vancouver, Whistler, the COC, and the Canadian Paralympic Committee (the "CPC") entered into the Multiparty Agreement. That agreement sets out the commitments and roles of each of the parties in the staging of the Games (including VANOC which would be established upon a successful bid), and their obligations to each other should Bid Corp's bid to host the Games succeed.

- On July 2, 2003, Vancouver was selected as the host city and the IOC, Vancouver, and the COC entered into the Host City Contract. That contract is the standard contract forming the basis of the relationship between the IOC and the organizing entities in respect of each edition of the Games.

ISSUES

1. Does the *Charter* apply to VANOC?

2. Is VANOC in breach of s. 15 of the *Charter*?

3. If there is an infringement of the *Charter*, is it saved by s. 1?

I. Does the *Charter* apply to VANOC?

[10] The threshold question is whether VANOC is bound by the provisions of the *Charter*. Broadly speaking, the *Charter* only applies to government and to entities that carry out government programs and responsibilities. This limited application stems from s. 32 of the *Charter* and the cases which interpret that section. Section 32 provides:

> 32. (1) This Charter applies
>
> (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
>
> (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

[11] There are two ways that a private entity, such as VANOC, can be subject to the *Charter.* First, the *Charter* applies if the entity is controlled by government (the "control test"); second, it applies if the entity is carrying out a government program or policy with respect to a particular activity (the "ascribed activity test"). Either basis will suffice.

1. Is VANOC controlled by government?

[12] An entity that is not part of government is nonetheless subject to the *Charter* if it is subject to "routine or regular control" by government. The governments of Canada, British Columbia, Vancouver, and Whistler are all involved with VANOC.

[13] VANOC argues that these four governments do not, either individually or collectively, exercise routine or regular control over VANOC's day-to-day activities. Rather, it says that the IOC exerts this kind of control over it. VANOC acknowledges that the four contributing governments have representatives on VANOC's Board and have some other limited supervisory roles, but VANOC says this falls far short of the degree of control required to bring it within the ambit of s. 32 of the *Charter*.

[14] The Supreme Court of Canada addressed the nature of "control" in *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483, 76 D.L.R. (4th) 700 [*Stoffman*]. That case concerned a challenge by physicians to a hospital regulation under which they lost their admitting privileges at age 65. The doctors argued that government controlled the hospital because 14 of the 16 members on the hospital's board of trustees were appointed by British Columbia; ministerial approval of the hospital's constitution and by-laws was required; the government had the power to displace the board and manage the hospital directly; and the *Vancouver General Hospital Act*, S.B.C. 1970, c. 55, also provided for additional ministerial controls where the government provided money for building. Mr. Justice La Forest, speaking for the majority of the Court, considered these indicia of control and said at 513-14:

> [It] is crucial … to bear in mind the difference between ultimate or extraordinary, and routine or regular control. While it is indisputable that the fate of the Vancouver General is ultimately in the hands of the Government of British Columbia, I do not think it can be said that the *Hospital Act* makes the daily or routine aspects of the hospital's operation, such as the adoption of policy with respect to the renewal of the admitting privileges of medical staff, subject to government control. On the contrary, it implies that the responsibility for such matters will, barring some extraordinary development, rest with the Vancouver General's Board of Trustees. It could in fact be said to contain an explicit recognition to this effect, in that it defines "board of management" as "the directors, managers, trustees or other body of persons having the control and management of a hospital" (s. 1). To similar effect is s. 5 of the *Vancouver General Hospital Act*, which provides that the "property and affairs of the corporation shall be managed by a Board of Trustees". These two provisions would be meaningless unless the *Hospital Act* is interpreted in accordance with the distinction between ultimate or extraordinary, and routine or regular control which I have described above. [emphasis added]

[15] It follows that, in order to prove that the *Charter* applies to VANOC on the basis of government control, the plaintiffs must establish that VANOC's daily or routine aspects are subject to government control.

[16] The plaintiffs point to three significant areas of government control over VANOC: (a) governance, (b) funding, and (c) policy and operations. I will consider each of these areas in turn.

(a) Governance

[17] The plaintiffs argue that government controls the Board of VANOC and, thus, controls its operations.

[18] Ten of VANOC's 20 directors are appointed directly by government: three by Canada, three by British Columbia, two by Vancouver, and two by Whistler. Of the other directors, the COC appoints seven, the CPC appoints one, and two First Nations together appoint one. The twentieth director, the Chair, is selected by the 19 appointed directors. The plaintiffs argue that because the twentieth director is elected by the 19 appointed directors, the majority of whom are government appointees, government effectively controls the selection of the Chair and, therefore, actually appoint 11 of the 20 VANOC directors.

[19] VANOC argues that treating the government appointments as one group ignores the fact that there are four distinct governments represented on the Board. VANOC submits that "government" does not control the Board because the most votes that any one government has is three of 20. It says that "there is no evidence that [the governments] act with one mind". Based on this approach, an intergovernmental entity with a board made up entirely of government appointments (for example two from each province and two from Canada) would not be considered to have a "government controlled" board. The control basis for subjecting an entity to the *Charter* stems from the principle that governments will not be allowed to escape *Charter* scrutiny by setting up a private entity to work through. Requiring any one level of government to be in control of a board or requiring the various levels of government to act as one to meet the control test is inconsistent with this principle.

[20] In the present case, I am satisfied that the governments collectively select the majority of VANOC's directors and that the government appointed directors have voting control over the Board. However, voting control is not conclusive of the control issue.

[21] The Supreme Court of Canada in *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451, 77 D.L.R. (4th) 55, held that a majority of government appointments was not enough to establish government control. Where the Supreme Court of Canada has found an entity to be controlled by government, the directors were all appointed by government: *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570, 77 D.L.R. (4th) 94 [*Douglas College*]; *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211, 81 D.L.R. (4th) 545.

[22] The plaintiffs say VANOC's Board is truly controlled by government because, unlike the board in *Stoffman*, the government appointees are not appointed for fixed terms. Rather, as in *Douglas College,* their appointments can be terminated "at pleasure". In addition, the governments may designate special appointees, any one of whom can block certain significant amendments to VANOC's Business Plan; VANOC is prohibited from amending its by-laws with respect to any essential aspect of its governing structure or purpose without the consent of all governments (as well as the COC and CPC). Finally, VANOC's original by-laws and letters patent are subject to the approval of British Columbia, Vancouver, and Whistler, as well as the COC and the CPC: Multiparty Agreement, Articles 3.3 and 3.4.

[23] There is no evidence that the government-appointed directors are acting on behalf of the governments that appointed them, as opposed to acting in the best interests of VANOC. Indeed, the only evidence on this point was to the contrary; collectively, the Board members have functioned in a manner that reflects their fiduciary duty to act in VANOC's best interest.

[24] On this point, I find that the four governments involved with VANOC collectively have a significant degree of control over the Board, but not to the extent that it can be said that government has control over VANOC's day-to-day operations. A board of directors exercises strategic oversight that does not generally include daily operations. As the Minister of Finance said to the Legislature in May 2007:

> The bottom line is that we are engaged with VANOC on a day-to-day basis. We sit at the table with them as they develop their plans in multitudes of areas. I think the bottom line is that our obligation is not to micromanage how VANOC organizes the Games. Our obligation is to make sure that there is a competent team in place that is actually managing the affairs of VANOC.
>
> British Columbia, Legislative Assembly, *Official Report of Debates of the Legislative Assembly* (*Hansard*), Vol. 21, No. 3 (16 May 2007) at 8110 (Hon. Colin Hansen)

(b) Funding

[25] The plaintiffs argue that government control of VANOC is further evidenced by the governments' economic stake in VANOC and VANOC's fiscal accountability to the governments. They rely on the following factors:

1. British Columbia is entitled to appoint the Chair of VANOC's audit and finance committee;

2. VANOC must provide notice to the government parties of any financial forecasts that predict a deficit;

3. Government parties are entitled to quarterly and audited financial statements, as well as "information on request" and access to VANOC's books and accounts;

4. Canada and British Columbia have each provided $255 million to the capital costs of developing venues (including $20 million towards staging the Paralympic Games) plus $55 million each as contributions to the Legacy Endowment Fund;

5. The four government parties are responsible for athletes' accommodation, security services, health services, and roads (such as the Sea to Sky Highway improvement and the road to the ski jumping facility at Whistler);

6. VANOC must obtain the approval of Canada and British Columbia for budget changes of $5 million or more that would materially affect the government parties' rights;

7. VANOC must obtain approval from British Columbia of all agreements related to construction and venues; and

8. British Columbia is a guarantor for any losses the 2010 Games incur and has a say in the distribution of any profits.

[26] The governments' right to financial information and approvals (items 1, 2, 3, 6 and 7 above) is indicative of their high-level supervisory role, but it does not amount to control over VANOC's finances. Actual control over expenditures is limited to the governments' approval of the Business Plan (which was an early best efforts projection of revenues and expenses) and to approval of changes to the Business Plan that meet or exceed $5 million and affect British Columbia's and Canada's rights. These restricted review and approval rights in relation to venues, construction, and the venue development budget suggest that direct oversight of VANOC's finances by government is the exception rather than the rule. The Supreme Court of Canada addressed this point in *Stoffman* where La Forest J. stated at 512-13:

> I also think that it is not very significant that the *Hospital Act* provides for ministerial control in respect of the use which the hospital makes of any grant received from the Province toward, in the words of s. 41(1), "the planning, constructing, reconstructing, purchasing and equipping of a hospital . . . or the acquiring of land or buildings for hospital purposes". The fact that the Vancouver General is not autonomous when it comes to the use of money given to it by the government for specific capital investments says little regarding the degree of autonomy it enjoys overall. If anything, it suggests that direct government involvement in hospital decision-making is the exception rather than the rule. [emphasis added]

[27] The governments' financial contributions (items 4 and 5 above) are significant; they involve both direct and indirect assistance. Governments are providing all but approximately $12 million of the $592 million development budget for the construction of new venues and the renovation of existing facilities. That

budget, while large, pales in comparison to the 2010 Games' operating budget of $1.75 billion. Most of the operating budget is financed through the private sector, including the IOC's contribution of $450 million from broadcast revenues. Corporate domestic sponsorships make up the bulk of the revenues ($760 million). The remaining revenues come from ticket sales and international sponsorships. Particularly noteworthy is British Columbia's commitment to cover any deficit from the 2010 Games. This is a significant indicator of that government's fiscal responsibility.

[28] It is inaccurate for the plaintiffs to suggest that government controls where surplus funds from the 2010 Games are to be spent (item 8 above). The Host City Contract specifies that the COC receives 20% of any surplus, the IOC receives 20%, and 60% is for the "general benefit of sport in [Canada] as may be determined by [VANOC] in consultation with the [COC]": Host City Contract, Article 44.

[29] I find that while the governments are kept informed about financial matters and some have direct involvement with venue contracts and significant budget decisions, they do not have routine daily control over VANOC's finances.

(c) Policy and operations

[30] The plaintiffs argue that government has the ability to direct VANOC's operations in part because Canada and British Columbia must approve VANOC's Business Plan for organizing, financing, and staging the 2010 Games. The Business Plan, which is defined under Articles 4.1-4.6 of the Multiparty Agreement, includes:

- A plan for acquiring services required by VANOC and for identifying how those services will be provided, for example, by volunteer support or by one of the parties;
- A human resources plan regarding paid staff and volunteers;
- An environmental scan;

- A plan for concluding development and use agreements with facility owners;
- A marketing plan;
- A security plan;
- A cultural plan;
- A health plan;
- A communications plan; and
- An evaluation mechanism for ongoing assessment of progress.

[31] While the Business Plan appears to reflect the "day-to-day" operations of VANOC, the reality is quite different. The Multiparty Agreement requires VANOC to submit a Business Plan that details "to the extent possible" the planning, organizing, financing and staging of the Games to Canada and British Columbia within 18 months of VANOC being established: Multiparty Agreement, Article 4.10. Mr. Bagshaw, VANOC's chief legal officer, gave evidence that the first business plan was completed in 2005, when VANOC "was about 45 people, just hardly off the ground, so there … really wasn't a well-developed plan". He described the Business Plan as "essentially a budget with some sketchy information". VANOC has the authority to change the Business Plan; it is only required to seek Canada's and British Columbia's consent to changes that would either materially impact their rights or obligations under the Multiparty Agreement or result in a change in the budget of $5 million or more: Multiparty Agreement, Article 4.5.

[32] In my view, the Business Plan is a high-level planning document akin to a general organization plan to ensure that all key areas have been considered and strategically addressed. The IOC, the COC, and the CPC had input into the original Business Plan along with all four governments.

[33] As further support for their submission that government controls VANOC's activities, the plaintiffs point to government involvement with the Master Schedule. Unlike the Business Plan, the Master Schedule is the "micromanagement" of the 2010 Games. It is a detailed planning tool that coordinates the activities that VANOC must carry out as part of the planning, organizing, financing, and staging of the Games. The Master Schedule lists each of VANOC's core activities; for each activity, it sets out the division within VANOC that is responsible for it, its expected completion date, its level of importance (whether it is a milestone, a deliverable or a key action in order of importance), whether it is an obligation owed to the IOC or the International Paralympic Committee, and if it involves interfacing with government, then which government. The Master Schedule records further comments and the date the activity is actually completed.

[34] The plaintiffs say the Master Schedule was "workshopped" with the governments in November 2006; since then, the governments have received monthly (later bi-monthly) reports on it. The plaintiffs say this demonstrates government involvement in day-to-day decisions. However, VANOC was not obligated to obtain government approval of the Master Schedule or communicate with government about it. I accept that VANOC "workshopped" the Master Schedule with the governments for the same reason that VANOC sought the comments of its sponsors; VANOC wants to ensure that the Master Schedule is an accurate and useful planning and communication tool. In the same vein, VANOC chooses to provide sponsors and governments with updates for information and coordination purposes. This communication is prudent, but it is discretionary; it is not an indicator of government control over the Master Schedule.

[35] In contrast to the governments' limited involvement with the Master Schedule, VANOC must obtain the IOC's approval of the original version and all subsequent amendments. VANOC is also obligated to provide the IOC with regular updates on its progress in completing the Master Schedule.

[36] In addition to the Master Schedule, there are several other significant indicia of IOC control over VANOC:

- VANOC reports directly to the IOC Executive Board (Olympic Charter, Rule 36);
- VANOC must obtain prior written approval of the IOC Executive Board for all VANOC's agreements directly or indirectly concerning the 2010 Games (Host City Contract, Article 15);
- VANOC must provide the IOC Executive Board with progress reports on its preparation for the 2010 Games and must act immediately upon any decisions of the IOC following such reports (Host City Contract, Article 24); and
- Three years before the 2010 Games, VANOC must submit to the IOC Executive Board for its prior written approval the schedule of the specific times when the Olympic events will be held (Host City Contract, Article 32).

[37] John Furlong, VANOC's chief executive officer, gave evidence that VANOC must obtain IOC approval for "a huge range of its activities". Without providing an exhaustive list, he gave as examples:

- All venue agreements;
- All marketing agreements;
- All sponsorship agreements;
- The design of the torch, cauldrons, and VANOC's uniforms;
- The general design principles for the 2010 Games – what is referred to as the "look of the games";

- The inukshuk logo;
- VANOC's mascots; and
- The opening and closing ceremony programs.

[38] VANOC must also submit to the IOC regular reports on each of its 52 functions so that the IOC can evaluate its progress. The IOC Coordination Commission meets semi-annually to review VANOC. It has working groups that focus on VANOC's specific functions in more detail. Project reviews occur between the Coordination Commission's semi-annual meetings; these reviews allow various members of the Coordination Commission and other IOC staff to visit VANOC so that they can be updated on VANOC's progress and instruct VANOC. Mr. Furlong also attends the IOC Executive Board's meetings to update the IOC on VANOC's progress and receive instructions from the IOC.

[39] While it is not necessary for government to have total control over the operations of an entity in order for it to be subject to the *Charter*, in my view, the kind of day-to-day control exercised by the IOC is inconsistent with government control of that kind. This situation cannot be characterized, as the plaintiffs suggest, as proof that the IOC "is a sophisticated customer who purchases a highly complex product and, to this end, requires a producer of this product to meet its specifications". The difficulty with this analogy is that the Olympic Games are the exclusive property of the IOC. VANOC is able to stage the 2010 Games only because the IOC has granted it that right under the Host City Contract. The IOC has licensed VANOC's use of the Olympic brand for that purpose. To the extent that analogies are useful, VANOC is more like a franchisee of the IOC than a purchaser of a product.

[40] The IOC's control over the minute details of VANOC's operations in planning and staging the 2010 Games is cogent evidence of the IOC's day-to-day control of VANOC's operations.

[41] Before turning to the "ascribed activity" test for control, I will address the plaintiffs' argument that VANOC has admitted that it is controlled by government. The plaintiffs rely on a memorandum that VANOC provided to the Federal Trademarks Commissioner in support of its claim to public authority status justifying the protection of trademarks under s. 9 of the *Trade-marks Act*, R.S.C. 1985, c. T-13. In that memorandum, VANOC describes itself as "a government controlled, not for profit corporation created solely to plan, organize and stage" the 2010 Games. VANOC says further in the memorandum that the Multiparty Agreement "provides the government parties with extensive ongoing supervision of, and control over [VANOC's] governance and decision making" and that "the Multiparty Agreement provides the government parties with extensive control over [VANOC] and all of its activities".

[42] The parties agree that the test under s. 9 of the *Trade-marks Act* is different from the control test under s. 32 of the *Charter*, but the plaintiffs say the statements in the memorandum are admissions by VANOC that it is government-controlled. They say that VANOC's assertions in this case to the contrary must, therefore, be disbelieved as convenient and self-serving sophistry.

[43] VANOC strongly objects to this characterization. It says that the memorandum is directed to compliance with s. 9(1)(n)(iii) of the *Trade-marks Act* which does not address issues that are central to a s. 32 analysis. Section 9(1)(n)(iii) of the *Trade-marks Act* prohibits anyone from "adopting any badge, crest, emblem, or mark ... adopted and used by any public authority, in Canada as an official mark for wares or services".

[44] VANOC was obligated under Article 41 of the Host City Contract to obtain legal protection within Canada for VANOC's emblem and mascots and for the "Vancouver 2010" identification. VANOC says that it submitted the trademark memorandum and applications because the contributing governments have extensive ongoing supervision of and control over VANOC's governance and

decision making – a high level of decision making that it says is not equivalent to the day-to-day control required to meet the test under s. 32 of the *Charter*.

[45] The divergence between the tests under s. 32 of the *Charter* and s. 9 of the *Trade-marks Act* is evident from a review of decisions in relation to each statute. Case law under s. 9 of the *Trade-marks Act* makes no reference to the jurisprudence under s. 32 of the *Charter*. Conversely, case law under s. 32 of the *Charter* does not refer to authorities developed under s. 9 of the *Trade-marks Act*. The purposes of these provisions are different. Consequently, the tests have developed independently.

[46] The distinct nature of these tests is also evident from a review of some of the entities that have been found to be "public authorities" under the trademarks analysis of control. These include 40 Canadian hospitals, various provincial and national cancer societies, bible societies, the United Way, and Big Brothers and Sisters of Canada.

[47] While I agree with the plaintiffs that VANOC's assertions in the trademark memorandum are a matter for serious consideration, I am of the view that the memorandum contains over-generalizations that do not reflect the actual degree of control exercised by government over VANOC. My analysis must be based on the facts I find on the evidence in this case. A statement made by VANOC to a third party to this litigation in the context of a trademark application with a different test for control, while a relevant evidentiary consideration, is neither a binding admission on VANOC in these proceedings, nor conclusive of the legal issue before this Court.

[48] In summary on this issue, the plaintiffs have not established that the governments exercise sufficient control over VANOC to make "government control" a basis for finding that the *Charter* applies to VANOC.

2. Is VANOC carrying out a government activity?

[49] A private entity that is not controlled by government can still be subject to the *Charter* under the ascribed activity test in relation to a discrete activity if that activity is "truly 'governmental' in nature": *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at para. 44, 151 D.L.R. (4th) 577 [*Eldridge*]. The parties characterize the activity to be considered under this test in two different ways. The plaintiffs say the activity is the staging of the 2010 Games; VANOC says the activity is the selection of events to be included in the Olympic Programme for the 2010 Games.

[50] VANOC argues that the impugned activity (determining which events will be included in the Olympic Programme or, more precisely, deciding that women's ski jumping will not be an Olympic event) has no "direct and ... precisely defined connection with a specific government policy". To the contrary, VANOC says, selection of events for inclusion in the Olympics is solely a matter for the IOC; no Canadian government has any role or authority over the determination of the Programme. VANOC relies on *Eldridge* at para. 51 where La Forest J. said:

> Unlike *Stoffman*, then, in the present case there is a "direct and . . . precisely-defined connection" between a specific government policy and the hospital's impugned conduct. The alleged discrimination -- the failure to provide sign language interpretation -- is intimately connected to the medical service delivery system instituted by the legislation.

[51] VANOC raises an important issue with respect to its authority to make the impugned decision. However, in my view, that argument is better addressed as part of the s. 15 analysis in considering whether, within its delivery of the 2010 Games, VANOC has exercised its decision-making power so as to breach s. 15. At this stage, under s. 32 of the *Charter*, I must determine whether VANOC is carrying out a government activity. The activity in issue is the staging of the 2010 Games.

[52] VANOC says hosting the 2010 Games is not a governmental activity. While VANOC recognizes that the 2010 Games will yield many public benefits and that the governments support and are involved with VANOC's efforts, VANOC stresses that

the 2010 Games are an IOC creation within IOC authority and control. They are being planned, organized, and staged as part of the IOC's programs and policies. VANOC says it does not exercise any special powers from government; rather, its powers are derived entirely from the IOC.

[53] I agree with VANOC that the celebration of any Olympic Games, including the 2010 Games, is a key component of the Olympic movement. The IOC owns the Olympic Games and has control over their delivery, but it does not actually stage the Olympic Games. That is left to others. The question I must answer is whether staging the 2010 Games is a truly governmental activity.

[54] In answering this question, I must bear in mind that it is not sufficient for an entity to be performing a public function; nor is it sufficient that the activity can be described as public in nature. In *Stoffman*, a hospital was found to be providing the public service of health care, but that did not qualify as a government function under s. 32. In *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 at 274, 76 D.L.R. (4th) 545 [*McKinney*], La Forest described as truly governmental "activities that can in some way be attributed to government" and "specific activities where it can fairly be said that the decision is that of the government, or that the government sufficiently partakes in the decision as to make it an act of government".

[55] In *Eldridge*, La Forest J. identified two examples of truly governmental activities:

- implementation of a specific statutory scheme; and
- implementation of a government program or policy.

La Forest J. left open the possibility that the test might be met by something other than implementation of a statutory scheme or a specific government program or policy. He said at para. 42 of *Eldridge*:

> … [A] private entity may be subject to the *Charter* in respect of certain inherently governmental actions. The factors that might serve to ground a

> finding that an activity engaged in by a private entity is "governmental" in nature do not readily admit of any a *priori* elucidation.

[56] I am not aware of any case that has moved beyond the threshold of the two examples given by La Forest J. in *Eldridge*, but that does not mean that other truly governmental actions do not exist. In my view, hosting the 2010 Games is uniquely governmental in nature. The 2010 Games are intended to bring together the nations of the world as the guests of one nation and one city. They are not awarded to a private entity, but to the host city. The 2010 Games are known as the "Vancouver 2010 Olympics". Historically, governments hosted the Games directly. As noted by Kenyon J. of the United States District Court in *Martin v. International Olympic Committee* (16 April 1984), CV 83-5847 (C.D. Cal. 1984), aff'd 740 F.2d 670 (9th Cir. 1984) [*Martin*], this changed for the 1984 Los Angeles Games. For that set of Olympic Games, and since, the IOC has required the host city to incorporate a separate entity to deliver the Olympic Games. While the historical role of government is not conclusive, it is one factor that supports the governmental nature of the Olympic Games.

[57] In my view, the governmental nature of staging the 2010 Games is evident from a review of the bid process (outlined earlier in the Background section of these reasons) and the contracts under which the 2010 Games are being staged.

[58] VANOC acknowledges that the IOC entrusted the organization of the 2010 Games to Vancouver and the COC, but it argues that those parties had to incorporate VANOC within five months; at that point, VANOC became bound by the Host City Contract and assumed the responsibilities of hosting the 2010 Games. VANOC says that the City's role was limited to the formation of VANOC in much the same way that the government's role in relation to the hospital in *Stoffman* was limited to incorporation of the hospital by special statute. That argument focuses on the nature of the entity delivering the activity, rather than the nature of the activity itself; it is the latter that is in issue under the "ascribed activity" test. The fact that government rapidly created a private entity to deliver the 2010 Games is not evidence that the activity is not governmental.

[59] Vancouver, in conjunction with Canada, British Columbia, and the COC, made the decision to bid for and host the 2010 Games. That decision required financial commitments and commitments of effort and collective will. In British Columbia's and Vancouver's case, it also included a guarantee and indemnification with respect to any shortfall from the 2010 Games. The real cost to the provincial government of staging the 2010 Games has been estimated by the British Columbia Auditor General at $2.5 billion.

[60] The Host City Contract (Clause 1) says clearly that the 2010 Games were awarded to Vancouver. It states:

> 1. Entrustment of Organization of the Games
>
> The IOC hereby entrusts the organization of the Games to the City and the NOC which undertake to fulfil their obligation in full compliance with the provisions of the Olympic Charter and of this Contract, including, without limitation, all matters referred to in the Appendices to this Contract, which, for greater certainty, are deemed to form part of this Contract.

[61] Rule 33(2) of the Olympic Charter provides that "[t]he honour and responsibility of hosting the Olympic Games are entrusted by the IOC to a city, which is elected as the host city of the Olympic Games." Rule 34(3) of the Olympic Charter also requires that:

> The National Government of the country of any applicant city must submit to the IOC a legally binding instrument by which the said government undertakes and guarantees that the country and its public authorities will comply with and respect the Olympic Charter.

[62] In my view, the IOC would not have awarded the 2010 Games to Vancouver without the backing of all four governments.

[63] The governments' decision to bid for the 2010 Games and to host them is an act of government that could not have been undertaken by any other entity. The staging of Olympic Games in Canada is, in my view, a rare but uniquely governmental activity. The governmental nature of the activity is borne out by Canada's imposition on VANOC of obligations similar to those imposed by s. 25 of

the *Official Languages Act*, R S.C. 1985, c. 31 (4th Supp.), which applies to bodies acting on behalf of the Canadian government. Further, Canada and British Columbia have both imposed procurement policies on VANOC, including those related to the nationality of goods and Canada's international obligations in relation to procurement. Similarly, Canada has imposed on VANOC its policies in relation to tobacco advertising and restrictions on certain investments. Canada will take part in planning the opening and closing ceremonies to ensure that they reflect Canada's cultural diversity and linguistic duality; the governments have also imposed on VANOC pay equity and equal employment standards.

[64] Although I am not bound by the decision, it is noteworthy that in *Martin* the U.S. 9th Circuit Court affirmed the District Court's finding that there was a sufficient nexus between the 1984 Los Angeles Summer Olympic Games and the government to trigger application of the equal protection rights under the Fifth and Fourteenth Amendments of the U.S. Constitution despite the fact that those Games were run by the Los Angeles Olympic Committee (VANOC's equivalent).

[65] In summary on this issue, VANOC is subject to the *Charter* when it carries out the activity of planning, organizing, financing, and staging the 2010 Games.

II. Is VANOC in breach of s. 15 of the *Charter*?

[66] The plaintiffs complain that VANOC has planned three Olympic ski jumping events for men, but none for women. It is easy to understand why the athletes who bring this case before the Court are frustrated by their continued exclusion from the Olympic Games. One of the plaintiffs, Lindsey Van of the United States, has competed on the Whistler 90-metre ski jump against men who will be jumping in the 2010 Games. She defeated them all and currently holds the record for that facility. Yet for her, and for the other talented female athletes who compete on the world ski jumping circuit, there is to be no place in the Olympic Village; more importantly, there is to be no place on the 90-metre ski jump in the 2010 Games.

[67] There is no doubt that the plaintiffs are being treated differently from their male counterparts. The issue is whether that differential treatment is a breach of s. 15 of the *Charter*. That section provides:

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[68] In *R. v. Kapp*, 2008 SCC 41 at para. 17, [2008] S.C.R. 483 [*Kapp*], McLachlan C.J. and Abella J. observed that in the series of cases culminating in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at para. 39, 170 D.L.R. (4th) 1 [*Law*], the Supreme Court of Canada established a two-part test for showing discrimination under s. 15(1):

> (1) Does the law create a distinction based on an enumerated or analogous ground?
>
> (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

[69] Before turning to this two-part test, I will address the threshold question of whether a contract entered into by a private entity that is not controlled by government can be the source of a "benefit of the law" within the meaning of s. 15.

[70] The benefit the plaintiffs say they are being denied is being delivered by VANOC under the Multiparty Agreement and the Host City Contract. It is clear that benefits delivered under a contract entered into by a government-controlled entity must be delivered in a manner consistent with s. 15 of the *Charter*: In *Douglas College* at 585-86, La Forest J. said the following regarding the issue of whether the collective agreement was "law within the meaning of s. 15(1) of the *Charter"*:

> For reasons discussed in *McKinney v. University of Guelph, supra*, I am of the view that the collective agreement is law. It was entered into by a government agency pursuant to powers granted to that agency by statute in

> furtherance of government policy. The fact that the collective agreement was agreed to by the appellant association does not alter the fact that the agreement was entered into by government pursuant to statutory power and so constituted government action. To permit government to pursue policies violating *Charter* rights by means of contracts and agreements with other persons or bodies cannot be tolerated. The transparency of the device can be seen if one contemplates a government contract discriminating on the ground of race rather than age. It may be that age can constitute a rational basis for a party to agree to contract out of certain rights and thus be open to the defences of waiver or estoppel or again that it may in certain circumstances constitute a reasonable limitation under s. 1. These are issues, however, which were not before the Board or the courts below and I refrain from commenting upon them further. [emphasis added]

[71] In *McKinney* at 276, La Forest J said:

> For section 15 of the *Charter* to come into operation, the alleged inequality must be one made by "law". The most obvious form of law for this purpose is, of course, a statute or regulation. It is clear, however, that it would be easy for government to circumvent the *Charter* if the term law were to be restricted to these formal types of law-making. It seems obvious from what McIntyre J. had to say in the *Dolphin Delivery* case that he intended that exercise by government of a statutory power or discretion would, if exercised in a discriminatory manner prohibited by s. 15, constitute an infringement of that provision. At all events, this Court has now acted on this basis in *Slaight Communications Inc. v. Davidson, supra*; see also the remarks of Linden J. in *Re McCutcheon and City of Toronto, supra*, at p. 202. On the assumption that the universities form part of the fabric of government, I would have thought their policies on mandatory retirement would amount to a law for the purposes of s. 15 of the *Charter*. Indeed, in most of the universities, these policies were adopted by the universities in a formal manner. That being so, the fact that they were accepted by the employees should not alter their characterization as law, although this would be a factor to be considered in deciding whether under the circumstances the infringement constituted a reasonable limit under s. 1 of the *Charter*. [emphasis added]

[72] The plaintiffs argue that s. 15 of the *Charter* should also apply to an entity that is not subject to government control but is delivering services that are truly governmental in nature under a contract. In my view, this is an incremental and principled extension of the Supreme Court of Canada's purposive interpretation of the *Charter*. A governmental activity carried out through a private entity that is not controlled by government should be carried out in a manner consistent with the *Charter*, whether that activity flows from legislation, government policy, or contract.

[73] Having determined that s. 15 can apply to a benefit delivered under a contract for the carrying out of an ascribed governmental activity, I return to the two-step test for discrimination articulated by the Court in *Kapp*.

1. Have the plaintiffs established differential treatment based on an enumerated ground?

[74] In order to determine whether the plaintiffs have established differential treatment cognizable as a breach of s. 15, Groberman J.A. in *McIvor v. Canada (Registrar of Indian and Northern Affairs),* 2009 BCCA 153, at para. 69 [*McIvor*], said this Court must consider three issues:

(1) What is the "benefit" that is in issue in the case?

(2) What is the appropriate comparator group? and

(3) Is the comparator group being treated more favourably than the plaintiffs?

[75] The benefit the plaintiffs seek is an opportunity to participate in the 2010 Games; more precisely, they seek to have an Olympic ski jumping event held for them as part of VANOC's mandate to plan, organize, finance, and stage the 2010 Games under the Multiparty Agreement. There is no dispute between the parties that the male ski jumpers form the appropriate comparator group; nor do they disagree that the plaintiffs are being treated less favourably and that this differential treatment is based on the enumerated ground of sex.

2. Does the differential treatment create a disadvantage by perpetuating prejudice or stereotyping?

[76] The second part of the test for discrimination involves consideration of whether the distinction based on enumerated or analogous ground creates a disadvantage by perpetuating prejudice or stereotyping. The starting point is McIntyre J.'s description of discrimination in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 174-75, 56 D.L.R. (4th) 1:

> … [D]iscrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

[77] In *Kapp*, McLachlin C.J. and Abella J. observed that the *Andrews* template for discrimination focussed on discrimination as a distinction that "has the effect of imposing burdens, obligations, or disadvantages" on an individual or group not imposed on others, while ten years later, in *Law*, the Supreme Court of Canada "suggested that discrimination should be defined in terms of the impact of the law or program on the 'human dignity' of members of the claimant group, having regard to four contextual factors": *Kapp* at paras. 18-19.

[78] Chief Justice McLachlan and Abella J. stated at para. 22:

> But as critics have pointed out, human dignity is an abstract and subjective notion that, even with the guidance of the four contextual factors, cannot only become confusing and difficult to apply; it has also proven to be an additional burden on equality claimants, rather than the philosophical enhancement it was intended to be. Criticism has also accrued for the way *Law* has allowed the formalism of some of the Court's post-Andrews jurisprudence to resurface in the form of an artificial comparator analysis focussed on treating likes alike. [footnotes omitted]

[79] They held that the analysis in a particular case should focus "on the factors that identify impact amounting to discrimination", the primary indicators of which relate to perpetuation of disadvantage and stereotyping: *Kapp* at paras. 23-24.

[80] The plaintiffs identify the IOC's application of its criteria for admitting new events to the Olympics as the source of discrimination. They argue that VANOC is in breach of the *Charter* because it is implementing the IOC's discriminatory decision.

[81] The analysis begins, therefore, with the IOC's criteria for the evaluation of new events. The criteria that were in force when the IOC made its decision not to

include women's ski jumping were set out in Rule 47 of the Olympic Charter, which stated in part:

> 3.2 To be included in the programme of the Olympic Games, events must have a recognised international standing both numerically and geographically, and have been included at least twice in world or continental championships.
>
> 3.3 Only events practised by men in at least fifty countries and on three continents, and by women in at least thirty-five countries and on three continents, may be included in the programme of the Olympic Games.

When the IOC adopted a new version of the Olympic Charter in 2006, these criteria were removed, but the IOC continues to apply them in practice.

[82] VANOC says that Rule 47 is not discriminatory because it applies equally to men and women, with the exception that it actually favours women by applying a lower threshold for inclusion of women's events. According to VANOC, there is no differential treatment because both men's events and women's events must meet fixed criteria in order to be added to the Olympic Programme.

[83] This was the approach adopted by the U.S. 9th Circuit Court in *Martin*. That case involved a challenge to the IOC's refusal to include 5,000 metre and 10,000 metre track events for women in the 1984 Los Angeles Games. In considering whether the predecessor rule (Rule 32) amounted to discrimination, the majority in *Martin* found at paras. 16-17:

> Rule 32 is facially gender-neutral. It describes the procedures for determining events to be included in the Olympic Games without referring to the competitors' sex[.]
>
> ….
>
> Similarly, rule 32 undeniably applies to both men and women athletes as it establishes criteria for adding *all* new events to the Olympic program. Indeed, the women runners' own brief concedes that forty-three new men's events have been added since 1949 – presumably under the process of rule 32 and its predecessors – while forty-eight new events have been added for women competitors during this same period. Thus, the women runners' argument that rule 32 is not gender-neutral is unpersuasive.
>
> [Emphasis in original]

The majority in *Martin* did not go beyond formal distinctions to consider adverse effects discrimination, in particular, whether the application of rules neutral on their face result in the unequal treatment of women who compete in events that are already included in the Olympics for men but not for women.

[84] In the case before me, men's ski jumping has been included in the Olympic Programme for the 2010 Games because it was, in effect, grandfathered. In 1949, the IOC adopted a rule to slow the rapid growth of the number of Olympic events within recognized sports. Rule 47 of the Olympic Charter was a successor to that rule. It allowed events which historically have been part of the Olympics, such as men's ski jumping, to continue as Olympic events, even if they did not meet the criteria for inclusion of new events. Rule 47(4.4) provided:

> 47(4.4) Sports, disciplines or events included in the programme of the Olympic Games which no longer satisfy the criteria of this rule may nevertheless, in certain exceptional cases, be maintained therein by decision of the IOC for the sake of the Olympic tradition. [emphasis added]

[85] Walter Sieber, who is a VANOC Board member, the COC vice-president and a member of the Olympic Committee's Olympic Games Programme Commission, deposed that the IOC refused to add women's ski jumping to the 2010 Games because "the level of competition had not yet developed sufficiently to be included in the Games". The IOC was of the view that women's ski jumping lacked the universality required under Rule 47(3.3).

[86] However, men's ski jumping also lacks the universality required under Rule 47(3.3), yet it remains an Olympic event because it falls into the "Olympic tradition" exception under Rule 47(4.4). While the Olympic Charter provides that the IOC can review existing events, there is no evidence that the men's ski jumping events were subjected to such a review.

[87] Currently, the International Ski Federation ("FIS") has registrations for male ski jumpers from 29 countries for all three events combined. That represents 58% of the required universality under Rule 47(3.3). The FIS has registrations for female ski

jumpers in 18 countries. That represents 52% of the required universality. Thus, both men's and women's ski jumping fall short of the required universality by approximately the same degree.

[88] The comparison to men's ski jumping on the large hill (the 120-metre jump) and women's on the normal hill (the 90-metre jump) is also illustrative. Since 2004, 12 nations medaled in 127 events held for men and 9 nations medaled in 91 events held for women.

[89] In 1949, when the Olympic tradition exception was created, the number of men's events far exceeded the number of women's events. This was the result of historic widely-held beliefs about the participation of women in competitive sport. As late as 1954, the IOC voted to limit women's participation to those events "particularly appropriate to the female sex": *Martin*. Sports Canada, a department of the Federal Ministry of Heritage, created a "Policy on Women in Sport" in 1986 to address the issue of exclusion of women from sport. It stated that "history has demonstrated that opportunities for women to develop either participants or leaders at any level in the sport system have been significantly fewer than those made available for men."

[90] The Olympic tradition exception under Rule 47(4.4) of the Olympic Charter gives an advantage to the comparator group that the plaintiffs do not enjoy; because men's ski jumping events have historically been part of the Olympic Programme, the IOC did not subject men's ski jumping events to its inclusion criteria. The women do not have the advantage of the Olympic tradition exception because historical stereotyping and prejudice prevented women from participating in ski jumping in sufficient numbers by 1949 to be included in the Olympics. Rule 47(4.4) perpetuates the effect of that prejudice and is, therefore, discriminatory.

[91] Whether this discrimination would be justifiable as a reasonable limit under s. 1 of the *Charter* in order to preserve Olympic traditions is a question I need not address at this stage of the inquiry.

[92] The plaintiffs argue further that the Olympic Charter standard for new events is in itself discriminatory because, even though it uses a lower standard for the addition of women's events generally, the criteria require a threshold number of nations, world class competitions, and athletes that sets the bar at a level that effectively eliminates women from ski jumping. They argue that historical stereotypes about women and barriers to their participation in ski jumping have been "headwinds" preventing them from reaching the numbers set by the IOC. The plaintiffs argue that:

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

[93] The plaintiffs led evidence in support of their submission that there has been historical prejudice against women in ski jumping. I place little weight on reports about comments made by spectators and officials that, while demeaning to women ski jumpers, are not proof of systemic disadvantage. I give some, although not significant, weight to Professor Patricia Vertinsky's opinion filed in support of the plaintiffs' case. Professor Vertinsky, who has studied the history of women's ski jumping, expressed the view that ski jumping has historically been considered inappropriate for women. She deposed that this view was "in part the result of a perception that women are medically at risk when ski jumping" because they are more frail than their male counterparts. Professor Vertinsky could say only that these views were "in part" responsible for a lack of sanctioned ski jumping events for women. According to her, this lack of sanctioned events, combined with societal pressures, "likely added to the effect of reducing the number of women participants in ski jumping until the late 1990's and early 2000's".

[94] I place significant weight on the evidence of the plaintiffs themselves. They have not been afforded the same financial support and training opportunities (both in terms of programs and facilities) as their male counterparts. The plaintiffs' affidavits describe:

- National organizations that have failed to establish teams for women or programs for women until very recently, despite women competing in the sport.

- The FIS' failure to establish any sort of circuit in which women could participate in ski jumping competitions until 2004.

- Male ski jumpers who have a four hills tournament (which, aside from the Olympics, is the most prestigious event in ski jumping), a world cup competition, a ski flying competition, world championship, and the Olympics; female ski jumpers who have only the continental cup and other smaller events such as national championships and who were finally included in the world championships only in the 2008/09 season.

- National organizations that have provided training and associated university education options for men that are not available to women who must choose between participating in competitions and a university education, or completing courses by correspondence.

[95] The thrust of the plaintiffs' evidence is that it has been difficult for women to get the training and support needed to reach a world class level, and that the FIS and its national counterparts have not organized a sufficient number of high level competitions for women to enable women to meet the Olympic criteria under Rules 47(3.2) and (3.3). This is a hurdle that these women cannot overcome by athleticism, perseverance, and dedication. The resulting exclusion of women's ski jumping from the Olympics perpetuates this disadvantage because a sport that is not an Olympic sport does not receive the same level of funding from national Olympic committees, nor does it attract the corporate sponsorships necessary to permit athletes to focus on a dedicated training program. A sport that is not an Olympic sport also does not receive the same exposure; it does not attract younger athletes in the same way. VANOC's documents on women's participation in sports note the

"explosion of participation" in women's hockey that accompanied its inclusion in the Olympic Programme.

[96] The plaintiffs argue that it is not enough for the IOC to say it "looks forward to welcoming women's ski jumping events in some future Olympics". They say that the historical hurdles and barriers have been so strong that the number of women ski jumpers is likely to decline if the sport is not included in the 2010 Games. For some of the plaintiffs, this will be their last chance to participate in the Olympics; Norwegian Annette Sagen and American Lindsey Van will both be 25 years of age during the 2010 Games. They will be 29 years of age in 2014.

[97] The assessment of discrimination under s. 15(1) takes into account how differential treatment affects the human dignity of the claimant. In *Law* at para. 53, Mr. Justice Iacobucci expressed the point in this way:

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

[98] Counsel for the plaintiffs described the importance to the plaintiffs of participation in the Olympics in this way:

> … [T]he recognition following on participation in the Olympics means that the time they have spent perfecting their ski jumping is equally worthy to that spent by their male colleagues. It is equal credit given for equal hard work. It is the fulfillment of a goal they share with the boys they train with but only the latter can reach. It is the fulfillment of a dream and the end of the sense that the women's sport is not worthy of the effort put into it. It is the mitigation of a frustration at banging at the door of a male world and being told that you

> cannot enter because you are a woman. It is the dream of doing something personally fulfilling. It is the end of a frustration and being seen as worthy of competing. It is affirmation of a life time of hard work. It is a spark of hope that women have opportunity too. It is validation that their efforts were not a hopeless futility. It is a hope for a future in which they can set goals and dream, just like the boys.

[99] While I agree that there have been "societal headwinds" that have made it difficult for women to meet the criteria for inclusion of an event in the Olympic Programme, I do not agree that the criteria for inclusion of new events are in themselves discriminatory. To the contrary, Rule 47(3.3) recognizes the historical disadvantage of women in sports and provides a lower "universality" standard for the inclusion of new women's events than it does for new men's events. If the IOC had applied the criteria for admission of new events to both men's and women's ski jumping events, neither group would be competing in the 2010 Games. As I have noted, the discrimination suffered by the plaintiffs in this case stems not from the criteria governing the addition of new events, but, rather, from the IOC's application of the "Olympic tradition exception" to men's ski jumping. Men can participate in the 2010 Games even though they do not meet the current standard for inclusion because men's ski jumping has traditionally been an Olympic event; women cannot participate in the 2010 Games because theirs is a new event and must, therefore, meet the criteria for the addition of an event to the Olympic Programme.

[100] Although intention is not relevant in a s. 15 analysis unless the purpose of the impugned law is to ameliorate disadvantages experienced by a marginalized group, I note that there is no evidence that the discrimination experienced by the plaintiffs in this case has been intentionally inflicted by the IOC. To the contrary, the IOC in recent years has supported the inclusion of women in the Olympics and in amateur sports. The Olympic Charter provides with respect to the IOC's role that it is, "to encourage and support the promotion of women in sport at all levels and in all structures with a view to implementing the principle of equality of men and women".

[101] The IOC has implemented a wide range of initiatives to increase women's involvement in leadership and administration within the Olympic movement and the

wider sporting community. The Women and Sport Commission was established to foster women's leadership in sports. The IOC has actively promoted increasing the number of women in its membership, and it established minimum targets for women's membership on National Olympic Committee Executives in an effort to spur greater participation of women among the IOC's partners in the Olympic movement.

[102] VANOC points out that these are not empty words or empty policies; women now compete in approximately 48% of the events at the Winter Olympics and the percentage of female athletes has steadily increased to just over 40%.

[103] In summary on this issue, I am satisfied that the differential treatment of the plaintiffs resulting from the application of the Olympic Charter Rules that grandfather men's ski jumping, while requiring women's ski jumping events to meet the criteria for inclusion of new events, discriminates against the plaintiffs in a substantive sense. This finding, however, does not equate to a breach of s. 15 of the *Charter* because the *Charter* does not apply to either the IOC or the Rules under the Olympic Charter. As noted above, the plaintiffs' claim is not against the IOC for refusing to add women's ski jumping to the Olympics, it is against VANOC for implementing that discriminatory decision. Thus, we come to the pivotal issue in the plaintiffs' case.

3. Is VANOC in breach of s. 15 by implementing the IOC's decision?

[104] As I have noted, the plaintiffs identify the IOC's application of Rule 47(3.3) of the Olympic Charter to women's ski jumping events, and not to men's ski jumping events, as the source of the discrimination. The IOC is not a party to this action because, as a Swiss-based organization, it is not itself subject to the *Charte*r; only VANOC is sued for breach of s. 15. The plaintiffs link VANOC to the IOC's decision by saying that VANOC is, under the Multiparty Agreement, implementing the IOC's discriminatory decision to exclude women's ski jumping.

[105] The plaintiffs say VANOC is planning, organizing, financing, and staging events in the discipline of ski jumping in partial fulfilment of an obligation to the government to plan, finance, organize, and stage the 2010 Games under Article 11.4(a) of the Multiparty Agreement, which provides as follows:

> 11.4 [VANOC] will:
>
> (a) organize, plan, finance, stage, manage, promote and conduct the Games in accordance with this Agreement, applicable governing agreements, the requirements of the IOC, and of any other person or entity with status to impose requirements related to the Games[.]

[106] No matter how the argument is framed, if the plaintiffs are to succeed in establishing a breach of their right to equality under s. 15 of the *Charter*, they must demonstrate that they are being denied a benefit of the law, which, in this case, manifests as a benefit of contract (the Multiparty Agreement and the Host City Contract). More precisely, the plaintiffs must show that they are being denied the benefit of VANOC's organizing, planning, and staging of the Games under the Multiparty Agreement and Host City Contract because VANOC has not organized, planned, and staged a ski jumping event for women.

[107] This is the plaintiffs' case at its highest: VANOC is carrying out the governmental activity of staging the 2010 Games; it is using significant public funds to build venues and support the 2010 Games, including the ski jump and the road to the ski jump; it is using these resources to put on three ski jumping events for men. The venue is there; it will be idle for days at a time, but VANOC is carrying out the IOC's decision and will not put on a ski jumping event for women.

[108] If the plaintiffs were asking VANOC to hold a ski jumping event for them at the Whistler Olympic Park during the 2010 Games as an exhibition event, this would be a different case, but that is not the benefit these plaintiffs say they are being denied. They say that VANOC must hold an Olympic ski jumping event for women in order to provide the plaintiffs with equal benefit of the Multiparty Agreement.

[109] The Multiparty Agreement provides under Article 11.4(a) that VANOC will:

> [O]rganize, plan, finance, stage, manage, promote and conduct the Games in accordance with this agreement, applicable governing agreements, the requirements of the IOC and of any other person or entity with status to impose requirements related to the Games. [emphasis added]

[110] The Host City Contract is a significant applicable governing agreement that sets out the detailed requirements of the IOC with respect to staging the 2010 Games. It provides under Article 32(a) that it is the IOC that sets "the programme of the Games (sports and disciplines)."

[111] There are three levels of competition at the Olympic Games: sports, disciplines, and events. Skiing is a sport, ski jumping is a discipline, and women's 90-metre ski jumping would be an event. Rule 47 of the Olympic Charter provides that the IOC determines which sports, disciplines, and events are included in the Games.

[112] The IOC decides at least seven years before an Olympic Games whether a sport will be included in that Games. The IOC Executive Board decides at least three years before an Olympic Games what disciplines and events will be included.

[113] The plaintiffs argue that by implementing the direction of the IOC not to plan, organize, finance, and stage a ski jumping event for women, VANOC imports the IOC's discrimination. The plaintiffs say that VANOC cannot do this and, in order to comply with s. 15 of the *Charter*, must disregard the direction of the IOC and plan, organize, finance, and stage a ski jumping event for women. It is the plaintiffs' view that the IOC can make decisions that draw distinctions between the benefits it provides to men and women in its activities in Switzerland, but VANOC cannot implement discriminatory decisions in carrying out the Olympic Programme in Canada.

[114] The plaintiffs say that in order to protect their human dignity interest ("their interest in not having their accomplishments, perseverance, efforts and athleticism demeaned and ignored"), VANOC is required to extend the scope of the benefit it

offers by "organizing, and planning" the 2010 Games to include a ski jumping event for women.

[115] The plaintiffs' argument shifted away from this position during the hearing. At the conclusion of the hearing, counsel acknowledged, correctly in my view, that VANOC does not have the capacity to stage any Olympic ski jumping events for women at the 2010 Games. That is so for a number of legal and practical reasons.

[116] First, the IOC owns and governs the Olympics. If an entity, including a government, tried to stage the "Olympic Games" without the IOC's permission, no one would actually consider the event to be the Olympics. Similarly, if VANOC attempted to hold additional events during the 2010 Games, contrary to the decision of the IOC, no one would actually consider those events to be Olympic. Those events would always be regarded as something else. The simple fact is that only the IOC may grant the imprimatur of "Olympic".

[117] Further, if VANOC tried to hold a women's ski jumping event without the IOC's permission, VANOC could not make that event happen. The actual staging of Olympic events requires not only the local organizing committees' efforts, but also participation by international sports federations and the national Olympic committees, all of whom are part of the Olympic movement and are under the authority of the IOC. It is the international sports federations that actually oversee the events at Olympic Games, and provide the officials and judging for the events. The FIS, the international federation responsible for ski jumping, has specifically stated that it has accepted the IOC's decision with respect to women's ski jumping; it has reiterated in the context of this litigation that the FIS is under the authority and instructions of the IOC; it says that the IOC determines the Olympic Programme and that it will not take instructions from VANOC in this regard.

[118] Similarly, it is the national Olympic committees that select the athletes to be brought to the 2010 Games on their national teams. Those committees are the IOC's ambassadors in their respective countries. They receive most of their funding from the IOC; they are subject to its authority and instructions. If VANOC attempted to

hold a women's ski jumping event at the 2010 Games, it is most unlikely that the national Olympic committees would act contrary to the direction of the IOC.

[119] The plaintiffs have, in the past, recognized that the IOC must make the decision to include women's ski jumping in order for it to be considered "Olympic". Prior to commencing this litigation, the plaintiffs focussed on having VANOC lobby for inclusion of women's ski jumping. To that end, they commenced a Human Rights complaint. That complaint (before the Canadian Human Rights Commission) was brought against the Government of Canada by Jan Willis "on behalf of the athletes who are members of the Canadian ski jumping team, on behalf of proponents of women's ski jumping and on behalf of Canadians who support gender equality". The relief sought in that complaint was as follows:

> The Department of Canadian Heritage, in concert with other government officials, must put pressure on the IOC to reverse the decision and remove the shadow from the 2010 Olympics. The IOC's disrespect of Canadian values of gender equity should not go unchallenged by the federal government.
>
> If the IOC refuses to reverse the situation, the Department of Canadian Heritage, as a major event funder, should be required to offset the negative consequences of the exclusion of women's ski jumping from the 2010 Olympics. This would include measures such as funding an international-level women's competition in 2010 as an alternative to the Olympics and also ensuring federal funding for Canadian women ski jumpers in lieu of funds they would otherwise have been entitled to receive but for the IOC decision.

[120] Ms. Willis and the Government of Canada settled in the course of mediation, with Canada agreeing to lobby the IOC for inclusion of women's ski jumping.

[121] VANOC cannot be held to be in breach of the *Charter* in relation to decisions that it cannot control. VANOC did not make the decision to exclude women's ski jumping from the 2010 Games. VANOC did not support that decision. VANOC does not have the power to remedy it.

[122] I note parenthetically that this is not a case in which the plaintiffs have argued that VANOC made a decision within its control to <u>accept</u> the discriminatory decision of the IOC. When VANOC entered into the Multiparty Agreement, the Programme for

the 2010 Games had not yet been set. Indeed, it was anticipated that women's ski jumping would be an Olympic event in the 2010 Games. Further, VANOC knew that the IOC has policies in place to encourage the participation of women in sports that are consistent with the *Charter* value of substantive equality.

[123] In my view, having found that VANOC is subject to the *Charter* with respect to ascribed activities that are governmental in nature, it must follow that only those activities and the decisions that VANOC has the ability to make while delivering those activities can be the source of a breach of the *Charter*. Staging the 2010 Games is a governmental activity. VANOC must therefore stage the Games in a manner consistent with the *Charter*. However, designating events as "Olympic events" is neither part of that governmental activity nor within VANOC's control.

[124] I acknowledge that there is something distasteful about a Canadian governmental activity subject to the *Charter* being delivered in a way that puts into effect a discriminatory decision made by others, but it is VANOC's conduct that is challenged here. It must be remembered that, in addition to not having control of the impugned decision, VANOC supported inclusion of women's ski jumping and remains ready and willing to host such an event should the IOC change its decision. There may be exceptions to the general principle that a party should only be found to be in breach of the *Charter* when the impugned decision is within its authority to make and amend, but if they exist they would be extremely rare, and this is not such a case.

[125] I find support for this approach in the judgment of McLachlan C.J. for a unanimous Court in *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78, [2004] 3 S.C.R. 657, a case involving a challenge to the British Columbia Medical Services Commission's alleged failure to fund ABA/IBI therapy for autism. The lack of funding was said to constitute discrimination on the basis of disability.

[126] Ultimately, the Court in *Auton* dismissed the s. 15 claim on the basis that because the law did not provide funding for all medically necessary treatments, there

had been no breach of the duty to provide that benefit without discrimination. Chief Justice McLachlin stated at para. 37:

> It followed that the Medical Services Commission, charged with administration of the *MPA*, had no power to order funding for ABA/IBI therapy. The Commission, as an administrative body, had no authority to enlarge the class of "health care practitioners". That could be done only by the government. Since the government had not designated ABA/IBI therapists as "health care practitioners", the Commission was not permitted to list their services for funding. This is how things stood at the time of trial. British Columbia's law governing non-core benefits did not provide the benefit that the petitioners were seeking. [emphasis added]

[127] In the case at bar, VANOC is akin to the Medical Services Commission, in that it is charged with staging the events included in the Programme by the IOC. That is, just as the Medical Services Commission had no power to order funding for ABA/IBI therapy, VANOC has no power either to order the inclusion of women's ski jumping in the Olympic Programme or to order the removal of men's ski jumping from the 2010 Games. In other words, VANOC is not under a duty to distribute equally what it has no power to provide.

[128] While in *Auton* the Court was concerned with whether a benefit was available under a legislative scheme, it also stands for the proposition that an entity cannot be in breach of the *Charter* in respect of a decision that it does not have the power to make.

[129] In summary on this issue, VANOC is not in breach of s. 15 of the *Charter* by staging the Programme of Olympic events determined by the IOC.

III. Section 1 of the *Charter*

[130] Having decided that VANOC is not in breach of s. 15 of the *Charter*, I need not address the arguments made under s. 1.

SUMMARY

[131] The IOC made a decision that discriminates against the plaintiffs. Only the IOC can alleviate that discrimination by including an Olympic ski jumping event for women in the 2010 Games.

[132] There will be little solace to the plaintiffs in my finding that they have been discriminated against; there is no remedy available to them in this Court. But this is the outcome I must reach because the discrimination that the plaintiffs are experiencing is the result of the actions of a non-party which is neither subject to the jurisdiction of this Court nor governed by the *Charter*. The plaintiffs' application is, therefore, dismissed.

[133] The parties may speak to costs if they are in issue.

The Honourable Madam Justice L. A. Fenlon