

**IN THE SUPREME COURT OF CANADA**  
(ON APPEAL FROM THE BRITISH COLUMBIA COURT OF APPEAL)

BETWEEN:

ANETTE SAGEN, JENNA MOHR, LINDSEY VAN, JESSICA JEROME,  
ULRIKE GRASSLER, MONIKA PLANINC, 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  
APPLICANTS  
(PLAINTIFFS)

AND:

VANCOUVER ORGANIZING COMMITTEE FOR THE 2010 OLYMPIC AND  
PARALYMPIC WINTER GAMES  
RESPONDENT  
(RESPONDENT)

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**MEMORANDUM OF ARGUMENT**

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## PART I

### STATEMENT OF FACTS

#### Introduction

1. The 2010 Olympic Games are “Canada’s Games”. The Respondent, the Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games (“VANOC”), describes their purpose as follows on its website:

The Vancouver 2010 mission is to touch the soul of the nation and inspire the world by creating and delivering an extraordinary Olympic and Paralympic experience with lasting legacies.

2. One of the “lasting legacies” of the 2010 Games will be their sexism. VANOC, the entity charged with planning, organizing, financing and staging – “hosting” for short – the Games, will be putting on three ski jumping events for men, but none for women. In a finding not disturbed on appeal, the trial judge concluded that this discriminates against the Applicants, elite women ski jumpers, solely on the basis of their sex, and that it perpetuates historical prejudice against women.

3. The hosting of the 2010 Games is a “rare but uniquely governmental activity” subject to the *Canadian Charter of Rights and Freedoms*, as the trial judge found. Despite that, the courts below refused to grant the Applicants a declaration that the discriminatory hosting of the Games violates their equality rights under s. 15(1) of the *Charter*. They held that the *Charter* cannot reach VANOC’s discriminatory hosting because VANOC is a private entity merely following orders.

4. According to the courts below, VANOC has “no choice” but to implement the discriminatory decision of a foreign entity that is beyond the reach of Canadian courts, namely, the International Olympic Committee (“IOC”). The courts focused on the IOC’s contractual powers over VANOC. But it is VANOC’s own conduct that is at issue here, and its constitutional obligations as an entity carrying out a government activity.

5. The proposed appeal raises three interrelated issues of national and public importance:
- (a) Should Canada be hosting discriminatory Games? The governments of Canada, British Columbia and Vancouver are promoting the Games as a source of pride for all Canadians. But the discriminatory exclusion of women ski jumpers from the Games – an exclusion that offends our most fundamental values – stains our international reputation and is an embarrassment to us all.
  - (b) Can an activity, undertaken pursuant to a government contract, that implements the discriminatory decision of a third party meet the “ascribed activity” test under s. 32 of the *Charter*? The Applicants say that the judgments below effectively exempt from the *Charter* any government activities that implement the decisions of contractual partners.
  - (c) For the purpose of the equality guarantee under s. 15(1) of the *Charter*, is a benefit provided by an entity carrying out a government activity a “benefit of the law” only if the benefit is directly derived from statutory authority, and only if government controls its distribution? The Applicants say that the approach of the Court of Appeal defeats the purposive interpretation of the *Charter*, because it effectively immunizes the under-inclusive provision of a benefit under a government contract against *Charter* scrutiny.
6. To allow the decision of the Court of Appeal to stand would be a fundamental retreat from the progressive nature of the equality jurisprudence this Court has fashioned over the last two decades. The concerns this raises are particularly acute because the Court of Appeal decided that the discrimination is sheltered under a government contract – increasingly, a pre-eminent instrument of governmental policy-making.

### **Facts relating to the discrimination**

7. Men have been ski jumping in the Olympic Games since 1924. Although men's ski jumping does not meet the IOC's own threshold for inclusion in the Games, it has always been grandfathered as an Olympic event.<sup>1</sup>

8. Women have never been allowed to ski jump in the Olympics. For a long time, this was based on historical prejudice about the sport not being "appropriate to the female sex". That prejudice set in motion a vicious circle of sexism. Women's past exclusion from the sport was, and is, used to justify their present exclusion. Because women's ski jumping is not an Olympic sport, it does not attract the same funding, commercial sponsorships, or public exposure as men's ski jumping. All of this conspires to keep women ski jumpers from reaching the level deemed necessary for inclusion in the Olympics by the IOC. As the trial judge found, "this is a hurdle these women cannot overcome by athleticism, perseverance, and dedication."<sup>2</sup>

9. Despite the difficulties the Applicants personally have had in getting training and support, they have managed to reach the top levels in their sport. In fact, the current record, male or female, for the 90-metre jump at Whistler is held by Lindsay Van, one of the Applicants.<sup>3</sup> Even now, there are enough qualified women ski jumpers to put together a compelling competition in women's ski jumping for the 2010 Olympics.<sup>4</sup>

10. The trial judge found that the differential treatment of the Applicants in excluding them from the 2010 Games discriminates against them in a substantive sense for the purposes of s. 15(1) of the *Charter*.<sup>5</sup> The Court of Appeal did not disturb that finding.

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<sup>1</sup> BCSC, paras. 84, 86, 90

<sup>2</sup> BCSC, paras. 89-95

<sup>3</sup> BCSC, para. 66

<sup>4</sup> see Affidavit of J. Horswill

<sup>5</sup> BCSC, para. 103

### **Facts relating to the hosting of the 2010 Games**

11. Hosting the 2010 Games is a mammoth and *sui generis* activity. The trial judge concluded that it is an activity that could not have been undertaken by anyone but government, and that it is uniquely governmental in nature.<sup>6</sup> The Court of Appeal did not disturb that finding.

12. The complex chain of events leading to VANOC's hosting of the Games was formally set in motion in November 2002, when the governments of Canada, British Columbia, Vancouver and Whistler, and other entities entered into a "Multiparty Agreement" to bid for the selection of Vancouver as the host city for the 2010 Games.<sup>7</sup> The IOC would not have awarded the 2010 Games to Vancouver without the backing of all four governments.<sup>8</sup> One of the terms of the Multiparty Agreement, as required by the IOC, was that Vancouver would have to incorporate an Organizing Committee, or OCOG, to take on the responsibility of planning, organizing, financing, and staging the Games, if the bid succeeded.<sup>9</sup>

13. After the IOC selected Vancouver as host city, the City (and the Canadian Olympic Committee) signed a "Host City Contract" with the IOC on July 2, 2003. The Host City Contract "entrust[ed] the organization of the Games to the City". Again, it required the City to incorporate the OCOG to take on the responsibility of hosting the Games, and to cause the OCOG to be made a party to the Host City Contract.<sup>10</sup>

14. Vancouver incorporated VANOC as OCOG some four months later. Vancouver gave VANOC the purposes it had agreed to in the Multiparty Agreement and the Host City Contract, and made it a party to the Host City Contract, responsible for hosting the Games. VANOC has no other mandate. It is a federal not-for-profit corporation and will be wound up when the Games are over.<sup>11</sup>

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<sup>6</sup> BCSC, paras. 58, 63

<sup>7</sup> BCSC, para. 9; Multiparty Agreement

<sup>8</sup> BCSC, para. 62

<sup>9</sup> Multiparty Agreement, Preamble B, E & F, clauses 2, 3

<sup>10</sup> BCSC, para. 59; Host City Contract, clauses 1, 2, 3

<sup>11</sup> Multiparty Agreement, clause 29.1

15. Vancouver remains a party to the Host City Contract and remains bound by its obligations.<sup>12</sup> The Contract makes Vancouver financially liable to the IOC. British Columbia has guaranteed that liability. The real cost to the provincial government of hosting the Games is, so far, estimated at \$2.5 billion.<sup>13</sup>

16. The governments expressly made VANOC subject to certain obligations relating to matters such as official languages, tobacco advertising, and procurement of goods.<sup>14</sup> They did not expressly specify that VANOC is subject to the *Charter* or, for that matter, any number of other statutes or regulations.

17. The governments of Canada, British Columbia, Vancouver, and Whistler have significant involvement with VANOC. Ten of VANOC's 20 directors are directly appointed by government.<sup>15</sup> The governments are kept informed about VANOC's financial affairs and are directly involved in significant budget decisions.<sup>16</sup> They have high-level planning input.<sup>17</sup>

18. However, it is the IOC that exercises day-to-day control of VANOC's operations.<sup>18</sup> The Olympic Games are the exclusive property of the IOC. Thus, the IOC alone controls the selection of the slate of sports (such as skiing), disciplines (such as ski jumping), and events (such as the men's 90 metre ski jumping event) for the Games.<sup>19</sup>

19. Only the IOC has the authority to add or cancel events. This is not in issue.<sup>20</sup>

20. In November 2006, the IOC decided that VANOC should not plan, organize, finance or stage even one women's ski jumping event for the 2010 Games.<sup>21</sup> On the other hand, the IOC is requiring VANOC to plan, organize, finance and stage three ski jumping events for men.

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<sup>12</sup> BCCA, para. 13, Host City Contract, clause 4

<sup>13</sup> BCSC, para. 59

<sup>14</sup> BCSC, para. 63

<sup>15</sup> BCSC, paras. 18, 24

<sup>16</sup> BCSC, para. 29

<sup>17</sup> BCSC, paras. 30, 32

<sup>18</sup> BCSC, para. 40

<sup>19</sup> BCCA, paras. 15, 16

<sup>20</sup> BCCA, para. 21

<sup>21</sup> BCCA, para. 20

## Proceedings below

21. The Applicants brought an action 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 section 1.

22. The Applicants carefully tailored the relief they are seeking to be as modest as possible. The Applicants have long acknowledged that VANOC cannot, on its own, add a ski jumping event for them or cancel the men's events.<sup>22</sup> Nor do they want to be the cause of the men's events being cancelled.<sup>23</sup>

23. There was no evidence – whether at trial or on the expedited appeal below – that the IOC would be likely to cancel the men's events if the court issued a declaration that VANOC's hosting of the men's events violates the Applicants' equality rights.<sup>24</sup>

24. Despite the Applicants' repeated and emphatic insistence in the courts below that their claim of discrimination does not attack *the IOC's decision* to exclude them, but rather *VANOC's own conduct in giving effect to that discrimination* by depriving them of a benefit it is providing to their male peers, both courts below dismissed the Applicants' claim on the basis that VANOC is merely carrying out the IOC's decision, a decision beyond the reach of the *Charter*.

25. The Applicants have not sued the IOC. They have never disputed that its decision is beyond the reach of the *Charter*.

26. Neither court answered the real question asked by the Applicants, namely, whether VANOC has a constitutional obligation to refuse to implement the discriminatory decision of the IOC, regardless of whether this may put it in breach of its obligations under the Host City Contract.

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<sup>22</sup> BCSC, para. 5; Affidavit of J. Horswill, para. 11

<sup>23</sup> Affidavit of J. Horswill, paras. 15-17

<sup>24</sup> BCSC, para. 6

27. The trial judge made the following findings:

- (a) VANOC's hosting of the Games is a government activity for the purpose of s. 32;
- (b) the hosting of ski jumping events is a benefit of the law for the purpose of s. 15(1);
- (c) the differential treatment of the Applicants inherent in VANOC's hosting of ski jumping events only for men discriminates against the Applicants in a substantive sense.

28. The trial judge dismissed the Applicants' claim because, in her view, the decision not to include a ski jumping event for women was not part of the governmental activity of hosting nor within VANOC's control.<sup>25</sup> She acknowledged, however, that there was "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".<sup>26</sup>

29. The Court of Appeal agreed with the trial judge in the result, and did not interfere with her findings that VANOC's hosting of the Games is a government activity for the purpose of s. 32, or that VANOC's differential treatment of the Applicants discriminates against them. However, the Court reached its result in a different way.

30. According to the Court, the question before it was "whether a contract entered into by government to provide infrastructure and to make up any shortfall in paying for the liability of the Games falls within the 'ascribed activity' test" under s. 32.<sup>27</sup> Although Vancouver remains fully liable under the Host City Contract,<sup>28</sup> the Court decided to analyze the question it had asked itself from the perspective that only VANOC, "but not government", is a party to that contract.<sup>29</sup>

31. The Court approached that question from the premise that the relevant activity sought to be ascribed was "the selection of the events to be staged" because this, it said, was "the nub of the Appellants' complaint".<sup>30</sup> The Court did not consider whether VANOC's implementation of

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<sup>25</sup> BCSC, paras. 121, 123, 124

<sup>26</sup> BCSC, para. 124

<sup>27</sup> BCCA, para. 38

<sup>28</sup> BCCA, para. 13

<sup>29</sup> BCCA, paras. 44, 62.

<sup>30</sup> BCCA, paras. 39, 46

that selection – which *was* in fact the nub of the Applicants’ complaint – was an activity to be ascribed to government.

32. The Court held that “deciding what events to include in the 2010 Games is not an activity to which the *Charter* applies”, and dismissed the Applicants’ claim on that basis.<sup>31</sup>

33. The Court held, alternatively, that the Applicants’ claim also failed because VANOC’s hosting of ski jumping events at the 2010 Games was not a “benefit of the law” for the purpose of s. 15(1). According to the Court, the benefits of hosting ski jumping events are derived from the decision of the IOC to hold an event, not from government. Moreover, it held, the IOC’s decision to deprive women of that benefit had not been “endorsed” by VANOC.<sup>32</sup>

34. The Court concluded that the benefit of the law under s. 15(1) must typically be derived from statutory authority, and that the present case “does not involve the exercise of any power flowing from the Crown.”<sup>33</sup> VANOC, it said, was just “a private corporation with the powers of an ordinary person”.<sup>34</sup> Because the discriminatory decision was not itself “embodied” in the contracts that oblige VANOC to host the men’s ski jumping events, the Applicants were not deprived of the equal benefit of the law.<sup>35</sup>

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<sup>31</sup> BCCA, para. 50

<sup>32</sup> BCCA, para. 56

<sup>33</sup> BCCA, para. 62

<sup>34</sup> BCCA, para. 63

<sup>35</sup> BCCA, para. 64

## PART II

### QUESTIONS IN ISSUE

35. The application for leave to appeal raises the following questions of national and public importance:

- (a) Should Canada be hosting discriminatory Olympic Games?
- (b) Can an activity, undertaken pursuant to a government contract, that implements the discriminatory decision of a third party meet the “ascribed activity” test under s. 32 of the *Charter*?
- (c) For the purpose of the equality guarantee under s. 15(1) of the *Charter*, is a benefit provided by an entity carrying out a government activity a “benefit of the law” only if the benefit is directly derived from statutory authority, and only if government controls its distribution?

**PART III**  
**ARGUMENT**

**1. Should Canada be hosting discriminatory Olympic Games?**

36. The Olympic Games are more than just commercial property or a financial enterprise. Their success requires an enormous commitment of money, time and effort from the citizens and governments of Canada, British Columbia, Vancouver and Whistler. For weeks, British Columbians will be directly and significantly inconvenienced by the Games: closures will affect courts, schools, universities, roads, and much of downtown Vancouver. Entirely apart from the fact that hosting the Games is a governmental activity in law, hosting is truly a Canadian activity.

37. Necessarily, therefore, it is an issue of national and public concern that this activity is being carried out in a manner that perpetuates discrimination against women. In the Multiparty Agreement, the Canadian government said that it regards the hosting of the Games “as an event of national significance”, and that it wants to ensure that the Games “will be a matter of pride to all Canadians and a credit to Canada abroad.”<sup>36</sup> Not surprisingly, the present litigation has attracted significant attention, both nationally and internationally. That VANOC’s hosting of the Games discriminates against women is an issue that goes well beyond the Applicants.

38. The courts below sidestepped that issue. They focused their attention on the IOC’s decision, and considered whether the *Charter* extends to that decision. Neither court adjudicated the gravamen of the Applicants’ claim: that it is VANOC’s conduct, not that of the IOC, that must conform with our Constitution.

39. “I have no choice but to follow orders” is an excuse with chilling pedigree. The import of the decisions below is that VANOC would be equally bound to implement discrimination against – for example – Blacks, Jews, or Muslims in the hosting of the Games. But VANOC does have a choice. It has the choice to refuse to perpetuate discrimination. More than that, it has the

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<sup>36</sup> Multiparty Agreement, Annex E

obligation to do so, because it is carrying out a government activity. Contractual duties cannot trump constitutional duties.

40. By accepting that the Applicants are being discriminated against, yet refusing to declare this to the world, the decisions below effectively treat this discrimination as unobjectionable. In itself, this perpetuates the attitude that each of the Applicants is “less worthy of recognition or value as a human being or as a member of Canadian society”.<sup>37</sup> This defeats the core purpose of s. 15(1).

41. Jurisprudence works to produce the reality in which we live; it does not merely reflect it. As this Court put it in *Vriend v. Alberta*.<sup>38</sup> “It can never be forgotten that discrimination is the antithesis of equality and that it is the *recognition* of equality which will foster the dignity of every individual.”

42. Violations of fundamental human rights are therefore a serious matter both for those who suffer from the violation and the public in general. Many of the individual rights protected in the *Charter* also have a broader, societal dimension, and it is consistent with both the purpose and the spirit of the *Charter* to look beyond the immediate parties to the litigation.<sup>39</sup>

43. The notion that the *Charter* does not protect women against discrimination effected by a Canadian corporation carrying out a government activity on Canadian soil flies in the face of that approach. The Court of Appeal said that VANOC has not “endorsed” the IOC’s discrimination.<sup>40</sup> With respect, it is difficult to imagine a more effective form of endorsement than the implementation of that discrimination by VANOC.

44. If the ascribed activity test is truly impotent to reach such discrimination, solely because government has given a third party a contractual power to impose it, then the ascribed activity test is inadequate. And if the benefit of VANOC’s hosting of the Games is not a “benefit of the law” simply because government has abdicated to a third party the right to control its distribution, then s. 15(1) must be revisited.

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<sup>37</sup> *Law v. Canada (Min. of Employment and Immigration)*, [1999] 1 S.C.R. 497, paras. 42, 51, 53, 54

<sup>38</sup> *Vriend v. Alberta*, [1998] 1 S.C.R. 493, para. 69, emphasis added

<sup>39</sup> *R. v. O’Connor* (1995), 130 D.L.R. (4<sup>th</sup>) 235 (S.C.C.), para. 64

<sup>40</sup> BCCA, para. 56

**2. Can an activity, undertaken pursuant to a government contract, that implements the discriminatory decision of a third party meet the “ascribed activity” test under s. 32 of the Charter?**

45. Section 32 makes the *Charter* applicable to government. If a private entity engages in an activity that can be attributed to government, the *Charter* will apply to this as well, even if the entity is not directly controlled by government. The issue is whether the activity in question “can fairly be said [to be] that of government” or is “truly” or “inherently governmental”.<sup>41</sup>

46. Given the ever-evolving nature of government, the concern is with the reality of the situation, not its form. La Forest J. explained this in *Lavigne v. O.P.S.E.U.*:<sup>42</sup>

In today’s world it is unrealistic to think of the relationship between those who govern and those who are governed solely in terms of the traditional law maker and law subject model. We no longer expect government to be simply a law maker in the traditional sense; we expect government to stimulate and preserve the community’s economic and social welfare. In such circumstances, government activities which are in form “commercial” or “private” transactions are in reality expressions of government policy, be it the support of a particular region or industry, or the enhancement of Canada’s overall international competitiveness. In this context, one has to ask: why should our concern that government conform to the principles set out in the *Charter* not extend to these aspects of its contemporary mandate?

47. Because government is protean, there is no fixed or rigid test for when an activity should be ascribed to government. As this Court said in *Eldridge v. B.C.*,<sup>43</sup> 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.” At bottom, it is the very purpose of the *Charter* that must inform the proper approach, namely, “to constrain governmental action inconsistent with [the] rights and freedoms” it enshrines.<sup>44</sup>

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<sup>41</sup> *Eldridge v. British Columbia*, [1997] 3 S.C.R. 624, paras. 41-42

<sup>42</sup> *Lavigne v. O.P.S.E.U.*, [1991] 2 S.C.R. 211 at 314

<sup>43</sup> *Eldridge*, supra, para. 42

<sup>44</sup> *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at 156

48. The *Charter* applies to private entities insofar as they act in furtherance of a specific government program or policy, as long as there is a “direct and precisely-defined connection” between the program or policy and the activity of the private entity.<sup>45</sup> This Court explained the underlying rationale in *Eldridge*:<sup>46</sup>

In these circumstances, while it is a private actor that actually implements the program, it is government that retains responsibility for it. The rationale for this principle is readily apparent. Just as governments are not permitted to escape *Charter* scrutiny by entering into commercial contracts or other “private” arrangements, they should not be allowed to evade their constitutional responsibilities by delegating the implementation of their policies and programs to private entities.

49. The chain of contracts that, in the present case, imposes on VANOC the obligation to host the Games falls within the very heart of this rationale. That the hosting of the Games implements the governmental policies or programs of Canada, British Columbia and Vancouver can hardly be in doubt, given those governments’ many public pronouncements to that effect. There was ample evidentiary support for the trial judge’s conclusion that hosting the Games is “a rare but uniquely governmental activity”,<sup>47</sup> and the Court of Appeal took no issue with it.

50. And yet the Court of Appeal ultimately concluded that VANOC’s implementation of the IOC’s discrimination is not part of that governmental activity because it is directly controlled by the IOC, not by the governments. That raises an important question: does the ascribed activity test apply only to activities over which government retains control, or does it also capture activities the control of which government has, by contract, abdicated to a third party?

51. The rationale for the test, set out above in *Eldridge*, suggests that the *Charter* should not be ousted when government agrees to confer control over an otherwise governmental activity to a foreign entity. The decision of the Court of Appeal carves a large exception out of the scope of government activities under the “ascribed activity” test, by exempting from *Charter* scrutiny any aspect of an activity over which government has by contract ceded control to a third party. This

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<sup>45</sup> *Eldridge*, supra, para. 51

<sup>46</sup> *Eldridge*, supra, para. 42

<sup>47</sup> BCSC, para. 56, 63

exception is particularly striking where, as here, the private entity is engaging in the very activity for which government itself has created it.

52. This Court dealt with a somewhat analogous situation in *Lavigne*, supra, where La Forest J. said:<sup>48</sup> “As I observed in *McKinney*, that a particular measure can be attributed to the initiative of a private party, as opposed to the government . . . does not *ipso facto* preclude a finding of government action.” What remains unclear is at what level the initiative of a third party overwhelms the governmental nature of the activity. Neither *Lavigne* nor *Eldridge* provides guidance on this point.

53. It may be that the Court of Appeal got confused about the facts on which it based its conclusion with respect to s. 32. Vancouver was, of course, a crucial party to the Host City Contract and remains liable under it, and it seems that the Court initially appreciated this.<sup>49</sup> Yet later in its reasons, the Court asked itself whether the Host City Contract “to which VANOC, but not government, is a party, can correctly be viewed as a matter within the authority of government under s. 32 of the *Charter*.”<sup>50</sup> To what extent that factual misunderstanding influenced the Court’s conclusion is unclear from its reasoning.

54. *Eldridge* is the last case in which this Court has comprehensively addressed the ascribed activity test. Given the ever-changing channels through which government conducts its activities, the loophole created by the Court of Appeal opens the door to the removal of many more governmental activities from *Charter* review. Indeed, the fact that the Court of Appeal should have adopted this approach to evaluate so important an activity as the hosting of “Canada’s Games” proves the point, and warrants guidance from this Court.

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<sup>48</sup> *Lavigne*, supra, at 313-314

<sup>49</sup> BCCA, para. 13

<sup>50</sup> BCCA, para. 44

**3. For the purpose of the equality guarantee under s. 15(1) of the Charter, is a benefit provided by an entity carrying out a government activity a “benefit of the law” only if the benefit is directly derived from statutory authority, and only if government controls its distribution?**

55. Section 15(1) provides:

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 . . . sex . . .

56. The s. 15(1) guarantee of equality “is the broadest of all guarantees” under the *Charter*, and the right to the equal benefit of the law is a basic one.<sup>51</sup> Accordingly, the “benefit of the law” has been broadly construed. The majority of this Court said in *Stoffman v. V.G.H.*,<sup>52</sup> a case dealing with the internal policy of a hospital adopted in reference to a regulation:

It would be incongruous if our entitlement to equality “before and under the law” and to the “equal protection and equal benefit of the law” did not reach the manner in which a law was interpreted and enforced by those charged with its operation. It will often be this process of interpretation and enforcement that determines the impact that a law has on the lives of those who come within its scope.

57. The proposed appeal raises the question what the “benefit of the law” is where the government activity in question is an ascribed activity being performed under a government contract. This Court has previously held that a benefit delivered under a contract of a government-*controlled* entity (within the meaning of s. 32) is a benefit of the law;<sup>53</sup> and, of course, that a government activity performed by a private entity comes within the *Charter* if it meets the ascribed activity test.<sup>54</sup> However, this Court has not yet analyzed what the “benefit of the law” means when it is being delivered under an ascribed activity arising by government contract.

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<sup>51</sup> *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 170; *Law v. Canada*, supra, para. 88

<sup>52</sup> *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483 at 517

<sup>53</sup> *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570 at 585-86; *McKinney v. University of Guelph*, [1990] 3 S.C.R. 230 at 276

<sup>54</sup> *Eldridge*, supra

58. As the conflicting reasoning of the courts below shows, that question raises two fundamental issues of *Charter* interpretation.

59. First of these is whether a benefit delivered by a private entity performing an ascribed activity by virtue of a government contract can be a benefit of the law at all. The trial judge said it could. In her view, this was but an incremental and principled extension of this Court's purposive interpretation of the *Charter*. She concluded that 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."<sup>55</sup>

60. The Court of Appeal said she was wrong. It said that only "deliberately and formally adopted policies of government" may constitute "law" for the purposes of s. 15(1).<sup>56</sup> It said that "an action or provision will typically be considered 'law' only if its validity derives from statutory authority", though it left open the possibility that action authorized by royal prerogative or the "ordinary" powers of the Crown might be considered "law".<sup>57</sup> In the Court's view, VANOC had been delegated no "additional powers" by the Crown,<sup>58</sup> and therefore the case did "not involve the exercise of any power flowing from the Crown."<sup>59</sup>

61. Effectively, therefore, the Court of Appeal would exempt from compliance with s. 15(1) any ascribed activity that is delegated by government contract rather than by legislation. The issue is important, because "Canadian governments do almost all of their business and much of their policy-making through contracts . . . And, increasingly, what an earlier era saw as core functions of government . . . are provided for through legally binding agreements with private parties."<sup>60</sup>

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<sup>55</sup> BCSC, para. 72

<sup>56</sup> BCCA, para. 60

<sup>57</sup> BCCA, para. 62

<sup>58</sup> BCCA, para. 63

<sup>59</sup> BCCA, para. 62

<sup>60</sup> Horsman & Morley, *Government Liability: Law and Practice* (Aurora, Ont.: Canada Law Book), looseleaf ed., para. 2.10, citing Industry Canada, *Public-Private Partnerships: A Canadian Guide* (Ottawa: 2001)

62. The reasoning of the Court of Appeal on this point is fraught with difficulties. VANOC was created by the Crown (i.e., Vancouver) by letters patent expressly and solely for the purpose of hosting the Games.<sup>61</sup> Vancouver made VANOC a party to the Host City Contract, and thus made it responsible for the obligations and rights that, together, make up the hosting of the Games – VANOC would not, otherwise, have had that power. The governments did expressly delegate to VANOC the responsibility of hosting – and thus, the responsibility of providing the benefits of hosting – when they entered into the Multiparty Agreement and the Host City Contract.

63. In light of this, the Court of Appeal's insistence on a formal statutory basis for the benefit of the law leaves open the question why government contracts that were so carefully designed should not be regarded as expressing a deliberate policy of the Crown, or as involving the exercise of a power flowing from the Crown – especially where, as here, the contracts in question involve the marshalling of vast public resources, financial and otherwise, and no one but government could have entered into them.<sup>62</sup> The Court of Appeal did not answer that question, other than by indirectly suggesting that this Court has not yet held otherwise.

64. In any event, there is in fact a statutory basis for the contracts in this case. Insofar as the contracts bind the governments to the expenditure of public funds, they are subject to the fundamental constitutional principle that all expenditures of public funds must be authorized by statute.<sup>63</sup> That principle is embodied in the *Constitution Act, 1867*, in s. 53 for the federal government and in s. 90 for the provincial government. In keeping with that requirement, in the Multiparty Agreement the federal and provincial governments expressly rested their commitments to the hosting of the Games on their respective *Financial Administration Acts*.<sup>64</sup> Given Vancouver's status as a delegated statutory creature, the *Vancouver Charter*<sup>65</sup> and the City's bylaws provide the necessary statutory authority. In addition, federal participation,

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<sup>61</sup> Letters Patent

<sup>62</sup> BCSC, para. 63

<sup>63</sup> *Auckland Harbour Board v. The King*, [1924] A.C. 318 at 326-27

<sup>64</sup> Multiparty Agreement, clauses 17, 18, 19

<sup>65</sup> *Vancouver Charter*, S.B.C. 1953, c. 55

without which the Games could not be staged in Canada,<sup>66</sup> flows from the *Department of Canadian Heritage Act*, the *Physical Activity and Sport Act*, and the *Federal Hosting Policy*.<sup>67</sup>

65. The second question raised in respect to the “benefit of the law” issue arises from the conclusion of the Court of Appeal that “even if the Multiparty Agreement or the Host City Contract qualified as ‘law’ for the purposes of s. 15(1), the appellants would have to demonstrate that the policy that is at the root of their complaint is embodied in those contracts.” The Court held that the Applicants were unable to show this, because “the decision at issue” is within the exclusive authority of the IOC.<sup>68</sup>

66. The Court did not explain *why* the deprivation of the benefit of the law had to be rooted in the government contracts themselves. Is this an appropriate limiting factor under s. 15(1)? While the ultimate source of VANOC’s discrimination against the Applicants lies undoubtedly in the IOC’s decision, the Applicants’ claim is that it is VANOC’s own conduct that denies the Applicants the benefits that flow from its hosting of the Games – benefits that VANOC is providing to the Applicants’ equally placed male peers while it carries out the government activity of hosting.

67. Effectively, the Court of Appeal gave VANOC’s contractual obligations to the IOC precedence over VANOC’s constitutional obligations, as a corporate citizen of Canada carrying out a government activity, to comply with the *Charter*. But is this appropriate, or does VANOC in fact have the control necessary to refuse to perform its contractual obligations in an unconstitutional manner, even if this puts it in breach of contract? The approach of the Court of Appeal would appear to open the backdoor of s. 15(1) to the under-inclusive provision of benefits under a government contract whenever the contract gives to a third party the power to decide how to distribute those benefits.

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<sup>66</sup> BCSC, para. 61

<sup>67</sup> *Department of Canadian Heritage Act*, S.C. 1995, c. 11; *Physical Activity and Sport Act*, S.C. 2003, c. 2; *Federal Hosting Policy*, Annex B to Multiparty Agreement

<sup>68</sup> BCCA, para. 64

68. At bottom, the Court of Appeal's pinched view of the scope of s. 15(1) is difficult to reconcile with the well-settled principle that the *Charter* should be given a generous and purposive interpretation. The courts must avoid a "narrow, technical approach to *Charter* interpretation which could subvert the goal of ensuring that right holders enjoy the full benefit and protection of the *Charter*."<sup>69</sup> Should that principle not apply equally to the interpretation of the "benefit of the law" provided by an ascribed government activity? As this Court said in *Eldridge*, "once the state does provide a benefit, it is obliged to do so in a non-discriminatory manner".<sup>70</sup>

#### **PART IV**

#### **SUBMISSION ON COSTS**

69. If leave is granted, the Applicants respectfully request costs in any event of the cause, in accordance with this Court's usual practice.

70. Should leave be refused, the Applicants respectfully ask that no costs be awarded against them. The Applicants are young women without financial means. VANOC is a publicly financed entity. The Applicants are being discriminated against, and have brought this action to clarify whether VANOC is constitutionally permitted to implement that discrimination against them. The issues raised in the proposed appeal are of importance to all Canadians.

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<sup>69</sup> *Doucet-Boudreau v. Nova Scotia (Min. of Education)*, [2003] 3 S.C.R. 3, para. 23

<sup>70</sup> *Eldridge*, supra, para. 73

**PART V**

**ORDER SOUGHT**

71. The Applicants ask for an order granting leave to appeal from the judgment of the British Columbia Court of Appeal of November 13, 2009, with costs in any event of the cause.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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D. Ross Clark, Q.C.

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Jeffrey D. Horswill

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Vancouver, BC  
November 30, 2009