CANADIAN COURT OF JUSTICE
(On appeal from the Federal Court of Appeal)

BETWEEN:

CANADIAN ATHLETICS FEDERATION

Appellant

and

VANESSA BISHOP

Respondent

APPELLANT'S FACTUM

TEAM NO. 3

TABLE OF CONTENTS

PART I – Overview

[1] This is a case about fairness in sport that boils down to two issues. Firstly, the Canadian Human Rights Tribunal ("**CHRT**") did not have jurisdiction to assess a pure policy decision made by the Appellant, the Canadian Athletics Federation ("**CAF**"), for discrimination. Secondly, in the event that it did, it failed to apply the correct legal tests. Each error alone is sufficient to override the tribunal's decision on judicial review.

[2] In domestically adopting international regulations that govern athletes with a Difference in Sexual Development ("**DSD**"), the Respondent, Vanessa Bishop, ("**Respondent**"), a DSD athlete herself, claims CAF provided her a service that caused a discriminatory effect. The regulations were originally implemented by the International Association of Athletics Federation ("**IAAF**") to ensure fair competition in female sport. The concern with DSD athletes competing unregulated arises from their high levels of testosterone, which creates an unfair performance advantage over other female athletes.

[3] Despite CAF's sympathy with the Respondent's predicament, this claim went beyond the jurisdiction of the CHRT and must be overturned. Even a perfunctory analysis of CAF's duties would have led the tribunal to conclude that CAF did not provide the Respondent a service in setting the selection criteria for Team Canada.

[4] In the event this Court upholds the CHRT's assumption of jurisdiction, this case would not turn on a discrete instance of discrimination. It is well established that finding discrimination is only the first step in a claim under human rights legislation. The responding party can defend its conduct under s. 15(2) of the *Canadian Human Rights Act* ("**Act**"),[1] also known as the *bona fide* ("**BF**") justification test. The CHRT erred in its application of the BF test by failing to balance the values of equality and ameliorative programs as outlined in the *Canadian Charter of Rights and Freedoms* ("***Charter***").[2]

[5] Had the CHRT balanced *Charter* values, it would have found the Canadian BF test aligns with that employed by the Court of Arbitration for Sport ("**CAS**") in adjudicating the complaint of South African DSD athlete, Caster Semenya, against the regulations. This international decision should have been recognized as a strong interpretive tool based on similarities between the two analytical and factual frameworks.

[6] Despite the application of a more deferential standard, reasonableness review does not mean unfettered discretion. When administrative bodies act with disregard for their jurisdiction, fail to apply the correct legal tests, and reject valuable interpretive jurisprudence, it frustrates the purpose of the administrative law regime by circumventing the will of the legislature. Upholding this decision would not only defeat the purpose of the female category in athletics by opening regulations aimed at preserving fairness to discrimination claims but would also allow human rights tribunals to evade the *Charter*.

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[1] *Canadian Human Rights Act*, RSC 1985, c H-6, s 5 [*Act*].

[2] *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

PART II – STATEMENT OF FACTS AND JUDICIAL HISTORY

1. Facts

i. The Origins of Regulating DSD Athletes

[7] Individuals with DSD are considered androgen-sensitive, meaning their bodies are not immune to the effects of testosterone.[3] As a result, they often enjoy higher than average levels of testosterone, which has been recognized to affect athletic performance.[4]

[8] When DSD athletes compete in professional sport events, specifically within the female category, fairness concerns are raised.[5] This is because testosterone has a positive impact on athletic performance – a fact agreed upon by both parties to this dispute.[6] The parties also agree that testosterone levels differ significantly between male and female athletes and that this is the best biological marker to differentiate between the sexes.[7] The categorical distinction between male and female athletes is not at issue here.[8]

[9] The integrity of the female category in professional sport is dependent on differentiating between athletes with varied testosterone levels. Not only does such a distinction preserve competitiveness amongst female athletes, but it also ensures female athletes have equal access to sponsorship and endorsement opportunities.[9] Because naturally-occurring testosterone levels is one of the main reasons male athletes enjoy a competitive advantage over female athletes, it is incumbent upon governing bodies to ensure equitable distinction between male and female categories in professional sport.

[10] The need to regulate DSD athletes seeking to compete in the female athletics category flows naturally from this objective to preserve fairness amongst female competitors.

ii. Implementation of International Regulations Governing DSD Athletes

[11] The IAAF, the international governing body for athletics, originally regulated DSD athletes under the *IAAF Regulations Governing Eligibility of Females with Hyperandrogenism to Compete in Women's Competition*.[10] In response to a successful challenge, the IAAF withdrew these rules with the intent to replace them.[11]

[12] In April 2018, the IAAF implemented new DSD regulations ("**IAAF Regulations**"). The revised regulations require athletes with 46 XY chromosomes who produce

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[3] *Canadian Athletics Federation v Bishop,* 2019 FC at para 4 [*FC Judgement*].
[4] *Ibid* at paras 4, 12.
[5] *Ibid* at para 14.
[6] *Ibid* at para 12.
[7] *Ibid*.
[8] *Ibid* at para at para 16.
[9] *Canadian Athletics Federation v Bishop,* 2019 FCA at para 29 [*FCA Judgement*].
[10] *Court of Arbitration for Sport: Executive Summary* at para 2 [*CAS Judgement*].
[11] *Ibid* at paras 2, 4.

testosterone above 5 nmol/L and experience a "material androgenizing effect" to manually reduce their testosterone levels.[12] Under the new regulations, DSD athletes must maintain their testosterone levels within a normal female range (i.e. below 5 nmol/L) for six months preceding competition.[13] Such restrictions apply to only a select group of restricted events, including the 400m, 800m and 1500m races.[14]

[13] The IAAF Regulations require DSD athletes to undergo testing and, if they exceed the prescribed testosterone limit, take medication to bring them within a natural female range.[15] This is not an invasive standard. DSD athletes can control testosterone levels using conventional oral contraceptives.[16]

[14] Although the IAAF Regulations require DSD athletes to maintain testosterone levels below 5 nmol/L, it is understood that the normal range of testosterone produced in female ovaries and adrenal glands is between 0.06 and 1.68 nmol/L.[17] Therefore, the testosterone limits imposed by the IAAF Regulations are not inordinately restrictive, as they include levels above the typical range of testosterone produced in female bodies.

iii. Challenging the IAAF Regulations

[15] Upon implementing the IAAF Regulations, Caster Semenya, a DSD athlete hailing from South Africa, challenged them as discriminatory on the basis of sex and/or gender.[18] After a 600 paragraph decision, CAS found that, while the regulations were *prima facie* discriminatory, they were justified in order to achieve the IAAF's legitimate objective of ensuring fairness in female athletics.[19]

[16] The CAS Panel ("**Panel**") highlighted that the parties to the dispute, Semenya and the IAAF, advocated competing interests.[20] Although every athlete has the right to have their sex and gender identity respected, female athletes with a biological disadvantage due to a lack of testosterone have the right to compete against similarly constituted athletes.[21] The protection of the latter is needed to ensure the sanctity of the female category.

[17] The Panel found the regulations imposed differential treatment on the grounds of innate biological characteristics; however, it also noted that establishing discrimination was only the beginning of the analysis.[22] Next, the Panel was required to determine

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[12] *Ibid* at para 7.
[13] *Ibid*.
[14] *Ibid* at para 5.
[15] *FC Judgement*, *supra* note 3 at para 6.
[16] *CAS Judgement*, *supra* note 10 at para 25.
[17] *Ibid* at para 21.
[18] *Ibid* at paras 8–9.
[19] *Ibid* at para 1.
[20] *Ibid* at para 12.
[21] *Ibid*11 at para 12.
[22] *Ibid* at para 14.

whether, despite this discrimination, the regulations could be justified as necessary, reasonable and proportionate to the stated objective.[23]

[18] The Panel found the DSD regulations necessary in light of the legitimate objective to create separate events for male and female athletes and the need to develop a fair and effective means of determining who can and cannot compete in such categories.[24] This categorical approach was not designed to prevent those with a male identity from competing against those with a female identity. It was designed to prevent individuals who developed differently after puberty from competing against those who, as a result of their biological development, possess certain performance advantages that render fair competition between the two groups impossible.[25]

[19] Once the Panel determined that division was necessary to preserve the integrity of female athletics, it also affirmed the IAAF's objective in wanting to regulate individuals competing in specific events.[26] The persuasive scientific evidence on the impact of testosterone on sport performance,[27] and the understanding that DSD athletes "enjoy a significant performance advantage over other female athletes,"[28] allowed the Panel to conclude that the IAAF Regulations were reasonably necessary for fair competition.[29]

[20] The Panel also assessed whether the burden imposed by the IAAF on DSD athletes was reasonable and proportionate to the objective of ensuring fair competition in female sport. The Panel found the IAAF Regulations were not unduly severe, as they did not require athletes to undergo any form of surgical intervention and could be controlled with oral contraceptives.[30]

[21] Although the Panel expressed concern with the practicality of the regulations and encouraged the IAAF to be open to new scientific evidence regarding DSD athletes, it upheld the regulations based on their necessity, reasonableness and proportionality to the objective of maintaining fairness in female athletics.[31]

iv. Adoption of the IAAF Regulations in Canada

[22] As the governing body for athletics in Canada,[32] CAF is responsible for determining the eligibility of athletes wishing to represent Canada in international competitions, such as the Olympics.[33] Understanding the IAAF Regulations would be imposed on Canadian

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[23] *Ibid* at para 1.
[24] *Ibid* at para 17.
[25] *Ibid* at para 19.
[26] *Ibid* at para 20.
[27] *Ibid* at para 21.
[28] *Ibid* at para 23.
[29] *Ibid* at para 24.
[30] *Ibid* at para 25.
[31] *Ibid* at paras 1, 26.
[32] *FCA Judgement*, *supra* note 8 at para 5.
[33] *FC Judgement*, *supra* note 3 at para 7.

competitors wishing to participate in restricted Olympic events, CAF adopted the IAAF Regulations in its own selection criteria.

[23] The Respondent is a Canadian athlete who competes in one of the restricted events. She possesses a DSD condition that necessitates regulation per the IAAF standards if she wishes to compete internationally. The Respondent challenged CAF's domestic adoption of the IAAF Regulations, despite the validity of the regulations at the international level.

2. Judicial History

i. CHRT Decision

[24] The Respondent initiated her claim before the CHRT alleging discrimination in CAF's adoption of the IAAF Regulations. The CHRT found that CAF, in implementing the IAAF Regulations, unjustifiably discriminated against the Respondent in its selection criteria for Team Canada in contravention of s. 5 of the Act.[34]

[25] CAF conceded that the IAAF Regulations impose a burden on DSD athletes based on sex, however, invoked the BF justification test under s. 15(2) to demonstrate why the impugned standard was justified.[35]

[26] Both parties agreed that CAF met the first two steps of the BF test.[36] Neither CAF's purpose, nor its good faith in adopting the international eligibility standards was questioned. This understanding was based on CAF's role as the managing body for athletics in Canada and in recognition that the regulations will, nevertheless, apply to any Canadian DSD athlete seeking to compete in a restricted event at the Olympics.[37]

[27] In its assessment of CAF's defence, the CHRT considered and rejected the CAS decision based on what it believed were differences in the justificatory tests in Canadian and international law.[38] It found the CAS test more lenient, as the IAAF was not required to show it accommodated DSD athletes to the point of undue hardship.

[28] Accordingly, the CHRT found CAF did not accommodate the Respondent to the point of undue hardship based on its "line-drawing exercise" in setting the testosterone limit for DSD athletes.[39] The CHRT concluded that CAF's domestic adoption of the IAAF Regulations could not be justified under s. 15(2) of the Act.[40]

[29] CAF applied to the Federal Court for review of the CHRT decision with success. It

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[34] *Ibid* at para 1.
[35] *Ibid* at para 8.
[36] *Ibid* at para 10.
[37] *Ibid*.
[38] *Ibid* at para 17.
[39] *Ibid* at paras 12, 21.
[40] *Ibid* at paras 20–21.

based its application for judicial review on the following grounds:

1. CAF established a *bona fide* justification for the alleged discrimination; and

2. The CAS decision merited greater deference in the Canadian context.[41]

ii. Federal Court Decision

[30] The Federal Court (Niyonsaba J.) allowed the application for judicial review and remitted the case back to the CHRT for reconsideration based on two reviewable errors.[42]

[31] The first reviewable error was the CHRT's failure to assess whether CAF, in setting the eligibility criteria for Canadian athletes, provided a service within the meaning of s. 5 of the Act.[43] Niyonsaba J. ruled that in adopting the IAAF Regulations domestically, CAF could not be considered to provide a service.[44] The CHRT was, therefore, outside its jurisdiction to enter into a finding of discrimination against the Respondent.[45]

[32] The second reviewable error was the CHRT's unreasonable distinction between the test applied by CAS in its justificatory analysis of the IAAF Regulations and the test adopted in Canadian jurisprudence.[46] CAF did not dispute that the standard imposed on DSD athletes was *prima facie* discriminatory based on sex.[47] However, Niyonsaba J. found the BF justification test as described in *Meiorin*[48] and *Grismer*,[49] as well as s. 15(2) of the Act, "strikingly similar" to the test applied by the Panel.[50]

[33] After conceding the first two steps of the test, the issue was whether the standard was reasonably necessary to achieve the goal of ensuring fairness in female athletics.[51]

[34] Niyonsaba J. relied on the Panel's reasoning that the IAAF Regulations were reasonably necessary so as to constitute a BF justification for the discriminatory standard.[52] Ultimately, Niyonsaba J. found the substantial similarity between the two tests required

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[41] *Ibid* at paras 9, 15.
[42] *Ibid* at para 32.
[43] *Ibid* at para 24.
[44] *Ibid* at para 28.
[45] *Ibid*.
[46] *Ibid* at para 30.
[47] *Ibid* at para 8.
[48] *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3, 176 DLR (4th) [*Meiorin*].
[49] *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*, [1999] 3 SCR 868 at paras 20, 23, 181 DLR (4th) 385 [*Grismer*].
[50] *FC Judgement*, *supra* note 3 at para 30.
[51] *Ibid* at para 19.
[52] *Ibid* at para 30.

the CHRT to follow the CAS decision in the Respondent's claim.[53]

iii. Federal Court of Appeal Decision

[35] The Federal Court of Appeal addressed the two reviewable errors identified in the Federal Court decision. Wambui J.A. writing for the majority allowed the Respondent's appeal and upheld the CHRT decision.

[36] Assessing whether CAF's activities fell within the CHRT's jurisdiction under the Act, Wambui J.A. distinguished CAF's "discretionary" adoption of the IAAF Regulations from a complaint against legislation, which does not constitute a service under Canadian jurisprudence.[54] Wambui J.A. ruled that CAF's "role in fixing and disseminating selection criteria" and in sending a team of Canadian athletes to compete at international competition equated a benefit offered to the Respondent.[55] As a result, the majority found the Federal Court erred in determining that CAF did not provide a service under the Act.

[37] The Federal Court of Appeal again diverged from the Federal Court in finding that the CAS decision was not binding on the CHRT. The Federal Court of Appeal ruled that both the CHRT and the Federal Court erred in how the CAS decision should be treated.[56] According to Wambui J.A., the issue was not whether the test applied by the Panel was similar to that adopted in Canadian jurisprudence, but rather whether the decision itself was binding; the Court determined it was not.[57]

[38] Chand J.A., in dissent, agreed with the majority's conclusion that the Federal Court erred in intervening in the CHRT decision and would dismiss the appeal.[58] Where Chand J.A. departed was with regards to the applicability and necessity for the CHRT to weigh competing constitutional values. Chand J.A. found the CHRT failed to adequately balance *Charter* values, including the purpose of the IAAF Regulations to serve an ameliorative purpose by ensuring fairness in female athletics.[59] Chand J.A. would have remitted the case back to the CHRT for reconsideration of competing *Charter* values.[60]

PART III – OBJECTIONS TO JUDGMENT APPEALED FROM

[39] This appeal should be allowed for the following reasons:

1. The CHRT unreasonably assumed that CAF provided a service under the Act.
2. CAF's policy adoption is justified under s. 15(2) of the Act.
3. The CHRT decision does not reflect a proportional balancing of *Charter* values.
4. The CHRT unreasonably distinguished the CAS decision.

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[53] *Ibid* at para 31.
[54] *FCA Judgement*, *supra* note 8 at paras 10–11.
[55] *Ibid* at para 13.
[56] *Ibid* at para 18.
[57] *Ibid* at para 19.
[58] *Ibid* at para 25.
[59] *Ibid* at para 30.
[60] *Ibid* at para 32.

PART IV – ARGUMENTS

1. The Standard of Review is Reasonableness

1.1 The Lower Courts Selected the Appropriate Standard of Review

[40] The Federal Court and the Federal Court of Appeal appropriately identified the standard of review as reasonableness.[61] However, the Federal Court of Appeal erred in its application. On appeal from judicial review, the reviewing court must assess whether the lower courts appropriately identified and applied the correct standard of review.[62]

1.2 The Federal Court of Appeal Erred in Applying the Reasonableness Standard

[41] Although there is a presumption of reasonableness review for tribunals applying and interpreting their home statute,[63] the CHRT decision fell far below a reasonable standard. While reasonableness indicates a level of deference for administrative decision makers, deference does not equate unfettered discretion.[64]

[42] The reasonableness standard is concerned with justification, transparency and intelligibility in the decision-making process, as well as with whether the decision falls within a range of possible, acceptable outcomes defensible in fact and law.[65] In applying a reasonableness standard, the party seeking judicial review must demonstrate that the tribunal could not have reasonably arrived at its conclusion.[66]

[43] The CHRT surpassed its jurisdiction under the Act, failed to apply the correct legal

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[61] *FC Judgement*, *supra* note 3 at para 22; *FCA Judgement*, *supra* note 8 at para 8.
[62] *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras 45–47.
[63] *Canada (Canadian Human Rights Commission) v Canada (Attorney General*), 2011 SCC 53 at paras 22–24.
[64] *Catalyst Paper Corp. v North Cowichan (District),* 2012 SCC 2 at para 15.
[65] *Dunsmuir v New Brunswick,* 2008 SCC 190 at para. 47.
[66] *Taylor-Baptiste v Ontario Public Service Employees Union*, 2015 ONCA 495 at para 42 [*Taylor-Baptiste*].

tests to the issues in dispute, and rejected valid jurisprudential authority. Such deficiencies are clear *indicia* of unreasonableness.[67] As a result, the Federal Court of Appeal erred in upholding the CHRT decision, which must be overturned on judicial review.

2. The CHRT Unreasonably Assumed CAF Provided a "Service"

[44] The CHRT unreasonably assumed jurisdiction to address the Respondent's claim for discrimination under s. 5 of the Act.[68] As a creature of statute, the CHRT is confined to address those matters that explicitly fall within its legislated authority.[69] It was unreasonable for the CHRT to proceed with the Respondent's claim based on a wrongful assumption that CAF's adoption of the IAAF Regulations constituted a "service".

[45] Section 5 articulates prohibited discriminatory practices and authorizes the CHRT to review specific instances of discrimination under the Act. Section 5 reads:

> It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public (a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual… on a prohibited ground.[70]

[46] If the issue falls outside the scope of this legislative authority, the CHRT loses jurisdiction to review the claim. In failing to consider whether CAF's adoption of the IAAF criteria constituted a "service", the tribunal committed a reviewable error that effectively ignored the will of the legislator. This mistaken belief in jurisdiction was unreasonable and compels this Court to overturn the decision.

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[67] *Németh v Canada (Ministre de la Justice)*, 2010 3 SCR 281 at paras 3, 115; *Dunsmuir*, *supra* note 65 at para 47; *Atlus Group Ltd. v Calgary*, 2015 ABCA 86 at para 31.
[68] *FC Judgement*, *supra* note 3 at para 24.
[69] Anne M. Wallace, "The Impact of the Charter in Administrative Law: Reflections of a Practitioner" (Paper delivered at the Canadian Institute for the Administration of Justice Annual Conference, Gatineau, October 2002), Dialogues about Justice at 260.
[70] *Act*, *supra* note 1, s 5.

2.1 Jurisdictional Claims May Be Raised for the First Time on Judicial Review

[47] Although CAF did not explicitly raise the issue of jurisdiction before the CHRT, this issue is not immune from judicial review as stated by Wambui J.A. of the Federal Court of Appeal.[71] While litigators should be wary to raise new issues before reviewing courts that were not considered by the tribunal, *ex post facto* claims of jurisdiction are permitted on judicial review at the discretion of the reviewing court.[72]

[48] In *Alberta Teachers*, the Supreme Court articulated a reasonableness standard of review for implicit decisions on issues that were not raised before the tribunal where the adjudicator was interpreting their home statute.[73] In this case, the Court reviewed the Privacy Commissioner's implicit decision to extend an investigation timeline in contravention of its enabling statute; the Teachers' Association argued this resulted in a loss of jurisdiction.[74] Although jurisdiction was not raised before the Commission at first instance, the Supreme Court allowed it to be judicially reviewed, largely based on the reviewing court's willingness to engage with the jurisdictional argument.[75]

[49] The CHRT implicitly accepted jurisdiction. As a result, there were no reasons offered in proceeding with the Respondent's claim. On judicial review, Niyonsaba J. evaluated whether the CHRT exercised valid legislative authority in adjudicating the Respondent's claim and concluded that the CHRT's assumption was unreasonable.[76]

[50] In cases where a tribunal's reasoning is not apparent, the reviewing court must

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[71] *FCA Judgement*, *supra* note 8 at para 12.
[72] *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 28 [*Alberta Teachers*].
[73] *Ibid* at para 48.
[74] *Ibid* at para 29.
[75] *Ibid* at para 28.
[76] *FC Judgement*, *supra* note 3 at para 24.

consider what reasons could have been offered to support the impugned decision.[77] This was the task assumed by the Federal Court on judicial review. Even in applying a more deferential standard, the Federal Court was correct to find no intelligible justification could support the CHRT's assumption that CAF provided the Respondent a service.

2.2 CAF's Adoption of the IAAF Regulations is Akin to Legislated Eligibility Criteria

[51] Similar to the exclusion of legislation from the definition of "service", CAF's adoption of the IAAF Regulations does not constitute a service. The Respondent alleges that in adopting criteria with which athletes must comply to compete in restricted athletics events, CAF provides her a service.[78] However, it is well established that pure attacks on the substance of legislation do not fall within the ambit of a s. 5 "service".[79]

[52] In *Forward*, the CHRT assessed discrimination in the context of a complainant's citizenship application.[80] The CHRT rejected her claim, as the complaint concerned the legislative language itself and not the veritable application of the citizenship criteria.[81]

[53] This is precisely the problem with the Respondent's claim. She does not take issue with how the criteria are applied, which could constitute a service, but rather that they apply to her at all.[82] A complaint against the contents of legislation alone is insufficient to ground an allegation of discrimination in the provision of a service under the Act.[83]

[54] If the Respondent takes issue with the contents of the IAAF Regulations, her concern

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[77] *Alberta Teachers*, *supra* note 72 at para 53.
[78] *FCA Judgement*, *supra* note 8 at para 11.
[79] *PSAC v Canada (Revenue Agency)*, 2012 FCA 7 at para 6.
[80] *Forward v Canada (Minister of Citizenship & Immigration)*, 2008 CHRT 5 at para 36 [*Forward*].
[81] *Ibid* at paras 38, 43.
[82] *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at para 58 [*Matson*].
[83] *Forward*, *supra* note 80 at para 38.

is best raised with the drafting body itself. In fact, a challenge to the substance of the regulations was already addressed and the validity of the regulations upheld.[84]

[55] Furthermore, CAF's domestic adoption of the eligibility criteria for DSD athletes is analogous to the government's adoption of eligibility criteria under impugned provisions of the *Indian Act* in *Matson*.[85] In this case, the Supreme Court upheld the CHRT's finding that the impugned eligibility criteria did not constitute a service based on their legislative nature.[86] The Court affirmed the CHRT's conclusion that the criteria were non-discretionary and that the responding party had no part in drafting them, findings which supported the reasonableness of the tribunal's decision.[87]

[56] CAF's policy adoption is akin to the enactment of eligibility criteria in substance and form. While the Respondent's claim is not a direct attack on legislation, her complaint is directed at the contents of binding regulations that apply to Team Canada selection criteria. It was the act of an authoritative governing body, the IAAF, that brought these regulations into force, which is analogous to enacting legislation.

[57] As aptly noted by Niyonsaba J. for the Federal Court, CAF's adoption of the IAAF Regulations was not discretionary and the organization took no part in their drafting.[88] Furthermore, the IAAF Regulations will bind the Respondent internationally if selected to compete based on the IAAF's official capacity to set and enforce eligibility criteria.[89]

[58] To effectively fulfill its mandate in assessing the eligibility of athletes seeking to join

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[84] *CAS Judgement*, *supra* note 10 at para 1.
[85] *FC Judgement*, *supra* note 3 at para 27.
[86] *Matson*, *supra* note 82 at para 61.
[87] *Ibid* at para 12.
[88] *FC Judgement*, *supra* note 3 at para 28.
[89] *Ibid*.

Team Canada, CAF must comply with international standards.[90] Absent domestic implementation of international selection criteria, CAF could send athletes to compete who are subsequently disqualified due to incompliance with international standards. CAF's organizational mandate combined with the applicability of the regulations at the Olympics render the domestic policy adoption mandatory.

[59] In sum, the non-discretionary and quasi-legislative nature of CAF's policy adoption is akin to legislated eligibility criteria, which is omitted from the definition of "service". Accordingly, there is no intelligible justification that could have supported the conclusion that CAF's implementation of the IAAF Regulations fell within the scope of the Act.

2.3 CAF's Activities Do Not Meet the Criteria for a "Service"

[60] In addition to falling within a jurisprudential exception, CAF's adoption of the IAAF Regulations does not meet the two-part test articulated in *Gould* for activities constituting a "service" under s. 5.[91] Per the *Gould* test, the reviewing court must: 1) "[i]dentify the service in question" based on the available facts; and 2) ascertain whether it creates a public relationship between the parties.[92]

[61] At the first step, the reviewing court must assess the service in question, which is considered something of benefit held out and offered.[93] The "benefit" allegedly received by the Respondent is CAF's role in fixing and disseminating the selection criteria.[94] The Federal Court of Appeal characterized this as being held out and offered when CAF communicates its selection criteria and sends a team of athletes to represent Canada.[95]

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[90] *FCA Judgement*, *supra* note 8 at para 5.
[91] *Gould v Yukon Order of Pioneers*, [1996] 1 SCR 571, 133 DLR (4th) 449 [*Gould*].
[92] *Ibid* at para 58.
[93] *Ibid* at paras 55, 130.
[94] *FCA Judgement*, *supra* note 8 at para 13.
[95] *Ibid*.

[62] However, if CAF's articulation of selection criteria constitutes a benefit, it is not something held out and offered to the Respondent. The IAAF Regulations apply in conjunction with domestic criteria. For this benefit to be held out and offered to a purported competitor, that athlete must also be able to comply with the IAAF Regulations, as this compliance informs CAF's function in selecting athletes to compete.[96] The benefit "held out and offered" – the ability for athletes to be selected to compete at the Olympics – is contingent upon that athlete's ability to meet domestic and international standards.

[63] Proceeding to the second phase of the *Gould* test, CAF's role does not create a public relationship between it and the Respondent. While a service need not be offered to the public at large to trigger discrimination, services with a public aspect, but which are effectively private, club-like associations are not public services under the Act.[97]

[64] The Supreme Court in *Gould* advocated a contextual analysis to determine if an organization falls on the public or private spectrum.[98] Whether an organization is said to provide a public service is established from a variety of factors, including selectivity in the provision of the service.[99] This was articulated as a consideration in *Berg*, where the lack of a private and discretionary selectivity process allowed the court to find the University provided Berg, a student of the school, a public service.[100]

[65] As the governing body for athletics in Canada, CAF may appear to be public in nature.[101] However, in reality, CAF's activities are more akin to a private sporting club, as

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[96] *FC Judgement*, *supra* note 3 at para 28.
[97] *University of British Columbia v Berg*, [1993] 2 SCR 353 at 355 [*Berg*].
[98] *Gould*, *supra* note 91 at para 62.
[99] *Ibid* at para 68.
[100] *Berg*, *supra* note 97 at 377.
[101] *FCA Judgement*, *supra* note 8 at para 5.

opposed to public service. CAF outlines a set of regulations designed to guide elite athletes in their competitive sporting endeavours.[102] Facilitating the selection of athletes who compete at international sporting events does not raise CAF's role to the level of providing a public service such that its activities can be subject to review under the Act.

[66] CAF's role in setting selection criteria is directed at a discrete group of athletes; it is not owed to every athletics competitor in the country. Rather, CAF's function in this context is dedicated exclusively to those top athletes with the qualifications to join Team Canada. CAF's circumscribed membership combined with the limited scope in the criteria's applicability validate the private nature of CAF's mandate.

[67] Despite the large and liberal interpretation adopted when interpreting human rights statutes, tribunals and reviewing courts must be careful to avoid circumventing the will of the legislature by too broadly interpreting the meaning of "service" under the Act.[103] In limiting s. 5 to those activities "customarily available to the general public", the legislature intended that some relationships are beyond the scope of scrutiny under human rights legislation.[104] This includes CAF's relationship with the Respondent and athletes seeking to represent Canada at prestigious sporting events such as the Olympics.

[68] Permitting the Act to apply to organizations such as CAF would unreasonably expand the CHRT's jurisdiction to those private associations that do not come within the purview of the Act. Such an interpretation would also inappropriately enlarge the definition of service to include non-discretionary policy implementations, which have previously been excluded from the definition of "service".[105]

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[102] *Ibid* at para 5.
[103] *Berg*, *supra* note 97 at 371.
[104] *Ibid*.
[105] *Matson*, *supra* note 82 at para 3.

[69] There is no intelligible justification that could support the CHRT's assumption that CAF provided the Respondent a service. This absence of jurisdiction indicates that the CHRT decision did not fall within a range of reasonable outcomes, as concluded by the Federal Court. The Respondent's claim must, therefore, be rejected by this Court.

3. Establishing *Prima Facie* Discrimination is only the First Step in a s. 5 Claim

[70] In the event CAF's adoption of the IAAF Regulations constitutes a "service", CAF does not dispute the existence of differential treatment for DSD athletes.[106] However, differential treatment does not necessarily equate discrimination. This is true in the context of initiatives designed to protect a disadvantaged or marginalized group.[107]

[71] Section 15(2) of the *Charter* indicates that ameliorative programs are not considered discrimination.[108] However, because this claim is raised under human rights legislation, the framework for discrimination is different. Under the Act, consideration for the valid purpose of the impugned standard occurs at the justificatory stage. Establishing a BF justification proves the standard itself is not discrimination.[109] This diverges from *Charter* claims where the ameliorative purpose is assessed at the outset.[110]

[72] To establish *prima facie* discrimination, complainants must demonstrate that they possess a protected characteristic and that they experienced an adverse impact arising from that characteristic.[111] The IAAF Regulations require DSD athletes wishing to compete in the female category of restricted events to reduce their testosterone levels, which amounts

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[106] *FC Judgement*, *supra* note 3 at para 8.
[107] *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 167, 56 DLR (4th) 1 [*Andrews*].
[108] *Ibid; Charter*, *supra* note 2, s 15(2).
[109] *Grismer*, *supra* note 49 at para 21.
[110] *R v Kapp*, 2008 SCC 41 at para 37 [*Kapp*].
[111] *Moore v British Columbia (Education)*, 2012 SCC 61 at para 33 [*Moore v BC(E)*].

to a burden on the basis of sex.[112]

[73] However, establishing the existence of differential treatment is only the first step in a discrimination claim under human rights legislation.[113] Once discrimination is found, the burden switches to the responding party to demonstrate it is justified under s. 15(2). CAF has effectively discharged this burden, as evidenced by a purposive application of the BF test and in balancing relevant *Charter* values at the justificatory stage.

4. CAF's Adoption of the IAAF Regulations is Justified under s. 15(2) of the Act

[74] The CHRT erred in its assessment of CAF's s. 15(2) defence based on an incomplete and improper application of the BF justification test. Section 15(2) offers a defence for those accused of discriminatory conduct in the provision of services (referred to in s. 15(1)(g) of the Act). This provision allows a party responding to a claim under ss. 5 to 14.1 to justify its implementation of the impugned standard.[114] Section 15(2) reads:

> … for any practice mentioned in paragraph (1)(g) to be considered to have a *bona fide* justification, it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.[115]

[75] To benefit from a s. 15(2) defence, the implementing party must establish, on a balance of probabilities, that the discriminatory standard had a BF and reasonable justification, per the test articulated in *Grismer*.[116]

[76] To satisfy the three-step *Grismer* test, the responding party must demonstrate that the standard's purpose was rationally connected to its function. Next, it must show the

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[112] *FC Judgement*, *supra* note 3 at para 8.
[113] *Moore v BC(E)*, *supra* note 111 at para 33.
[114] *Act*, *supra* note 1, ss 4, 15(2).
[115] *Ibid*, s 15(2).
[116] *Grismer*, *supra* note 49 at paras 20, 23.

standard was adopted in good faith. Finally, it must prove the standard was reasonably necessary to achieve its goal and that accommodation would result in undue hardship.[117]

[77] The duty to accommodate requires the service provider to show it took reasonable steps to accommodate the recipient.[118] Accommodation is a cooperative practice and all members affected must act reasonably in searching for an alternative.[119] In accommodating the Respondent, CAF did not need to offer a perfect solution – it must simply have presented her a reasonable alternative, which it did.[120]

[78] The CHRT failed to consider that the use of conventional contraceptives to reduce an athlete's testosterone was a reasonable accommodation to which there was no available alternative. It also neglected to consider that further accommodation would constitute a "cost", imposing undue hardship on CAF. Finally, the CHRT ignored its duty to balance relevant *Charter* values as required by *Doré*,[121] which allowed the tribunal to overlook the ameliorative purpose of the regulations.

[79] Even if CAF is not required to provide the Respondent further accommodation, the timing of this Court's decision would still not allow the Respondent sufficient time to undergo the necessary hormone therapy to qualify for the 2020 Olympics. Oral submissions are to take place in February 2020 and the earliest selection for the Olympics will take place on July 24, 2020. This timeframe is too short to allow her sufficient time to comply with the IAAF Regulations, as they require DSD athletes to maintain testosterone

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[117] *Grismer*, *supra* note 49 at para 23; *FC Judgement*, *supra* note 3 at paras 19–20.
[118] *Ontario Human Rights Commission v Simpsons-Sears*, [1985] 2 SCR 536 at para 8, 23 DLR (4th).
[119] *Central Okanagan School District No. 23 v Renaud*, [1992] 2 SCR 970 at 989, 95 DLR (4th) 577 [*Central Okanagan*].
[120] *Ibid* at 995.
[121] *Doré v Barreau du Québec*, 2012 SCC 12 at para 5 [*Doré*].

levels below 5 nmol/L for six months preceding competition.[122]

[80] These errors lead the CHRT to arrive at a conclusion outside the range of reasonable alternatives. This decision must be overturned based on the impossibility of providing the Respondent further accommodation combined with the imminence of the 2020 Olympics. There is nothing CAF could do in this timeframe to produce the result the Respondent desires, namely, competing for Team Canada at the 2020 games.

4.1 CAF meets the Rational Connection and Good Faith Requirements of the *Grismer* Test

[81] The Respondent concedes that CAF meets the rational connection and good faith requirements of the *Grismer* test.[123] This is not in dispute before this Court.

4.2 CAF meets the Reasonably Necessary and Undue Hardship Requirements of the *Grismer* Test

[82] CAF meets the third step of the *Grismer* test, which asks whether the impugned standard is reasonably necessary to achieve the organization's goal and if further accommodation would result in undue hardship.[124] Providing the Respondent more accommodation is not only impractical, but would also infringe the right to fair competition enjoyed by other female athletes as members of a protected class.

[83] Outlining maximum testosterone levels in female competitors is necessary to both define the scope of the protected class and to further the IAAF and CAF's goal of preserving fairness in female athletics.[125] Any accommodation of DSD athletes beyond the ability to take oral contraceptives to lower testosterone would cause undue hardship, as

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[122] *FC Judgement*, *supra* note 3 at paras 6, 28.
[123] *Ibid* at para 10.
[124] *Grismer*, *supra* note 49 at para 20.
[125] *CAS Judgement*, *supra* note 10 at para 24.

allowing them to compete unregulated would defeat the purpose of the protected class and undermine CAF's organizational mandate.[126]

[84] Undue hardship is recognized as affecting health, safety or cost for the party required to accommodate.[127] In *Grismer*, hardship is characterized as whether it takes the form of impossibility, serious risk or excessive cost.[128] The service provider must show that there is no reasonable or practical alternative to the impugned rule.[129]

i. CAF Discharged its Duty to Provide Accommodation in Light of the Surrounding Rights of Affected Parties

[85] Accommodations must be offered in light of their effects on the surrounding rights of other parties equally affected by the accommodation. According to the Supreme Court in *Central Okanagan*:

> The concern for the impact on other employees […] is a factor to be considered in determining whether the interference […] would be undue […] The employer must establish that actual interference with the rights of other employees, which is not trivial but substantial, will result from the […] accommodating measures.[130]

[86] Although *Central Okanagan* involved an employer's duty to accommodate an employee's religious beliefs, the justificatory test for services is modelled after these employment law principles.[131]

[87] Given that the typical female range of serum testosterone is between 0.06 and 1.86 nmol/L, the 5 nmol/L restriction on DSD athletes gives them sufficient leeway to comply

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[126] *Ibid* at para 22.
[127] *Act*, *supra* note 1, s 15(2).
[128] *Grismer*, *supra* note 49 at para 32.
[129] *Ibid* at para 9.
[130] *Central Okanagan*, *supra* note 119 at 984–85.
[131] *Grismer*, *supra* note 49.

without requiring surgical intervention.[132] The ability to take oral contraceptives is the only reasonable alternative to ensure consistency with international regulations that necessarily apply to Canadian athletes seeking to compete at the Olympics.[133] It is also a minimally invasive standard and the most scientifically sound method to address the performance advantage caused by DSD athletes' increased testosterone.[134]

[88] The female category was delineated to protect those who lack testosterone-derived performance advantages from competing against those who do enjoy this advantage.[135] This accommodation is sensitive to the surrounding rights of other female athletes, as it respects the parameters of the protected class in female athletics.[136]

[89] If CAF was required to offer further accommodation by allowing the Respondent to compete *without* lowering her testosterone, it would infringe the right of other athletes to compete against those with a similar biological makeup. Such an accommodation would defeat the categorial approach to female athletics, which is not in dispute here.[137]

[90] While it is true that the IAAF Regulations only affect female athletes, male athletes' testosterone need not be tested to know they do not fall within the protected class of female athletes, nor are they attempting to join this class. DSD competitors *are* attempting to join the protected class. If it is agreed that testosterone is the best marker for athletic performance and that female bodies naturally produce less testosterone,[138] it is legitimate to regulate testosterone in the female category. In fact, this activity is necessary in the

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[132] *CAS Judgement*, *supra* note 10 at para 21.
[133] *FC Judgement*, *supra* note 3 at paras 6, 7.
[134] *CAS Judgement*, *supra* note 10 at paras 21, 25.
[135] *Ibid* at para 22.
[136] *Ibid* at para 24.
[137] *Ibid* at para 22; *FC Judgement*, *supra* note 3 at para 16.
[138] *FC Judgement*, *supra* note 3 at para 4.

context of sport where sex-based separation supports a protected class.

[91] Any accommodation of DSD athletes that permits them to maintain their naturally elevated testosterone levels infringes the right of other female athletes to receive their accommodation in separating competition into male and female categories.

ii. Further Accommodation Would Entail a Cost Altering CAF's Essential Nature and Result in Undue Hardship

[92] Cost concerns would be implicated if CAF was required to provide the Respondent greater accommodation. If accommodating a complainant would result in too high a cost for the responding party, such that they could no longer carry on regular business, this would constitute undue hardship satisfying the BF test.[139]

[93] Although there is no clear consensus on the precise meaning of "cost", jurisprudence indicates that the service provider can satisfy this factor if the expense of accommodation would threaten the viability of the employer's operations.[140]

[94] As noted, accommodating persons with the Respondent's characteristics would undermine the purpose of the regulations, which would, in turn, frustrate CAF's organizational mandate. CAF's duty is to ensure a fair opportunity for all qualified athletes to be considered to represent Canada at international competition.[141]

[95] Requiring CAF to provide additional accommodation in a manner that is inconsistent with the international regulations "would alter the essential nature or substantially affect the viability of the enterprise responsible for the accommodation".[142] Such a decision

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[139] *Central Alberta Dairy Pool v Alberta (Human Rights Commission),* [1990] 2 SCR 489 at 528, 72 DLR (4th) 417.
[140] *Quesnel v London Educational Health Centre,* 28 CHRR D/474 (HRTO) at para 60 [*Quesnel*]; *VIA Rail Canada Inc. v Canadian Transportation Agency*, 2007 SCC 15 at para 132 [*VIA*].
[141] *FCA Judgement*, *supra* note 8 at para 13.
[142] *Quesnel*, *supra* note 140 at para 60.

would require CAF to allow athletes who do not meet Olympic standards to try out and join Team Canada, in direct opposition to CAF's purpose by undermining the organization's viability in setting selection criteria for Canadian athletes.

[96] Requiring further accommodation would result in undue hardship and ignore the interests of female athletes who rely on regulations such as those adopted by CAF to protect their fair competition rights. Notably, if CAF was required to offer further accommodation or if its adopted policy was struck down, the Respondent would still need to comply with IAAF standards. Regardless of the outcome before this Court, the Respondent cannot compete for Team Canada at the 2020 Olympics, as there is insufficient time for her to complete the requisite hormone therapy before competition.[143]

[97] All of these reasons indicate that the CHRT's rejection of CAF's s. 15(2) defence did not fall within a range of reasonable outcomes and merits overriding by this Court.

5. The CHRT Decision does Not Reflect a Proportional Balancing of *Charter* Values

[98] As evidenced from the above analysis, CAF satisfies the undue hardship requirement of the BF justification test. A proportional balancing of *Charter* values, as required by *Doré*, further affirms this compliance.

[99] As found by Chand J.A. for the Federal Court of Appeal, the CHRT failed to engage in a requisite balancing exercise between the competing *Charter* values of equality and ameliorative programs, and the statutory purpose of the Act.[144] This omission is unreasonable,[145] and must be rectified by this Court to uphold the crucial interplay between the *Charter* and human rights legislation.

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[143] See *supra* at para 79.
[144] *FCA Judgment*, *supra* note 8 at paras 28, 30–31 (dissent).
[145] *Doré*, *supra* note 121 at para 58.

5.1 The CHRT is Required to Consider Relevant *Charter* Values Engaged

[100] *Charter* values should have informed the CHRT's interpretation of the BF test as required by *Doré*. The *Doré* framework compels administrative bodies exercising discretion under enabling statutes to consider *Charter* values in determining whether their exercise "unreasonably limits the *Charter* protections in light of the legislative objective and statutory scheme".[146] This directive applies equally to human rights tribunals.[147]

[101] Although *Doré* has been met with critique,[148] the Supreme Court's most recent articulation of *Charter* values in *Trinity Western* upheld this framework, requiring decision-makers to exercise authority in light of constitutional values and rights.[149]

[102] While neither the Respondent nor CAF explicitly grounded its claim in the *Charter*, consideration for relevant *Charter* values should have informed the CHRT's *Grismer* analysis. Indeed, Chand J.A., in dissent at the Federal Court of Appeal, found it incumbent upon the CHRT to consider the s. 15(2) *Charter* value of ameliorative programs.[150]

[103] If the reviewing court concludes that the administrative decision-maker has not properly balanced the relevant *Charter* values, the decision will be found to be unreasonable.[151] The complete omission of any *Charter* balancing demonstrates the unreasonableness of the CHRT decision in the present case.

5.2 The CHRT Failed to Consider the *Charter* Value of Ameliorative Programs

[104] The *Doré* framework outlined the approach for an administrative tribunal applying

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[146] *Doré*, *supra* note 121 at para 24; *see also Taylor-Baptiste*, *supra* note 66 at para 50.
[147] *Ibid.*
[148] Audrey Macklin, "Charter Right or Charter-Lite? Administrative Discretion and the Charter" (2014) 67 SCLR (2d) 561 at 563.
[149] *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at para 57.
[150] *FCA Judgement*, *supra* note 8 at para 31 (dissent).
[151] *Doré*, *supra* note 121 at para 58.

Charter values: the decision-maker should 1) consider the statutory objectives at play; and 2) determine how the *Charter* values at issue are best protected in light of these statutory objectives.[152] Step two is achieved by balancing the severity of the interference with the *Charter* protection against the statutory objectives.[153] The tribunal's result is entitled to deference providing it falls within a range of acceptable outcomes.[154]

[105] In the present case, the competing *Charter* protections found in s. 15(1), equality, and s. 15(2), ameliorative programs, are at issue. The Respondent's equal treatment rights were engaged when the CHRT found CAF's implementation of the IAAF Regulations discriminatory. Ameliorative program interests were engaged due to the importance of the regulations in preserving fairness in female athletics, and the need to regulate female athletes' testosterone levels to achieve this goal.

[106] As noted in *Loyola*, *Charter* values are those which underpin each right and give them meaning.[155] The presence of these two competing protections triggers review of the *Charter* values at play and informs the constitutional compliance of the CHRT decision.

[107] The statutory purpose of the Act is to ensure individuals have their needs accommodated, without being hindered or prevented from doing so by discriminatory practices.[156] The objective of s. 15(2) of the Act is to define an exception to a finding of discrimination where there is a BF justification.[157]

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[152] *Doré*, *supra* note 121 at paras 55–56.
[153] *Ibid*.
[154] *Ibid.*
[155] *Loyola High School v Quebec (Attorney General),* 2015 SCC 12 at para 36 [*Loyola*]; Lorne Sossin & Mark Friedman, "Charter Values and Administrative Justice" (2014) 67 SCLR (2d) 391 at 403–04 [*Sossin & Friedman*].
[156] *Act*, *supra* note 1, s 2.
[157] *Ibid*, s 15(2).

[108] The CHRT implicitly considered the value of equality in its finding of discrimination, defined as adverse differentiation on the basis of an enumerated ground.[158] The CHRT's evaluation of the Respondent's equality rights was in line with the statutory objective of the Act to prohibit discriminatory practices that prevent individuals from having "an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have".[159]

[109] As noted, the IAAF Regulations adopted by CAF also engage *Charter* values regarding the protection of ameliorative programs. Ameliorative programs, despite operating through distinctions on enumerated grounds, are protected by s. 15(2) of the *Charter*.[160] The *Charter* recognizes that substantive equality does not require everyone be treated identically.[161] As the Supreme Court explains in *Andrews*, "the fact that identical treatment may frequently produce serious inequality is recognized in s. 15(2)".[162] This value seeks to achieve substantive equality by allowing a distinction on an enumerated ground to improve conditions for a disadvantaged group.[163]

[110] An ameliorative program under s. 15(2) is defined as a program with an ameliorative or remedial purpose that targets a disadvantaged group identified by an enumerated ground.[164] The remedial purpose of CAF's domestic adoption of the IAAF Regulations is to define the scope of the protected class of female athletes. This is done in furtherance of the fair competition objective by preventing female athletes from having to

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[158] *Ibid*, s 5.
[159] *Ibid*, s 2.
[160] *Sossin & Friedman*, *supra* note 155 at 404.
[161] *Andrews, supra* note 107 at 171.
[162] *Ibid*.
[163] *Charter*, *supra* note 2, s. 15(2); *Andrews*, *supra* note 107 at para 171.
[164] *Kapp*, *supra* note 110 at para 30.

compete against those who enjoy an insurmountable biological advantage due to high testosterone levels.[165] The regulations serve this intended goal by preventing athletes who naturally produce less testosterone from having to compete against those who produce an excess of this performance-enhancing hormone.[166]

[111] In this context, female athletes are a disadvantaged group on the enumerated ground of sex because they biologically produce less testosterone than male athletes and, historically, could not qualify to compete when measured against males due to their lower testosterone levels.[167]

[112] CAF's adoption of the regulations bolsters this ameliorative program of separating male and female athletes by ensuring female competitors exhibit similar levels of testosterone, which is produced most highly in male bodies. It was incumbent on the CHRT to consider this value to ensure its decision was consistent with *Charter* principles.[168]

[113] The CHRT's failure to consider the *Charter* value of protecting ameliorative programs limited this value to the point of full preclusion. In unreasonably ignoring the ameliorative program furthered by CAF's policy adoption, the CHRT failed to achieve its own statutory objective of ensuring individuals' needs are accommodated.

[114] The CHRT's formalistic and decontextualized understanding of discrimination does not reflect a proportional balancing of *Charter* values, nor does it advance the Act's statutory objectives. The failure to balance relevant *Charter* values against the Act's statutory purpose was unreasonable in light of the Supreme Court's directives in *Doré*, *Loyola* and *Trinity Western*.

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[165] *FCA Judgment*, *supra* note 8 at paras 28–30.
[166] *FC Judgement*, *supra* note 3 at para 16.
[167] *FCA Judgement*, *supra* note 8 at para 30.
[168] *Doré*, *supra* note 121 at paras 47, 57; *Loyola*, *supra* note 155 at paras 39, 42.

[115] In omitting this crucial analysis, the tribunal's application of the justificatory test was inherently flawed and merits rectification by this Court by overturning the CHRT decision. This claim's restricted timeline requires *Charter* balancing to occur at this Court, as opposed to sending a directive back to the tribunal where there would be insufficient time for the Respondent to either comply with the standard or, in the event the regulations are struck down, for her to join Team Canada in time for the 2020 Olympics.[169]

6. The CHRT Unreasonably Rejected the CAS Decision

[116] Although the CHRT was not bound to follow the CAS decision, it was unreasonable for the tribunal to refuse it as an interpretive tool given the importance of the ameliorative purpose principle in justifying limitations on human rights. Failure to consider a relevant factor, including persuasive jurisprudence, is an *indicium* of unreasonableness.[170] This is precisely where the CHRT erred in the present claim.

[117] Where a claim falls within the ambit of *Charter* values, there is a presumption that administrative discretion be exercised in accordance with international human rights norms.[171] The international human rights norms reflected in the CAS decision are analogous to the values reflected in s. 15(2) of the *Charter*. It was, therefore, incumbent on the CHRT to consider the CAS Panel's reasoning as a relevant interpretive factor. The CHRT's blanket rejection of CAS's reasoning was unreasonable.

[118] The CHRT distinguished the CAS decision based on its finding that the CAS

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[169] See *supra* at para 79.
[170] *C.U.P.E. v Ontario (Minister of Labour)*, [2003] 1 SCR 539 at para 21, 226 DLR (4th) 193.
[171] *Slaight Communications Inc. v Davidson*, [1989] 1 SCR 1038, 59 DLR (4th) 416 [*Slaight Communications*]; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 81, 174 DLR (4th) 193.

justificatory test – whether the impugned standard was a necessary, reasonable and proportionate means of achieving a legitimate objective – differed from the test in Canadian jurisprudence. The CHRT found the CAS decision had not considered whether the IAAF Regulations accommodate DSD athletes to the point of undue hardship. It was on this basis that the CHRT found it was not required to follow the decision.[172]

[119] The Supreme Court finds that the more similar the factual scenario and legal framework to a previous internationally decided case, the more precedential and interpretive weight it ought to be given.[173] Accordingly, it is unreasonable for a tribunal to blatantly reject valid interpretive tools if there are substantial similarities in the factual scenarios, impugned regulations, and applicable legal tests.

[120] The regulatory framework and factual scenario in the CAS decision and the Respondent's claim are identical. The IAAF Regulations challenged by Ms. Semenya were the same ones adopted by CAF and the subject of the Respondent's complaint.[174] Both the Respondent and Ms. Semenya are female athletes caught by the regulations. They both possess a DSD condition and exhibit XY chromosomes.[175]

[121] Furthermore, the BF test applied in light of *Charter* values is a functional equivalent to the test applied by the CAS. Both consider the ameliorative purpose against the reasonableness, proportionality and necessity of the impugned standards.[176] These similarities indicate that the CAS decision should have been given a high level of

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[172] *FC Judgement*, *supra* note 3 at para 20.
[173] *Reference re: Public Service Employee Relations Act (Alberta)*, [1987] 1 SCR 313 at 348–50, 38 DLR (4th) 16.
[174] *CAS Judgement*, *supra* note 10 at para 5; *FC Judgement*, *supra* note 3 at para 7.
[175] *CAS Judgement*, *supra* note 10 at para 9; *FC Judgement*, *supra* note 3 at para 4.
[176] *CAS Judgement*, *supra* note 10 at para 1; *FC Judgement*, *supra* note 3 at paras 19, 30.

interpretive weight by the CHRT, and should have been used to determine whether the ameliorative purpose of the regulations could justify the discriminatory standard.

[122] Furthermore, customary international law may indicate what constitutes an important objective, which can justify restrictions on human rights.[177] As a decision of an international arbitral body, the CAS decision represents customary international law.[178] It is well established that there is a level of permissible limitations on human rights where the standard's objective serves a valid purpose, such as ensuring fairness in sport.[179]

[123] CAS found the ameliorative nature of the IAAF Regulations indicative of the IAAF's need to implement the standards.[180] The non-surgical option for DSD athletes to comply with the regulations lead the CAS majority to find the IAAF Regulations reasonable and proportionate.[181] When balancing the value of ameliorative programs with enabling statutory objectives and competing values of equality, the CHRT ought to have considered the CAS decision in its interpretation of the importance of the regulations to achieving CAF's objective of promoting fairness in sport.

[124] The CHRT's failure to consider the ameliorative purpose of the DSD regulations with the CAS Panel's justificatory analysis resulted in an unreasonable conclusion that cannot be justified in fact or law. Accordingly, the CHRT's rejection of the interpretive value of the CAS decision was unreasonable and must be overturned on judicial review.

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[177] *Slaight Communications*, *supra* note 171 at 1057–58.
[178] Michael Bryant & Lorne Sossin, *Public Law: An Overview of Aboriginal, Administrative, Constitutional and International Law in Canada*, (Scarborough, ON: Carswell, 2002) at 201.
[179] *CAS Judgement*, *supra* note 10 at para 10.
[180] *FC Judgement*, *supra* note 3 at paras 18–19.
[181] *Ibid* at para 18.

7. Conclusion

[125] This is a pure administrative law case that turns on pure administrative law principles. When a tribunal acts unreasonably by surpassing its jurisdiction or in failing to apply the correct legal tests, that decision must be overturned on judicial review.

[126] The CHRT acted unreasonably in several respects. Firstly, it assumed that in adopting eligibility criteria for athletes seeking to compete for Team Canada, CAF provided the Respondent a service. The tribunal's implicit reasoning was flawed. CAF's activities do not, and were not intended, to come within the scrutiny of the Act.

[127] If the CHRT was within its jurisdiction, the tribunal offered an incomplete analysis of the alleged discriminatory conduct. It incorrectly applied the s. 15(2) test, and also failed to balance relevant *Charter* values as required by *Doré*. In disregarding the ameliorative purpose of the regulations, the CHRT committed a reviewable error. This oversight led the tribunal to unreasonably discount constitutional values that ensure substantive – and not only formal – equality is achieved.

[128] Allowing the Respondent to serve as part of Team Canada without respecting the testosterone limits would be unfair to eligible competitors who do comply with these valid international standards. Regardless of whether the IAAF Regulations are implemented domestically, it is undisputed that the IAAF Regulations will apply at the Olympics.[182]

[129] Qualified athletes could lose their opportunity to join Team Canada due to the Respondent's insuperable and unregulated performance advantage during tryouts. A DSD athlete who wins a position in this way would be non-compliant with the Olympic standards and face disqualification upon arrival in Tokyo. They would rob the opportunity

[182] *FC Judgement*, *supra* note 3 at paras 6–7.

to compete from another qualified athlete with the same goals, dreams, and dedication.

[130] Each error on its own indicates unreasonableness in the CHRT decision and compels this Court to quash it in its entirety. Failing to do so would offer the CHRT an unreasonable amount of discretion to address claims beyond its jurisdiction and would uphold a quasi-judicial decision that is contrary to fundamental constitutional principles.

[131] For the foregoing reasons, the Appeal should be allowed, the CHRT decision should be set aside, CAF's application for judicial review should be granted, and the Respondent's complaint shall be dismissed.

PART V – ORDER SOUGHT AND NAMES OF COUNSEL

[132] The Appellant requests that the Canadian Court of Justice:

ALLOW the appeal;

OVERTURN the decision of the Federal Court of Appeal;

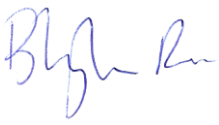
ALLOW the application for judicial review;

SET ASIDE the CHRT Decision;

DISMISS the Respondent's complaint;

WITH COSTS throughout.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of January, 2019



Bhreagh Ross
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Counsel #2 for the Appellant

APPENDIX A: LIST OF AUTHORITIES

LEGISLATION

Canadian Charter of Rights and Freedoms, s 15(2), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

Canadian Human Rights Act, RSC 1985, c H-6.

JURISPRUDENCE

Agraira v Canada (Public Safety and Emergency Preparedness), 2013 SCC 36.

Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association, 2011 SCC 61.

Andrews v Law Society of British Columbia, [1989] 1 SCR 143, 56 DLR (4th) 1.

Atlus Group Ltd. v Calgary, 2015 ABCA 86.

Baker v Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817, 174 DLR (4th) 193.

British Columbia (Public Service Employee Relations Commission) v BCGSEU, [1999] 3 SCR 3, 176 DLR (4th).

British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights), [1999] 3 SCR 868, 181 DLR (4th) 385.

C.U.P.E. v Ontario (Minister of Labour), [2003] 1 SCR 539, 226 DLR (4th) 193.

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