

SPORT DISPUTE RESOLUTION CENTRE OF CANADA (“SDRCC”)

SDRCC FILE NO. 19-0421

KAILLIE HUMPHRIES

Claimant

and

BOBSLEIGH CANADA SKELETON

Respondent

and

TODD HAYS

Affected Party

AWARD

Arbitrator: The Honourable Robert P. Armstrong, Q.C.

Counsel:

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I. INTRODUCTION

1. Kallie Humphries was a Bobsleigh Canada Skeleton (“BCS”) athlete from 2002 to 2018. She is both an Olympic and World Champion in the sport of Bobsleigh. At the present time she is a member of the United States Bobsleigh team.
2. In July 2018 Ms. Humphries filed a complaint pursuant to the BCS Discrimination and Harassment Policy (“DH Policy”). She alleged that during her 2017-2018 season she was subjected to conduct by the head coach of the BCS team, Todd Hays, which contravened sections 10(a) and 10(g) of the DH Policy. Ms. Humphries alleged that Sarah Storey, President of BCS, and Chris LeBihan, High Performance Director of BCS, breached section 14(b) of the DH Policy for failing to address the alleged misconduct when they became aware of it. The Complaint is attached as Appendix A to this award.
3. The relevant sections of the DH Policy are sections 2, 9, 10(a), 10(g) and 14(b) of the DH Policy, which read as follows:
 2. BCS is committed to providing an environment free of discrimination and harassment on the basis of race, nationality or ethnic origin, colour, religion, sex, sexual orientation, marital status, family status or disability.
 9. Harassment is improper behaviour related to one or more prohibited grounds that are offensive and which the person knew or ought to reasonably have known would be inappropriate or unwelcome. The

behaviour can be verbal or physical and can occur on a one-time repeated or continuous basis. The person does not have to intend to harass for the behaviour to be harassment.

10. Harassment can take many forms but generally involves conduct, comment or display that is insulting, intimidating, humiliating, hurtful, demeaning, belittling, malicious, degrading or otherwise cause offence, discomfort or personal humiliation or embarrassment to a person or a group of persons.

Examples of harassment include:

a. Hostile verbal and non-verbal communications;

...

g. Acts of retaliation designed to punish an individual who has reported discrimination or harassment;

...

14. Prevention and intervention are key to achieving a sport and work environment free of discrimination and harassment. The BCS must represent a positive role model. BCS participants should:

...

b. Exercise good judgment and initiate appropriate action under this policy, if they become aware that discrimination or harassment may have occurred;

...

4. BCS appointed Hill Advisory Services Inc to carry out an investigation of the allegations. The Terms of Reference of the Investigation are attached as Appendix B to this award. The investigation was carried out by Dylan Hill of Hill Advisory Services who conducted telephone interviews of Ms. Humphries

and others. There were five other witnesses who were interviewed by Ms. Gail Camille Hill, the founder of Hill Advisory Services. She is also Mr. Hill's mother.

5. In the original complaint Ms. Humphries sought a remedy under s. 17 of the DH Policy that Mr. Hays, Ms. Storey and Mr. LeBihan be dismissed from their positions in BCS and be subject to lifetime suspensions from any involvement with BCS in any capacity.
6. At the end of the Hill investigation Mr. Hill filed a report, which concluded that there was insufficient evidence to establish any breach of the DH Policy. The Board of BCS adopted Mr. Hill's report on September 15, 2019.
7. This matter now comes before me as Arbitrator pursuant to s. 3.4 of the Canadian Sport Dispute Resolution Code of January 1, 2015. In the request to the SDRCC of October 2, 2019, Ms. Humphries sought the following relief:

Ms. Humphries requested that the findings of the Investigation Report be set aside and for the Arbitrator to provide its own findings on Ms. Humphries' harassment and abuse complaint based on evidence presented to the Arbitrator. In the alternative, Ms. Humphries requested that the Arbitrator order a new investigation to be conducted with direction to the investigator to interview witnesses identified by Ms. Humphries capable of corroborating her complaint or capable of making findings of credibility on the basis of corroborating similar fact evidence provided by Ms. Humphries of similar, if not identical, instances of harassment, verbal abuse or discrimination.

8. In a further Request to the SDRCC dated October 5, 2019, counsel for Ms. Humphries amended the original request and requested an order that there be a new investigation by an independent investigator.
9. After the conclusion of the hearing before me counsel for Ms. Humphries advised that they were seeking the following relief:
 - (a) An order setting aside the Hill investigation and the respondent's decision to adopt the findings and conclusion of the Hill report and [an] order for a new investigation into the Claimant's Harassment Complaint by an independent investigator of the SDRCC Investigation Unit; or
 - (b) In the alternative, an Order setting aside the Hill investigation and the respondent's decision to adopt the findings and conclusions of the Hill report.

II. THE COMPLAINT OF MS. HUMPHRIES – RE: HEAD COACH TODD HAYS

10. Ms. Humphries described six incidents involving the Head Coach of the BCS Olympic team, Todd Hays, during the period between September 2017 – February 2018. They are briefly summarized in the paragraphs below.

(i) The Argument on Team Selection, Calgary September / October 2017

11. This first incident involved a discussion between Mr. Hays and Ms. Humphries at a gym in Calgary in late September or early October 2017 about the selection of athletes for the Women's World Cup team. Ms. Humphries took issue with Mr. Hays' opinion in respect of the selection of team members. This became a heated discussion within ear shot of other members of the team, which Ms. Humphries found embarrassing.

12. Ms. Humphries testified that she and Mr. Hays were yelling back and forth at each other. The discussion ended with Mr. Hays stating that he was the head coach and Ms. Humphries had to do what he said and deal with it.

13. There was no physical contact and no threats from Mr. Hays.

14. This incident was not included in the original complaint made by Ms. Humphries. She apparently remembered it when she was first interviewed by Dylan Hill.

(ii) Video Review Incident, Park City Utah, November 2017

15. In preparation for a World Cup race Mr. Hays held a video session in the hotel bar. Ms. Humphries said that Mr. Hays screamed at her during the meeting over an apparent disagreement on how to deal with the Bobsleigh track at Park City, which was Mr. Hays' home track. Ms. Humphries said that Mr. Hays referred to

the manner in which the members of the women's team conducted themselves as a "shit show". She stated in her complaint that she believed Mr. Hays intended to demean, abuse, and play games with "us" mentally. She further stated that, "I do believe the situation was related to my membership in one of the prohibited grounds ... likely based on my sex given my knowledge of how male athletes have been treated diametrically different from myself."

(iii) Winterburg, Germany, December 6, 2017 – RE: Snow Pants

16. This incident involved a pair of snow pants, which would be worn by Ms. Humphries on the podium should she be a medalist for the presentation ceremony. Mr. Hays had the snow pants in his hotel room and told Ms. Humphries that he would bring her pants and the pants of another team member to the hill where the team was training.
17. When Ms. Humphries arrived at the top of the hill she asked Mr. Hays about the snow pants. Mr. Hays told her that she would have to speak to Graham Richardson about it and she told him that Mr. Richardson was parking the truck and reminded him that he (Mr. Hays) was the head coach. A yelling match ensued. Mr. Hays responded that "This is not my problem" in a loud voice. Ms. Humphries told Mr. Hays to stop yelling. Mr. Hays told her that she should not

be focused on meaningless details and that she should focus on driving the bobsleigh. He said she would get the pants and that she was worrying about details that did not matter. Ms. Humphries said that details mattered to her and her performance. She then left to find Mr. Richardson. She got the pants the next day.

18. Ms. Humphries said that she was embarrassed because of this yelling confrontation and that there were a number of people at the top of the hill where this incident occurred.

(iv) Igls, Austria, December 13, 2017 - Massage Time

19. This incident took place prior to a World Cup event in Igls, Austria. Each of the members of the team were entitled to 30 minutes of massage time. Ms. Humphries wanted an additional 30 minutes. In order to get extra time, she had to get the coach to intervene. She exchanged WhatsApp messages with the coach in which she said that she did not care about the other athletes and that she had rank.

20. This situation prompted another argument between Ms. Humphries and Mr. Hays. Ms. Humphries met Mr. Hays in the hotel bar. Mr. Hays told her that she demanded too much of the staff and of her teammates. He suggested she had an

immature attitude. At some point during this discussion, she apparently said that she did not “Give a fuck” about the other members of her team.

21. The shouting match in the hotel bar continued for a considerable period of time.

Ms. Humphries said it lasted for 90 minutes. She said that there were other people present in the bar including John Morgan, an IBSF TV announcer. She did not know if he heard anything as he was 15-20 feet away. Ms. Humphries commented that she and Mr. Hays “Seemed to have constant battles over who was right and who was wrong, but I knew what I need for my top performance.”

22. In addition, she also claimed that Mr. LeBihan had attempted to make a massage therapist stop treating her.

(v) Igls, Austria, December 14, 2017 – Shoulder Touch

23. The day following the heated discussion about the massage time, Ms.

Humphries was sitting in the hotel lobby drinking tea. Mr. Hays approached Ms. Humphries and he placed his hand on her right trap muscle (shoulder) and squeezed it a couple of times. Ms. Humphries said she pulled away – the contact lasted two or three seconds and Ms. Humphries immediately stepped back.

**(vi) The Opening Ceremony for the Olympics (Pyeong Chang:
February 2, 2018)**

24. Ms. Humphries complained that Mr. Hays behaved inappropriately at the opening ceremony. This part of the original complaint was withdrawn in the hearing before me.

**III. MS. HUMPHRIES' COMPLAINT AGAINST SARAH STOREY AND
CHRIS LEBIHAN**

25. As indicated in the introduction the gist of her complaint against Ms. Storey and Mr. LeBihan is that they failed to take appropriate action in respect of Mr Hays' conduct and thereby breached s. 14(b) of the DH Policy.

IV. THE INVESTIGATION

26. Mr. Hill was provided with the written complaint of Ms. Humphries and then conducted three telephone interviews with her on March 8, April 13 and 17, 2019. Mr. Hill was provided with Mr. Hays' response to Ms. Humphries' complaint and interviewed him on July 2, 2019. Mr. Hill also received

responses from Ms. Storey and Mr. LeBihan for the complaints against them by Ms. Humphries. They were interviewed on June 28, 2019, by Mr. Hill.

27. Mr. Hill requested Ms. Humphries to provide the names of individuals “Capable of providing direct evidence on the specific allegations.” Ms.

Humphries provided the following names:

- a. Alysia Rissling – Team Member
- b. Christine DeBruin – Team Member
- c. Stephen Bosch – Coach
- d. Lascelles Brown – Team Member
- e. Graham Richardson – Coach
- f. Marcin Groszcznski – Massage Therapist

28. Ms. DeBruin declined to be interviewed. The other five people were interviewed by Ms. Gail Camille Hill.

29. Mr. Hill produced two documents from his investigation. The first document is a 75-page Evidence Compilation. The second document is a 17-page piece also titled, Evidence Compilation. However, it has been referred to in this arbitration as the Final Report, which is included as Appendix C to this award.

30. In his Final Report Mr. Hill provided the following summary of Ms.

Humphries’ complaint against Mr. Hays, Ms. Storey and Mr. LeBihan:

The essence of Ms Humphries’ complaint alleges that Mr Hays has harassed/discriminated against her by: verbally and mentally abusing her, shunning her, yelling at her, punishing her with a removal of services, screaming at her and intimidating her during a video review session, treating her differently than male athletes, “losing it” with her with respect to a question about snow pants, which included

screaming at her, attacking her personally and professionally while raising his voice with respect to a conflict about massage time allotment, touching and rubbing her shoulder, which was unwelcome, favouring other athletes, and yelling at her during a conversation about favouritism.

The essence of Ms Humphries' complaint alleges that Mr LeBihan has harassed her by: failing to keep her safe from Mr Hays' verbal and mental abuse, trying to make a massage therapist stop treating her, which was a form of punishment, and falsely claiming he had not been made aware of concerns Ms Humphries had with Mr Hays.

The essence of Ms Humphries' complaint alleges that Ms Storey has harassed her by: failing to keep her safe from Mr Hays' verbal and mental abuse, telling her "he's not going anywhere" in reference to Mr Hays, after she had informed Ms Storey of her concerns, and falsely claiming she had not been made aware of concerns Ms Humphries had with Mr Hays.

31. Mr. Hill referred to two definitions of harassment. The first is at page 4 of his

Final Report and reads:

Harassment is improper behaviour related to one or more prohibited grounds that are offensive and which the person knew or ought to reasonably have known would be inappropriate or unwelcome. The behaviour can be verbal or physical and can occur on a one-time repeated or continuous basis. The person does not have to intend to harass for the behaviour to be harassment.

Harassment can take many forms but generally involves conduct, comment or display that is insulting, intimidating, humiliating, hurtful, demeaning, belittling, malicious, degrading or otherwise cause offence, discomfort or personal humiliation or embarrassment to a person or a group of persons.

32. The second definition of harassment used by Mr. Hill is at page six of his Final Report and reads:

Harassment takes many forms but can generally be defined as behaviour including comments and/ or conduct which is insulting, intimidating, humiliating, hurtful, malicious, degrading or otherwise offensive to an individual of groups or individuals or which creates an uncomfortable environment. The Bobsleigh CANADA Skeleton Discrimination and Harassment Policy may be found at <http://www.bobsleighcanadaskeleton.ca/PoliciesAndProcedures.aspx>.

The DH Policy is attached as Appendix D to this Award.

33. In the Final Report Mr. Hill deals with the evidence of specific allegations made by Ms. Humphries. He does not identify the witnesses from whom he received the information.

V. MR. HILL'S CONCLUSION IN RESPECT OF THE VARIOUS ALLEGATIONS

(i) The Argument on Team Selection – Calgary September-October 2017

34. The following is Mr. Hill's conclusion in respect of this issue:¹

¹ I use bold type in the places where Mr. Hill did so in his Report.

The essence of Ms Humphries' complaint alleges that Mr Hays has harassed/discriminated against her by: yelling at her during a conversation about favouritism.

Mr Hays denied the allegations.

One witness stated he saw Ms Humphries and Mr Hays having a "long conversation" and that "at some point she was crying" but he was not paying strict attention and did not overhear their conversation.

One witness indicated in this report that Mr Hays did raise his voice in general.

Two witnesses stated in this report that they had never heard Mr Hays yell.

In the investigator's opinion the evidence has not substantiated that Mr Hays yelled at Ms Humphries during a conversation about favouritism

(ii) Video Review Session, Park City Utah, November 2017

35. Mr. Hill's conclusion in respect of the video review session in Park City is as follows:

The essence of Ms Humphries' complaint alleges that Mr Hays has harassed/discriminated against her by: screaming at her and intimidating her during a video review session, and treating her differently than male athletes.

Ms Humphries stated, "The situation was likely based on my sex given my knowledge of how male athletes have been treated drastically different than myself... Certainly, if Mr Hays has treated the male athletes differently, there is a basis for discrimination on the prohibited grounds."

Mr Hays denied the allegations.

None of the witnesses stated that Mr Hays yelled or was abusive during the meeting in question.

One of the witnesses stated that Mr Hays had raised his voice or yelled in general from a normal level of 2-3/10 to 7-8/10. The witness stated that Mr Hays could come across as intimidating due to his physical size. The witness stated he had witnessed Mr Hays lose his temper, in general.

Two witnesses stated they had never heard Mr Hays yell.

One witness stated she did not witness any expression of temper or abusive behaviour from Mr Hays, and that she did not find him intimidating.

One witness stated Ms Humphries and Mr Hays never saw eye to eye. The witness stated Ms Humphries was defensive and caustic in her responses to Mr Hays.

In the investigator's opinion the evidence has not substantiated that Mr Hays screamed at Ms Humphries and intimidated her during a video review session.

In the investigator's opinion Ms Humphries has not met her burden of proof with the

allegation that Mr Hays treated her differently than male athletes with this issue. In the investigator's opinion Ms Humphries' rationale for this element of her complaint is theoretical, in that she indicated she felt the treatment was "likely based on my sex" and stated, "if" Mr Hays treated male athletes different in similar circumstances there would be a basis for a complaint of discrimination. In the investigator's opinion the evidence has not substantiated the allegation.

(iii) Winterburg, Germany, December 6, 2017 – Snow Pants

36. Mr. Hill's conclusion in respect of the above incident in his Final Report is as follows:

The essence of Ms Humphries' complaint alleges that Mr Hays has harassed/discriminated against her by: "losing it" with her with respect to a question about snow pants, which included screaming at her.

Mr Hays denied the allegations.

None of the witnesses stated they witnessed the conversation directly, although one witness stated he heard both Ms Humphries and Mr Hays were "shouting" at each other.

In the investigator's opinion the evidence has not substantiated that Mr Hays "lost it" with Ms Humphries with respect to a question about snow pants, which included screaming at her.

(iv) Igls, Austria, December 13, 2017, Massage Time

37. Mr. Hill's conclusion in respect of the above issue is as follows:

The essence of Ms Humphries' complaint alleges that Mr Hays has harassed/discriminated against her by: attacking her personally and professionally while raising his voice with respect to a conflict about massage time allotment.

Mr Hays confirmed that Ms Humphries and he had a conversation regarding massage time, however he denied the allegations.

Two witnesses stated they knew there was conflict between Ms Humphries and Mr Hays with respect to massage time, though they did not recall the details.

In the investigator's opinion the evidence has not substantiated that Mr Hays attacked Ms Humphries personally and professionally

while raising his voice with respect to a conflict about massage time allotment.

38. Although not listed as a separate allegation Ms. Humphries alleged that Mr. LeBihan had tried to make a massage therapist stop treating her as a form of punishment. Mr. Hill concluded that this allegation was not substantiated.

(v) Igl's, Austria, December 14, 2017 – Shoulder Touch

39. Mr. Hill's conclusion on the shoulder touch issue is as follows:

The essence of Ms Humphries' complaint alleges that Mr Hays has harassed/discriminated against her by: touching and rubbing her shoulder, which was unwelcome.

Mr Hays denied the allegations.

One witness stated Mr Hays was "always putting his arms around athletes to try and calm them down" and stated that Ms Humphries told him once that Mr Hays touched her in a way she did not like. The witness did not see the alleged event.

In the investigator's opinion the evidence does not substantiate the allegation that Mr Hays touched Ms Humphries and rubbed her shoulder, which was unwelcome.

VI. MR. HILL'S GENERAL CONCLUSION

40. Mr. Hill's final general conclusion is set out at pages 16-17 of his Report as follows:

In the investigator's opinion the evidence *has not substantiated* that Mr Hays: screamed at Ms Humphries and intimidated her during a video review session, treated her differently than male athletes, "lost it" with Ms Humphries with respect to a question about snow pants, which included screaming at her, attacked Ms Humphries personally and professionally while raising his voice with respect to a conflict about massage time allotment, touched Ms Humphries and rubbed her shoulder, which was unwelcome, or yelled at Ms Humphries during a conversation about favouritism.

In the investigator's opinion the evidence *has not substantiated* that Mr LeBihan: tried to make a massage therapist stop treating her as a form of punishment.

In the investigator's opinion the following elements are *outside the scope* of this investigation: concerns related to Mr Hays and a potential Code of Conduct breach – section # 13 of this report.

In the investigator's opinion Ms Humphries has *failed to meet her burden of proof* with respect to the following elements of this investigation: that Mr Hays treated her differently than male athletes - section # 3, and the allegations relating to favouritism - section #20.

In the investigator's opinion the evidence *substantiated* that Ms Humphries expressed concerns and spoke about conflict with Mr Hays with Ms Storey, Mr LeBihan and others, however, in the investigator's opinion the evidence *has not substantiated* that Ms Humphries stated she was being harassed by Mr Hays or that he was discriminating against her, within the context of the BCS policies.

In the investigator's opinion the evidence in this report *does not substantiate* that the only logical and reasonable conclusion Mr LeBihan and Ms Storey could have come to (given the information regarding conflict shared with them) was that there was a potential complaint being made with respect to the relevant policies.

It is noted that evidence was presented that Ms Storey took action upon hearing of a number of concerns that Ms Humphries had, and that she found that a number of the concerns did not have merit.

It is noted that conflict can and does occur in many workplaces, and is satisfactorily resolved, without the use of a formal complaint or investigation. In the investigator's opinion the burden of filing a formal complaint therefore, belongs rightfully and reasonably with the complainant (in this case Ms Humphries) and not with Ms Storey, Mr LeBihan or any others.

In the investigator's opinion there has been no breach to relevant policy.

VII. MR. HILL'S APPROACH TO THE INVESTIGATION

41. Mr. Hill set out the principles of evidence, which he applied during the course of his investigation. This is found at page three of his Final Report as follows:

The Principles of Evidence:

These principles of evidence were followed throughout the investigative process:

1. The onus of proof, or the burden of proof rests with the complainant.
2. The standard of proof required is a civil law principle based on a balance of probabilities, that is: by a preponderance of the evidence, can it be reasonably concluded that such allegations are founded.
3. The corroboration of various events, either by witnesses or documentation is pertinent. The assertions of one party over another cannot be accepted as fact simply because that party says it is so.
4. The issue of credibility of witnesses themselves is pertinent. Since many cases may not have corroborative witnesses, some of the evidence may be on the determination of whom is most credible in their evidence.

42. Mr. Hill was called as a witness before me. It appears from his evidence that before he began to interview any witnesses, he concluded that on the information that was provided to him he did not think that there had been a breach of the BCS DH Policy. He came to this conclusion on the basis that the complaint “Did not detail a nexus between the conduct for comment and one of the prohibited groupings...” in the DH Policy. In January 2019 he met with BCS officials and advised them, “I did not see, based on the initial documentation the nexus and we spoke about what steps should be taken. And we determined that I would interview the Claimant and ask her specifically to make out the case, which I did.” After he interviewed Ms. Humphries, he again advised BCS officials that “It still does not appear that the case is made out what would you like me to do.” He was told to continue to collect the evidence. Arrangements were then made for Ms. Hill to interview the five witnesses referred to above. The interviews of the five witnesses did not change his mind that there was no case made out in respect of a breach of the DH Policy.

VIII. MR. HILL’S APPROACH TO CREDIBILITY

43. As indicated above Mr. Hill identified the issue of creditability of witnesses as one of the principles of evidence “Which [was] followed throughout the

investigative process.” This was emphasized by Mr. Hill in his affidavit filed in this arbitration where he stated:

Contrary to the submissions made by the Complainant’s Counsel in these proceedings, excerpted below, I appropriately assessed the credibility of all the witnesses interviewed during the investigation, including Mr. Hays. [Emphasis Added]

44. However, Mr. Hill was asked whether he made a credibility finding as between the evidence of Mr. Hays and Ms. Humphries and he responded, “No.”

45. Mr. Hill agreed with counsel that he made “No credibility findings at all in this case.” He explained that it was unnecessary to do so because “I determined that she had not met the burden of proof therefore there was no breach to relevant policy.”

IX. OTHER EVIDENCE PRESENTED IN THIS ARBITRATION

46. Apart from the evidence of Mr. Hill I was also provided with affidavit evidence from the following witnesses:

1. Daniel Botha, MD – Calgary
2. Todd Hays – BCS Coach
3. Dylan Hill – Investigator
4. Kaillie Humphries
5. Debra Janzen – Paralegal Assistant
6. Justin Kripps – Member of BCS Team
7. Chris LeBihan – BCS High Performance Director

8. Melissa Lotholz – BCS Team Member
9. Stephen Norris – Vice-President of BCS
10. Alyssia Rissling – BCS Team Member
11. Bree Schaaf – Former USA Team Member
12. Cody Sorensen – Director of BCS – Former Team Member
13. Sarah Storey – President of BCS
14. Elana Myers Taylor – US Bobsleigh Athlete
15. Neville Wright – Former Team Member

47. Dr. Botha, Dr. Morris, Neville Wright, Bree Schaff and Elana Meyers Taylor were all cross-examined, and I was provided with the transcripts of the cross-examinations.

48. The following persons were called as witnesses before me in the following order:

1. Kaillie Humphries
2. Todd Hays
3. Dylan Hill
4. Sarah Storey
5. Chris LeBihan

49. Each filed an affidavit, and each was called as a witness.

X. THE POSITION OF MS. HUMPHRIES

50. Counsel for Ms. Humphries' submits the following:

The issue in this arbitration is whether the investigation conducted by Hill Advisory Services into a harassment complaint made by the claimant, Kaillie Humphries, pursuant to the respondent's, Bobsleigh Canada Skeleton discrimination and harassment policy and the

resulting decision of the respondent's board of directors to accept the findings and conclusions of the Hill Investigation should be set aside on the basis that they were both unreasonable and breached the rules of procedural fairness and natural justice, and a new investigation be ordered. This arbitration is not about whether the conduct of Todd Hays, Ms. Storey and Chris LeBihan as alleged by the claimant amount to a breach of the respondent's discrimination and harassment policy.

51. Counsel submits that the appropriate standard of review to be applied in reviewing the Hill Investigation and the decision of the Board of Directors of BCS to accept the result of the Investigation is reasonableness. The counsel cites both *Dunsmuir v. New Brunswick* 2008 SCC 9 and the more recent decision of the Supreme Court in Canada (*Minister of Citizenship and Immigration*) v. *Vasilov* 2019 SCC 65.
52. Counsel submits that the Hill Investigation and the decision of the board were unreasonable because Mr. Hill breached the principles of procedural fairness and natural justice.
53. The gist of counsel's submission is that the principles of procedural fairness and natural justice were breached because the investigation lacked thoroughness and that Ms. Humphries was unable to respond to the Hill Report in a meaningful way giving rise to a reasonable apprehension of bias.
54. In respect of the lack of thoroughness counsel submits that Mr. Hill declined to interview John Morgan, Christine DeBruin, Lyndon Rush (BCS Coach) and Elana Taylor (US Bobsleigh Athlete). Counsel also refers to the fact that Dr.

Norris, Vice-President of BCS, had provided a list of prospective witnesses to Mr. Hill in the expectation that he would conduct “As thorough as possible investigation.” Mr. Hill declined to do so.

55. Counsel cited a judgement of the Federal Court in *Slattery v. Canada* (Human Rights Commission) 1994 Carswell NAT 271 where the Court observed at para.

54:

The requirement of thoroughness of investigation stems from the essential role that investigations play in determining the merits of particular complaints.

56. Counsel also relies on a breach of the rules of procedural fairness in not providing Ms. Humphries the opportunity to respond to the facts and conclusions of the Hill Report before the Board of BCS.

57. Counsel also relies on the decision in *Andy McInnis v. Athletics Canada and Ottawa Lions Track and Field Club*, SDRCC 19-0401 where Arbitrator Bennett provided a non-exhaustive list for fair investigations, which included:

- a. Review and carefully consider all evidence (both inculpatory and exculpatory);
- b. Interview all witnesses put forward by both sides unless there are compelling reasons not to do so. If an investigator chooses not to interview someone, this should be identified in the final report and reasons given for why that decision was made;
- c. There is no absolute right to know the names of witnesses or have access to their witness statements, but the respondent should be given accurate information of what is being alleged (i.e., place, time and occurrence);
- d. Allow the complainant to provide further evidence if complaint not founded;

- e. Allow and consider written submissions disputing findings;
- f. Provide a final report that is responsive to the original mandate letter and does not go out of its way to answer more than has been set out in the mandate; and
- g. Provide a final report that presents its findings in an impartial manner that is free of hyperbole and editorializing.

58. Counsel Ms. Humphries submits that Mr. Hill failed to carry out a reasonable investigation in accordance with the principles of procedural fairness and natural justice. Counsel referred to the language of the Terms of Reference, which state that the scope of the investigation “Is investigate to determine whether there is any evidence to substantiate the allegations contained in the initial complaint (as amended, if applicable).” The terms provided that the investigator was to conduct interviews with the complainant and respondents and as well as those persons identified in specific allegations or others deemed necessary as witnesses.

59. Counsel submits that Mr. Hill placed too narrow a focus on who should be interviewed as follows:

Mr. Hill himself placed limitations and preconditions on the Hill Investigation that did not square with the Terms of Reference. Specifically, Mr. Hill stated there were criteria that he considered with regard to whether witnesses should be interviewed, including whether they were outside the Respondent’s organization or members of the media. These criteria were applied by Mr. Hill on the basis of his view that the Respondent had an overwhelming desire to protect themselves from any outside knowledge of the Harassment Complaint and the Hill Investigation. These artificial limitations did not form part of the

Terms of Reference, and together with Mr. Hill's stated prejudice against the consideration of hearsay or similar fact evidence, unreasonably limited the scope of the Hill Investigation and virtually guaranteed from the outset that the resulting report would be unreasonable or "clearly deficient".

60. In respect of witnesses who should have been interviewed by Mr. Hill counsel for Ms. Humphries stated at paragraphs 99-101:

99. The Claimant submits that a reasonable investigation would have reviewed all relevant evidence, including interviewing witnesses put forward by both sides unless there were compelling reasons not to do so, particularly witnesses named by the Claimant as direct witnesses to specific allegations, witnesses that could speak to credibility, and witnesses that could provide evidence to demonstrate a prohibited ground of discrimination.

100. As stated in the Hill Report, Hill Advisory Services only interviewed a total of five (5) witnesses in addition to the Claimant, the Affected Party, Ms. Storey and Mr. Le Bihan, and one witness, Ms. De Bruin, refused to participate in the investigation contrary to the DH Policy. However, both the Claimant and the Respondent identified significantly more than the six (6) witnesses contacted by Hill Advisory Services during the course of the Hill Investigation.

101. The Claimant specifically identified 18 witnesses in addition to herself, the Affected Party, Ms. Storey and Mr. Le Bihan during her interviews with Mr. Hill, in her statement, and by her previous legal counsel. Specifically, during her three interviews with Mr. Hill and in her statement, the Claimant identified Morgan Alexander, Stuart McMillan, Lyndon Rush, Gordon Bosworth, Jorg Patzer, Phylcia George, Christine De Bruin, Elana Meyers Taylor, and John Morgan as witnesses that were not interviewed as part of the Hill Investigation. Most significantly, the Claimant identified Ms. De Bruin, Mr. Morgan, Mr. Rush and Ms. Taylor as witnesses to her allegations against the Affected Party pursuant to subsection 10(a) and (g) of the DH Policy and against Ms. Storey and Mr. LeBihan

pursuant subsection 14(b) of the DH Policy.

61. Counsel for Ms. Humphries submitted that Mr. Hill was provided a list by Dr.

Norris. Mr. Hill did not interview any of them.

62. Counsel for Ms. Humphries provided detailed submissions on the failure of Mr.

Hill to address issues of credibility. I have already made reference to this issue and will have more to say about it in my analysis and conclusion.

63. Counsel for Ms. Humphries requested me to draw an adverse inference for the

failure of BCS to provide the home address of Christine DeBruin in order to

serve her with a Notice to Appear as a witness in this arbitration. Some months

before the commencement of the arbitration I had issued a Notice to Appear

pursuant to the Arbitration Act.

64. In my view Ms. DeBruin is entitled to her privacy. BCS was not required to

provide the home address of Ms. DeBruin. I decline to draw an adverse

inference against BCS. Counsel could have sought an Order for substitutional

service under section 53(6) of the Arbitration Act.

XI. THE POSITION OF BOBSLEIGH CANADA SKELETON

65. Counsel submits that procedural perfection is not required. The content of

procedural fairness is variable and depends on the context of each case. Relying

on a judgement of the Nova Scotia Court of Appeal in *Nova Scotia Long Term Disability Plan Trust Fund v. Hyson* 2017 NSCA 46 at para. 25 counsel argues that a two-step analysis be undertaken to determine if there has been a breach of procedural fairness:

- i. The content of the Boards duty of fairness
- ii. Whether the Board breached that duty

66. The Court said that in determining the content of the duty of fairness the BCS Board “Must pay careful attention to the context of the particular proceeding and show appropriate deference to the Tribunal’s discretion to set its own procedures.” The second step – is assessing if the Board lived up to its duty – assess whether the Tribunal met the standard of fairness defined at the first step.

67. Counsel cited the Federal Court of Appeal decision in *Bergeron v. Canada (Attorney General)* 2015 FCA 160 at paras. 74-76 where the Court set forth the following principles:

- (a) An investigator need not pursue every last conceivable angle.
- (b) The degree of thoroughness required of an investigation depends on the circumstances of each case. In some cases, one or more facts may resolve the issue under investigation to the investigator’s satisfaction, rendering continued investigation unnecessary.
- (c) In some cases, at some point, the utility of further investigation is nil.
- (d) Only “fundamental issues” need be investigated so that complainants can receive the “broad grounds” of the case against them. Put another way, a deficient investigation warranting relief is

one where there has been an “unreasonable omission” in the investigation or the investigation is “clearly deficient”.

- (e) An investigator is not required to refer to everything submitted by a complainant.

68. Counsel for BCS also submitted that there was no obligation on Mr. Hill to provide a copy of his report to Ms. Humphries for the purpose of her making a representation before the report was presented to the Board of BCS. Counsel relies on *Thomas v. Canada (Attorney General)* 2013 FC 292 at para. 89:

I do not agree that procedural fairness requires such an approach. A requirement that the Investigator provide the penultimate report with findings and analysis to the parties before submitting the report to the DM representative would lead to potentially endless investigation, as the parties would likely continue to comment on or rebut each others' comments. It would also undermine the role and mandate of the independent Investigator and would relegate the Investigator to the position of merely gathering information, summarising it and making suggestions. It would then place the DM representative, who is the decision-maker, in the position of reviewing all the material, reviewing the draft report and the comments of each party on the draft and on each other's comments – in effect doing much of the investigation him or herself. This was not contemplated by the applicable Policy or Guideline and would not be effective or practical, given the many other responsibilities of the DM representative, including with respect to other complaints under the Policy and Guideline. The investigation must be delegated and the DM representative must then make a decision based on the final report of the independent investigator.

69. Counsel submitted that BCS followed the steps required by the DH Policy at paras. 58-59 of their submissions:

58. Here, the Investigation and Decision followed the process detailed in the Policy, and the Complainant had ample and adequate opportunity to set out and describe her allegations in writing and through a series of interviews. These opportunities provided the Complainant with a meaningful way to address the insufficiency of evidence connecting the alleged misconduct to a prohibited ground.

59. In accordance with the Policy, Hill Advisory advised each Respondent of the complaint, provided each Respondent with a copy of the written complaint, gave each Respondent an opportunity to respond to allegations, and took instructions from the BCS co-officials, as directed.

70. In respect of an allegation of bias against Ms. Humphries, counsel for BCS addressed Ms. Humphries' allegations that Mr. Hill made preliminary conclusions prior to conducting witness interviews and that his report was released just before Ms. Humphries made an application to Court for injunctive relief. BCS responded at paras. 64-67 of their submissions:

64. The Complainant's first allegation of bias can be rejected on a plain reading of the Policy. The Policy provides that a person or body charged with investigating a complaint of discrimination or harassment is entitled to dispose of a complaint where, in the opinion of the investigator, the facts as alleged in the complaint would be insufficient, if proven, to establish discrimination or harassment under the policy.

65. This is exactly what Hill Advisory did when Mr. Hill wrote to the co-officials in January 2019 and in June 2019 and communicated that a conclusion could be reached that the allegations of breach of the Policy were not substantiated on the face of the Complaint.

66. In any case, the point is moot because in both instances, on the instruction of the co-officials, Hill Advisory continued the Investigation. There is no evidence before this Tribunal suggesting

that in investigating the Respondents or the Witnesses, Hill Advisory was not open to considering their evidence and being persuaded by it.

67. With respect to the second allegation of bias, the evidence does not support the allegation that the Decision was tactical and rendered hastily to resist Ms. Humphries application for injunctive relief, brought in the Court of Queen's Bench Action. Specifically, there is no evidence before this Tribunal, indicating that Mr. Hill or anyone at Hill Advisory had knowledge of the Court of Queen's Bench Action.

Was Mr. Hill required to interview all individuals identified by Ms. Humphries?

71. A major complaint of counsel for Ms. Humphries is that Mr. Hill did not interview certain individuals whom she identified as likely to have relevant information. In particular, Ms. Humphries identified: Christine DeBruin who was said to be present during the video review in Park City, John Morgan who was present in the bar at Igls, Austria and may have witnessed the argument concerning massage time, Elana Myers Taylor of the US Olympic Team in respect of similar fact evidence and Lyndon Rush a BCS pilot coach who did end of season interviews by way of debriefing who participated in the World and Olympic Championships.

72. The evidence of the above witnesses, except for Christine DeBruin and John Morgan, was presented in this arbitration. Counsel for BCS submits that the

evidence that each had to offer would not have made a difference to the outcome of the arbitration.

73. In respect of Ms. DeBruin's lack of evidence counsel submit that there was evidence from Alyssa Rissling and Stephen Bosch that did not confirm Ms. Humphries' evidence of the video review session. Ms. Rissling had no recollection of Mr. Hays behaving in an intimidating or unprofessional fashion and has never seen Mr. Hays being abusive to anyone. Mr. Bosch could not recall attending the video briefing.

74. In respect of John Morgan counsel relies on Ms. Humphries' evidence that Mr. Morgan was 15-20 feet away and she did not know if he heard anything. Counsel for BCS also made the following submissions in respect of the potential evidence of John Morgan:

Furthermore, it is Mr. Hill's evidence that, when conducting a confidential, internal investigation, deciding whether or not to interview individuals outside the organization entails a balancing between the value of the external witness's prospective evidence, and the damage to the organization that could flow from revealing details of the investigation. In argument, the Complainant suggests that confidentiality was only at the insistence of the Respondents. However, the Policy provides for confidentiality with limited exceptions.

Since Mr. Morgan is a member of the bobsleigh international media, the concern regarding confidentiality was heightened. In any event, Hill Advisory made the conclusion that any evidence Mr. Morgan may have given would not bear on whether or not the altercation between Ms. Humphries and Mr. Hays constituted a breach of the Policy, particularly whether a prohibited ground was engaged.

75. Ms. Myers Taylor provided affidavit evidence in this arbitration. She was not present at any of the five incidents identified by Ms. Humphries. Her evidence was admitted as similar fact evidence and related to her personal relationship to Mr. Hays when he was her coach on the US Bobsleigh Team. Counsel for BCS stressed the limitations of similar fact evidence in respect of Ms. Myers Taylor.
76. In respect of Mr. Lyndon Rush counsel for BCS submits that at no time did Ms. Humphries suggest to Mr. Hill that she had told Mr. Rush that she had been harassed or discriminated against by Mr. Hays.

The Terms of Reference

77. Counsel for BCS submits that the investigation was conducted in accord with the Terms of Reference and in particular in respect section 3 of the terms which provides:

3. Methodology & Standards

- 3.1. The investigator will review all allegations and relevant documents.
- 3.2. The investigator will conduct the investigation in accordance with due process, giving each party sufficient information, an opportunity to be represented by a representative of their choice and the opportunity to give evidence.

- 3.3. The investigator will conduct interviews with the Complainant and Respondent as well as those persons identified in specific allegations or others deemed necessary as witnesses to events. Such interviews may be conducted via vide-conferencing, in person or by whatever means the investigator deems appropriate.
- 3.4. The burden of proof, or the onus of proof, rests with the accuser.
- 3.5. The standard of proof required is a civil law principle based on the balance of probabilities, that is; by a preponderance of the evidence, can it be reasonably concluded that such allegations are founded.

78. Counsel for BCS made the following submissions in respect to the Terms of Reference at paras. 124-125 of the closing arguments:

The Respondent submits that the Investigation was conducted in accordance with the Terms of Reference in that Hill Advisory: (1) reviewed all allegations; (2) accorded due process; (3) gave all parties several opportunities to give evidence; (4) conducted interviews with the Complainant and Respondents and others identified in specific allegations, save for Ms. De Bruin.

There was no requirement for Hill Advisory to conduct any inquiry “without limitation”. An unlimited investigation in the manner suggested by the Complainant would be contrary to the Terms of Reference and to practicality.

Was the decision of the Board made in a procedurally fair manner and was it reasonable?

79. Counsel for BCS submits that the standard of review of the Board's decision is reasonableness as articulated in Canada (Minister of Citizenship and Immigration) v. Vavilov 2019 SCC 65.

80. Counsel for BCS further submits that all the Board members received a copy of the Hill Report and the Board held two separate meetings on back-to-back days to review its contents. The meeting minutes state:

The Directors present discussed developments in the Humphries investigation matter, the legal advice obtained and the requirements of BCS's Discrimination and Harassment Policy and the recommendations of the Co-Officials appointed by the board of directors and took the following decisions:

1. To adopt the findings of the Hill Investigation Report in the Humphries investigation matter;
2. To adopt the recommendations, as presented, of the BCS Co-Officials in the Humphries investigation matter; and
3. Agreed that the Co-Officials would proceed to inform the parties as soon as reasonably possible on Sunday, September 15th.

81. Counsel submit that "A reasonable decision maker would conclude that the alleged misconduct does not contravene the policy."

The Issue of Credibility

82. Counsel for BCS address the following question: "Was Mr. Hill able to determine whether the allegations were tied to a prohibitive ground without

having to make findings of credibility?” Counsel submits that the issue before me was not whether the investigation was unreasonable but whether the Board’s decision to adopt the findings and conclusions was reasonable. In addressing this issue counsel submits that the “Arbitrator should consider whether the investigation was thorough and whether the [Claimant] was afforded procedural fairness during the investigation period.” Counsel submits that there was no breach of procedural fairness by Mr. Hill’s failing to consider credibility. In support of this position counsel rely on *Ferguson v. Canada (Citizenship and Immigration)* 2008 FC 1067 at para. 27:

The Board adopted the conclusions and finding of the Hill Report, including that the conduct complained of did not come within the definition of abuse, harassment, or discrimination under the Policy. When considering the Complaint in light of the Hill Report and Investigation (discussed above), a reasonable decision-maker would conclude that the Alleged Misconduct does not contravene the Policy.

83. According to counsel for BCS the issue that I have to decide is not whether the investigation was unreasonable. The question for me according to counsel for BCS is whether the decision of the BCS Board of Directors to adopt the findings and conclusions of the Hill Report was reasonable. Counsel for BCS adds: “In doing so, the Arbitrator should consider whether the investigation was thorough and whether the complainant was afforded procedural fairness during the investigation.”

84. Counsel for BCS submit that there was no breach of procedural fairness by Mr. Hill failing to consider credibility. In support of this position counsel rely on *Ferguson v. Canada (Citizenship and Immigration)* 2008 FC 1067 at para. 27:

Evidence tendered by a witness with a personal interest in the matter may also be examined for its weight before considering its credibility because typically this sort of evidence requires corroboration if it is to have probative value. If there is no corroboration, then it may be unnecessary to assess its credibility as its weight will not meet the legal burden of proving the fact on the balance of probabilities. When the trier of fact assesses the evidence in this manner he or she is not making a determination based on the credibility of the person providing the evidence; rather, the trier of fact is simply saying the evidence that has been tendered does not have sufficient probative value, either on its own or coupled with the other tendered evidence, to establish on the balance of probability, the fact for which it has been tendered. That, in my view, is the assessment the officer made in this case.

85. Counsel for BCS submit that of the six incidents involving Mr. Hays (now reduced to five) only three boiled down to a “he-said-she-said” situation: the team selection incident, the snow pants incident, and the massage time incident. In respect to these incidents the decision of whether the DH Policy was breached did not turn on the investigator’s preference as between the evidence of Ms. Humphries and Mr. Hays. No assessment of credibility was required. The decision turned on the claimant’s lack of evidence.

XII. THE POSITION OF TODD HAYS

86. Counsel for Mr. Hays submit that the allegations advanced by Ms. Humphries were taken seriously by Mr. Hays and BCS. Mr. Hays fully cooperated with the Hill Investigation, which took nearly a year to complete.

87. Counsel submit that the Hill Investigation was reasonable, adequate, and procedurally fair. Mr. Hill's argument that the investigation lacked thoroughness and failed to address the credibility of the witnesses is without merit according to counsel for Mr. Hays. Counsel further submit that the position taken by Ms. Humphries is "Premised on holding the investigator to a standard of perfection." According to counsel for Mr. Hays "The findings and conclusions of the investigator are subject to deference provided that the investigator acted reasonably."

88. Counsel for Mr. Hays submits:

Mr. Hays should not be asked again to answer the six incidents complained about by Ms. Humphries nor should BCS be required to commission a second investigation. Mr. Hays submits that such a result will be wrong in law and would divert much needed resources away from BCS in furtherance of an athlete who is now a member of the United States Bobsleigh Team and a direct competitor to Team Canada. Moreover, an objective view of the six incidents based on the substantial evidence before the Arbitrator in this proceeding demonstrates prima facie that the result will not be different.

89. Counsel for Mr. Hays accepts and adopts the position of BCS in this arbitration.

The balance of Mr. Hays' argument addresses each of the six incidents, now reduced to five. The submissions address the substance of Ms. Humphries complaint and request me to dismiss Ms. Humphries claims in this arbitration.

XIII. ANALYSIS AND CONCLUSION

90. In my view in reviewing the Hill Investigation Report and the decision of the Board of BCS to accept the Report the test to be applied is reasonableness. See *Dunsmuir v. New Brunswick* 2008 SCC 9 and *Canada (Minister of Citizenship and Immigration) v. Vasilov* 2019 SCC 65.

91. The allegations made against Mr. Hays by Ms. Humphries are serious and needed to be addressed. The allegations made against Ms. Storey and Mr. LeBihan in their capacities as senior officials of BCS are of a different character but are equally serious and needed to be addressed. In each case they call for an appropriate and thorough investigation. The question I have to decide is whether the Hill Investigation was appropriate and thorough and in the result reasonable.

92. I emphasize that my mandate does not include carrying out a reinvestigation of the allegations. That said, much of the evidence before me related to the merits

or lack of merits of the allegations made by Ms. Humphries and at times this arbitration took on the appearance of a reinvestigation of the complaint.

However, my purpose in hearing this evidence was to assist me in concluding whether the Hill Investigation was appropriate and thorough and therefore reasonable.

93. With the exception of the allegation against Mr. Hays under section 10(g) in respect of the alleged acts of retaliation I have concluded that the investigation of Mr. Hill was neither thorough nor reasonable. As a result, the decision of the Board of BCS to accept the Report cannot stand.

The Terms of Reference and Mr. Hill

94. I start my analysis with the Terms of Reference. The Terms of Reference were Mr. Hill's instructions on what he was retained to do. Section 3.3 of the Terms of Reference addresses "Methodology and Standards" and include the following instructions:

The investigator will conduct interviews with the Complainant and the Respondent as well as those persons identified in specific allegations or others deemed necessary as witnesses to events. Such interviews may be conducted via video-conferencing, in person or by whatever means the investigator deems appropriate.

I interpret the above as a clear instruction to Mr. Hill of what he was required to do at the outset. At the outset it is apparent that Mr. Hill did not think it was necessary to interview any of the witnesses including Ms. Humphries because of his view that Ms. Humphries had failed to identify how the alleged behaviour of Mr. Hays related to any of the prohibited grounds in the DH Policy.

95. It is clear that Dr. Norris and the Board of the BCS expected a thorough investigation by Mr. Hill including the conducting of interviews of the relevant witnesses. Indeed Dr. Norris provided a list of potential witnesses that he thought Mr. Hill should interview. Mr. Hill did not interview all of the witnesses suggested by Dr. Norris.

96. When Dr. Norris was asked if the list was more than five, he responded “Oh yes.” He said, “It was definitely more than five, but it wasn’t like 20.”

97. There was much discussion in this arbitration about the failure to interview John Morgan, the IBS TV Announcer, who was in the hotel bar in Igls, Austria, when the argument about massage time occurred. In cross-examination it was suggested to Mr. Hill that Mr. Morgan was a potential witness who had not been interviewed. Mr. Hill responded:

I believe I answered that in a previous answer, sir. The decision making process I make when I determine which witnesses to interview, there are few questions that I asked myself in this particular circumstance, I asked myself, does this witness have information related to a potential breach of policy. In this case in this

circumstance, it was not my opinion, that that witness specifically Mr. Morgan could have evidence relating to the breach of the policy for BCS. The complainant has not linked [the] two and so the evidence would be ...

...

My evidence is that the complainant did not link the behaviours, conduct or comments to one of the related, related to a prohibited ground as required in the policy as such, the decision making to whether or not to interview particular witnesses goes through that analysis. He was also outside of the organization, a member of the media, and the complainant indicated, she did not know what, if anything, beyond the volume, he would have heard. Therefore, it was my determination that regardless of what evidence he would [have] provided relating to the incident, even if it aligned to the complainant, it would not breach the relevant policy. [Emphasis Added]

98. The last sentence clearly illustrates Mr. Hill's approach to this investigation. He simply concluded at the outset that there was no case to investigate: "Even if it aligned to the complainant, it would not breach the policy." Therefore no investigation was called for.

99. It was also suggested to Mr. Hill that he should have interviewed Lyndon Rush a BCS Coach who conducted debriefing interviews of the BCS athletes after the Olympic games. Mr. Hill indicated that Ms. Humphries had not suggested his name as a possible witness. In any event he testified:

Yes sir, Mr. Rush was not proposed or indicated to have any direct evidence, i.e., witnessed any of the events in question that the complainant set forth. Additionally, the complainant did not provide a nexus between the events, the comments or conduct that happened to her and one of the prohibited groupings and those were the focus of

the investigation, both in discussions with the complainant, as well as with the respondents and witnesses.

100. In my view, Mr. Hill took a very narrow view of his mandate. But for the insistence of Dr. Norris and Mr. Sorensen he was not inclined to interview any witnesses at all. He read Ms. Humphries complaint as if he were a judge reviewing a pleading and concluding that on its face no offence was charged or no case made out and he that need not go any further.
101. Mr. Hill was retained to do an investigation, which clearly involved interviewing relevant witnesses. Under section 29 of the DH Policy the role of an investigator is to “Investigate the complaint and make findings of fact”.
102. While I agree with the Federal Court of Appeal in *Bergeron v. Canada* (Attorney General) supra that “An investigator need not pursue every last conceivable angle” that is not the situation here.
103. Mr. Hill started from a position where his inclination was to interview no witnesses. Then he appears to have reluctantly agreed to interview five of six witnesses in addition to the principal actors.

The Credibility Issue – Mr. Hill

104. I repeat what Mr. Hill said in his Report about credibility. In listing the Principles of Evidence, he stated:

The issue of credibility of witnesses themselves is pertinent. Since many cases may not have corroborative witnesses, some of the evidence may [turn] on the determination of [who] is most credible in their evidence.

105. In his affidavit in this arbitration Mr. Hill swore:

Contrary to the submissions made by the complainant's counsel in these proceedings, excerpted below, I appropriately assessed the credibility of all witnesses interviewed during the investigation, including Mr. Hays. [Emphasis Added]

106. Mr. Hill in his testimony stated a number of times that he did not assess the credibility of any of the witnesses because it was not necessary to do so.

107. The following excerpts from Mr. Hill's evidence are on point:

Question: So it is fair to say, sir, that given your determination, both of numerous unsubstantiated events and the lack of nexus, that you made a credibility finding as between the evidence of Mr. Hays, and Ms. Humphries?

Answer: No

Question: So you made no credibility findings at all in this case?

Answer: Correct

108. Similar statements to the above were made during the course of Mr. Hill's cross-examination. Indeed Mr. Hill made it clear that he made no credibility findings of any of the witnesses.
109. What I understand Mr. Hill to be saying in his evidence is that taking Ms. Humphries evidence at face value she simply did not link her evidence with any of the prohibited grounds under the DH Policy and therefore there was no case.
110. However, at a minimum the investigator needed to consider whether the confrontations between Mr. Hays and Ms. Humphries amounted to something more than two strong minded individuals disagreeing on what needed to be done in the particular circumstances facing them in the World Cup and the Winter Olympics. In respect of Mr. Hill's position that there was no breach of section 10(a) because of Ms. Humphries' failure to connect the conduct to one of the prohibited grounds, surely he was required to analyze the evidence and test it. Ms. Humphries position is that there was hostile verbal communication from Mr. Hays because of her sex and because he treated male athletes differently. That position needed to be analyzed. No such analysis was done. Ms. Humphries was at least entitled to have more from Mr. Hill than the simple statement that she was unable to connect the alleged conduct of Mr. Hays to one of the prohibited grounds. He was required to tell her why he thought there was no connection.

111. The problem as I see it, is that Mr. Hill simply makes conclusive statements without any sufficient analysis to support his conclusion.
112. On the basis of what he said in his affidavit and his clear contradiction in his evidence before me I have difficulty accepting his conclusion. On the one hand his testimony in his affidavit is that he “appropriately assessed the credibility of all the witnesses” and on the other hand, in his evidence before me, he agreed that there were “No credibility findings at all in this case”.
113. I accept that there may be cases where credibility is not an issue because the complaint stated simply does not articulate a breach of the DH Policy. As discussed below that is the situation in respect of the alleged breach of section 10(g). However, it is difficult to come to that conclusion when Mr. Hill indicated that when he did the investigation, he addressed the issue of credibility. It is only when he testified before me some 18 months after he delivered his Report that he advised that there had been no credibility findings in respect of any witness including Mr. Hays and Ms. Humphries. While this may not have been a “he-said-she-said” case the verbal exchanges between these two people do raise questions that call for analysis such as: Were these no more than angry exchanges between two people who were strongly asserting their respective positions on issues of disagreement or were they something more than that amounting to conduct on the part of Mr. Hays that breaches the

relevant provisions of the DH Policy. In my view this situation calls for an analysis that amounts to more than a bald statement that there was no breach of the policy because Ms. Humphries failed to connect the alleged conduct to the prohibited grounds in the DH Policy. I emphasize that I take no position as to what the outcome may be of that analysis. That will be for a new investigator and the Board of BCS to consider and decide.

The investigation of the alleged breach of section 10(g) of the DH Policy

114. I start my analysis with Ms. Humphries' complaint concerning the allegation that she was denied access to massage time as "An act of retaliation designed to punish an individual who has reported discrimination or harassment."
115. Mr. Hill provides a detailed summary of the evidence on this issue in the Evidence Compilation of his Report. What is clear from this summary is that Ms. Humphries "believes" that she was being denied an extra 30 minutes of massage as a form of a punishment to her. What is clear from the evidence, summarized by Mr. Hill, is that there was confusion on the part of the massage therapist, Marcin Groszcznski, concerning his responsibilities. He said he was

originally assigned to look after the massage therapy needs of three skeleton athletes as well as Ms. Humphries and another athlete.

116. Mr. Hill interviewed Mr. Groszcznski who told him he could not remember if he told Ms. Humphries that someone threatened him if he did not stop treating her. Mr. Groszcznski referred Mr. Hill to an email that he sent to Chris LeBihan on December 13, 2017, which addressed his concerns about the rescheduling of massage times and related issues. He told Mr. Hill that the email “Sums up how I responded to the matter.” There is nothing in the email concerning an alleged threat that he stop treating Ms. Humphries.

117. The evidence in this matter before me was somewhat confusing in that the evidence suggested that the target of this allegation was really Mr. LeBihan which of course Mr. LeBihan denied that he was involved in any inappropriate conduct.

118. I have no difficulty in concluding that Mr. Hill’s investigation in respect of this issue was thoroughly conducted and the details are provided in Mr. Hill’s Compilation of the Evidence. There is nothing in the additional evidence placed before me which would lead anyone to conclude that there has been a breach of section 10(g) by either Mr. LeBihan or Mr. Hays. The issue of credibility does not come into play. There is simply no evidence that Mr. Hays or Mr. LeBihan engaged in the alleged breach.

119. Further, I note that section 10(g) of the DH Policy relates to “an individual who has reported discrimination or harassment.” In December 2017, Ms. Humphries had not reported discrimination or harassment against either Mr. Hays or Mr. LeBihan. On a plain reading of section 10(g) it has no application at all to the circumstances here.

120. In conclusion, I have no difficulty in concluding that the investigation in respect of the “massage time” issue was thoroughly conducted by Mr. Hill and no useful purpose would be served by ordering a new investigation on this issue. There is nothing in the additional evidence before me that would lead me to conclude that section 10(g) of the policy comes into play in anyway.

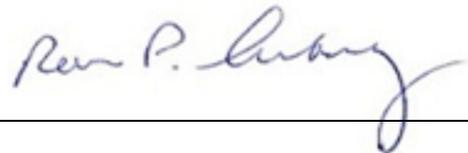
XIV. RESULT

121. In the result an Order will go:

- (i) Setting aside the findings of the Hill Report dated September 12, 2019 in respect of the complaint of Kaillie Humphries regarding sections 10(a) and 14(b) of the DH Policy and setting aside the decision of the Board of BCS to adopt the said findings.

- (ii) Dismissing Ms. Humphries request to set aside the findings of the Hill Report in respect of her complaint pursuant to section 10(g) of the DH Policy and to set aside the decision of the Board of BCS to adopt the said findings.
- (iii) Requesting that BCS appoint a new investigator from the SDRCC's Investigation Unit to investigate the allegations of Ms. Humphries pursuant to sections 10(a) and 14(b) of the DH Policy.

Dated at Toronto, this 15 day of July, 2021
Minor edits made on August 31, 2021



The Honourable Robert P. Armstrong, QC

APPENDIX A

COMPLAINT PURSUANT TO THE BOBSLEIGH CANADA SKELETON

DISCRIMINATION AND HARASSMENT POLICY, SECTION 10,

SUBSECTIONS (a) AND (g), AND SUBSECTION 14(b)

COMPLAINANT: KAILLIE HUMPHRIES

August 17, 2018

Introductory Remarks:

I was verbally and mentally abused by our Head Coach Todd Hays. The part that got me was that while I expressed concern throughout the entire season for specific incidents, nothing was ever done about it by the people who are supposed to keep us safe, the President and the High Performance Director. In fact when I talked to the President about all of this in a season debrief for 7 hours, her response at the end was “well, he’s the Head Coach and he’s not going anywhere so deal with it” which led to an even more unsafe feeling.

Throughout the season I felt he controls people with mind games, and acts like your best friend one day, and your enemy the next. He pits people against each other, calls it “motivating us” when really it’s favouritism. Contrary to the principle laid out in the *Bobsleigh Canada Skeleton Coaches Code of Conduct* that a coach’s privileged position in relation to the athletes means he or she “must understand and respect the inherent power that exists in the relationship and must be extremely careful not to abuse it,” Todd’s behaviour is clearly abusive. If you fall out of his favour, you get shunned, yelled at, punished with removal of services, or dismissed altogether. While I understand that every coach has their own style, and that discipline in training is a part of high-performance sport, I believe Todd’s conduct with regards to disciplinary action has been inconsistent, and therefore not in accordance with **section 11(b)** of the *Discrimination and Harassment Policy*, which reads:

Discipline in training is an indispensable part of high performance sport and should not be confused with discrimination or harassment. However it is of vital importance that those in authority:

b) Be consistent in corrective or punitive action without discrimination or harassment based on prohibitive grounds.

After the first 2 World Cup races of the 2017/18 season, I avoided all team video, not just at the Olympics, for the same thoughts and fears as I stated previously. As our new Head Coach I tried to work with Todd numerous times, give him opportunities to change because I was asked to by Sarah Storey and Chris Le Bihan, but it quickly became clear he wasn't fit to run the team or coach. I routinely did video privately with Stephan Bosch, away from the team and the other coaches. I didn't feel safe in the team environment that Todd had created, and removed myself whenever possible. All coaching staff were aware of this, through my verbal allegations as they occurred throughout the season, and allowed me to pull away temporarily with each incident. I was always told I had to communicate with Todd though as he made all the decisions.

The behaviour of Todd Hays, coupled with the failure on the part of Sarah Storey and Chris Le Bihan to take corrective action (all of which is outlined in the subsequent "Complaint" section), has taken a significant toll on me, both mentally and physically. Further, not only did this last for the duration of the season, but also it has continued to have an impact well into the post-season. Todd's abusive actions over the course of the season have made me feel disrespected, degraded, demoralized, worthless, unsafe, emotionally exhausted, and overwhelmed. Moreover, Sarah and Chris's failure to take corrective action with regard to Todd's actions left me feeling alone, unsupported, let down, and heartbroken. Ultimately, on July 8, 2018, I visited a doctor at Pure North and took the PHQ-9 (a tool used to screen, diagnose, monitor, and measure the severity of depression) and scored a 13. This test, coupled with the consultation with the doctor, resulted in

being diagnosed with Major Depressive Disorder. I was subsequently given 5-HTP (an amino acid that aids in serotonin production).

Not only have the emotional impacts led to depression; they have also manifested themselves physically, as my body was adversely reacting to the emotional and mental trauma I was subjected to from the beginning of the season. This began with headaches and escalated to migraines, which are accompanied by excruciating eye, neck, and jaw pain: I have had many, many sleepless nights. As the season progressed, and the symptoms worsened, my menstrual cycle became irregular, beginning in February 2018.

Complaint:

Head Coach **Todd Hays**' behaviour fits the definition of harassment as set out in **section 10** of the *Bobsleigh Canada Skeleton* (hereafter "BCS") *Discrimination and Harassment Policy*:

Harassment can take many forms but generally involves conduct, comment or display that is insulting, intimidating, humiliating, hurtful, demeaning, belittling, malicious, degrading or otherwise cause[s] offence, discomfort or personal humiliation or embarrassment to a person or a group of persons.

Specifically: **subsections (a)** "Hostile verbal and non-verbal communications"; and **(g)** "Acts of retaliation designed to punish an individual who has reported discrimination or harassment".

Todd Hays has also been seen in violation of one specific additional section of the *BCS Coaches Code of Conduct*, namely: "Refrain from the abuse of alcohol or tobacco when representing BCS".

Furthermore, in their failure to take appropriate action once they had become aware of the harassment, **Sarah Storey** (President, BCS) and **Chris Le Bihan** (High Performance Director, BCS) are in violation of **subsection 14(b)** “BCS participants should: Exercise good judgement and initiate appropriate action under this policy, if they become aware that discrimination or harassment may have occurred”.

Evidence:

Numerous incidents substantiate my claim of harassment and abuse:

- 1) During the Park City World Cup event (November 17-18, 2017), Todd lost his temper at a meeting about video review of team dynamics, and screamed at me in the presence of witnesses.
- 2) On December 6, I approached Todd at the top of the bobsleigh track about acquiring a pair of the team pants, and he “lost it” on me, saying it wasn’t his problem, even though I had specifically been told that it was Todd’s responsibility as Head Coach.
- 3) On December 13, in Igls, Austria during a World Cup event, I texted Todd about needing 60 minutes of massage rather than the 30 that massage therapist Jorg Patzer had said I was due. As Head Coach, only Todd could get me more time. I argued that my performance hinged on it. As a Canada 1 pilot, I held top rank. He took offence at my lack of concern for the needs of the other athletes, and told me I should get the massage from the women’s skeleton dedicated therapist, Marcin Goszczynski.

I felt I could get my point across better in person, so we met in the hotel bar. There were several witnesses, including people from the media and the International Bobsleigh & Skeleton Federation, and members of the USA bobsleigh team. It was clear by their body language and behaviours that they were able to hear our conversation.

I explained that I hadn't had a massage the week before, that I needed it, and that Marcin wanted to work on specific areas (my jaw and foot) and had asked that I request the additional time from Jorg. Todd began to raise his voice and say that I wasn't above the team, I didn't need more time. I said that in fact I held a higher rank than the rest of the team and that it wasn't personal, it was about performance.

The conversation became very heated. Other people were snickering and discussing us.

I felt at this point that I was fighting for my life, because the disagreement escalated very quickly to personal and professional attacks. Todd said: "you do not deserve all the support you get"; "you demand too much of the staff and your teammates, and it's unwarranted"; "you are not liked, respected, or trusted by your fellow teammates"; "you should be the leader that your country needs, and you are falling short of that, not living up to their expectations, or mine"; "I want you to be the picture of perfection personally and professionally, and you are far from that"; "I know what it takes to win, and your immature attitude clearly shows me you do not"; "you need to listen to me, and take my advice. I know what's best"; "you disappoint me"; "I see right through you, you are a bully"; "you should be lucky to get everything you have"; "you use your own personal coaches as a crutch"; "you need an attitude adjustment".

After over an hour of verbal insults attacking me personally and professionally in a public place with people watching, I began to cry out of frustration, hurt feelings, and astonishment at what he was saying. I said "I'm leaving" and went to a pizza restaurant where Sarah was eating dinner with Graham Richardson. I was crying and hysterical and asked to go home. They spent an hour listening to me recount what Todd had just said and done, and asked me what I needed in order to remain and perform. I said I wanted nothing to do with Todd ever again, and they said that wasn't possible because he was the Head Coach. I told them that I got yelled at every time I spoke to him, that there was no communication, respect or trust between us, and that if this is how he makes athletes feel by yelling demeaning things at them in a public setting, I couldn't be around him. They eventually agreed I would stay away from Todd for a while, and Graham offered to find a way to get me the 60-minute massage the next day.

I was an hour late for my appointment with Marcin and was still crying. I had therapy nearly every day for lockjaw and possible concussion symptoms. Marcin was a safe place for me. On numerous occasions, Chris had tried to make Marcin stop treating me. They traded threats of being fired and of quitting. I felt that BCS was trying to take Marcin away as a form of punishment.

- 4) On December 13, Todd approached me as I was drinking tea in the crowded hotel bar and rubbed my shoulder. I pulled away. We had the following exchange: "What, are you still mad at me?" "Yes." "For how long?" "I don't know." "Forever?" "No, but at least for a while." He replied "Well, I'm mad at you too" and walked away.

The following incident shows Todd Hays in violation of the *Coaches Code of Conduct*:

- 1) On February 2, during the Olympic opening ceremonies, I noticed Todd running up and down the aisles giving away free stuff to the Finnish team, which was a major distraction that occurred 5 times. Then he sat down and started yelling down at other team members and staff: “the view is better from up here”, “it’s fun”, and “are you seeing this shit?” It was apparent from his demeanour and behaviour that he had been drinking.

Failure on the part of BCS Participants to take corrective action:

- 1) On July 7, I received an email from Sarah inviting me to a meeting that would include Todd. I replied that I was not willing to speak to him, and clarified that on numerous occasions I had spoken with BCS leadership about his verbal and mental abuse, abuse of power, personal public embarrassment, and inappropriate behaviour with female athletes. In fact, I had met with Sarah for 7 hours on May 9 to debrief the season. I discussed all the incidents and explained my feelings, and Sarah agreed that I needed to seek professional help. This is when she mentioned “he’s not going anywhere; he’s the Head Coach so you’re going to have to find a way to deal with it”.

I understand that it was a casual and candid debriefing session, and felt that the level of professionalism was high, but cannot see how Sarah could have interpreted my words in any other way than as informing her about the abuse I had suffered. Sarah’s response blew me away because it made it seem like everything was my fault. I felt that I had nobody I could turn to and that I was going to be forced to work with an abuser.

- 2) I also asked Sarah why Todd had been let go from the USA team in 2014, and the response was that he had stepped down for personal reasons because he didn't get along with the other staff. On the contrary, I have heard from more than one source that he was fired for harassment, and that this was well known within the international bobsleigh community.
- 3) Additionally, I had mentioned during end-of-season debriefs that Todd had been drunk at the opening ceremonies, that he yelled at me when I asked questions, that he played favourites, and also the abuse in Igls. I related I felt unstable and never knew which version of Todd I would encounter, and that he was unsafe coaching female athletes, or any athletes for that matter. I said I never wanted to work with or speak to him again.
- 4) Furthermore, on December 14, I had texted Stuart McMillan that I would rather not see Todd because of his degrading behaviour, lack of communication, lack of help with problem-solving, and creation of a hostile environment, and Stu agreed to coach me himself. I know from the language I used in that text that Sarah and Chris were also aware of how I had been feeling throughout the entire season.
- 5) Even when I reminded her of our conversation at the restaurant in Igls, Sarah claimed not to have been aware of my allegations against Todd. I do not understand how BCS staff can get away with such claims in view of my repeated conversations on this matter.

Conclusion:

I believe Canadian sport, of which BCS is a part, should provide a safe, welcoming, and accessible sport environment, free of harassment and abuse, amongst other things. Anti-harassment initiatives

are clearly a priority in the Canadian Sport Policy, as NSOs, and even MSOs, are required to have a policy on abuse and harassment in place to meet federal funding requirements. Additionally, The International Olympic Committee (IOC) Medical Commission Expert Panel issued a *Consensus Statement on Sexual Harassment and Abuse in Sport* stating that:

In its role of promoting and protecting the health of the athlete, the IOC Medical Commission recognises all the rights of athletes, including the right to enjoy a safe and supportive sport environment. **It is in such conditions that athletes are most likely to flourish and optimise their sporting performance.** Sexual harassment and abuse are violations of human rights, regardless of cultural setting, that damage both individual and organisational health. While it is well known that sport offers significant potential for personal and social benefits, this potential is undermined where such problems occur. Sexual harassment and abuse occur worldwide. In sport, they give rise to suffering for athletes and others, and to legal, financial and moral liabilities for sport organisations. No sport is immune to these problems which occur at every performance level. Everyone in sport shares the responsibility to identify and prevent sexual harassment and abuse and to develop a culture of dignity, respect and safety in sport. **Sport organisations, in particular, are gatekeepers to safety and should demonstrate strong leadership in identifying and eradicating these practices. A healthy sport system that empowers athletes can contribute to the prevention of sexual harassment and abuse inside and outside sport.**

I am calling on BCS to be a model in this regard and empower not only me, but other BCS athletes, in helping eradicate this behaviour. I am simply asking for conditions in which we athletes are most likely to flourish and optimize our sporting performance. Moreover, I am calling on BCS to help prevent future instances of harassment and abuse, so that any changes made carry a long-standing impact. In fact, in hiring Todd Hays, Sarah and Chris - as members and representatives of

BCS - did not meet the duty that was reasonably owed to us athletes. BCS ought to have known of Todd's prior conduct and involvement/tainted relationship with the USA program, and I am curious to see what, if any, due diligence was conducted prior to Todd's hiring.

As a recent example, I wish to draw your attention to the recent firing of Athletics Canada's head coach, Peter Eriksson. Prior to this decision, AC conducted an extensive internal investigation that included both an anonymous online survey and more than 120 in-person or over-the-phone interviews with staff, provincial branch members, athletes, coaches, sponsors and other stakeholders. The review committee, tasked by the Board of Directors, was asked to use the results of the report to make recommendations to the Board. I believe BCS should follow in similar fashion with respect to its own organizational review.

Remedies sought:

As a result of the foregoing complaint, and pursuant to **section 17** of the *BCS Discrimination and Harassment Policy*, which states:

Employees, members, volunteers or registrants of BCS against whom a complaint of harassment is substantiated may be subject to discipline, according to the severity of the substantiated conduct, up to and including dismissal from employment, termination of membership or registration or a life time suspension from all bobsleigh/ skeleton activities depending on the nature of the conduct.

I am requesting that, upon substantiation of my complaint, each of the following: **Todd Hays,**

Sarah Storey, and **Chris LeBihan** be:

- 1) Immediately dismissed from their respective roles with BCS; and
- 2) Subject to life time suspensions which would preclude any sort of involvement in all BCS activities.

Layth Gafoor per Kaillie Humphries

Date

Kaillie Humphries

252111 2157 Drive West

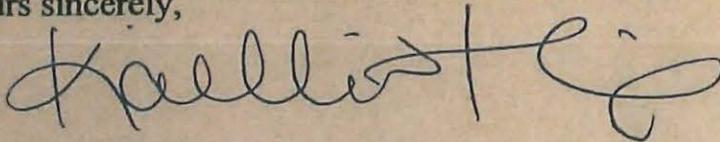
Foothills, AB T0L 1W2

August 7, 2018

To Whom it May Concern:

I, Kaillie Humphries, authorize Layth Gafoor of Lucentem Sports & Entertainment Law Professional Corporation to act as my agent with respect to all matters pertaining to my harassment complaint against Bobsleigh Canada Skeleton. Said authorization includes but is not limited to: submitting written materials; signing documents; etc.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Kaillie Humphries', written in a cursive style.

Kaillie Humphries

APPENDIX B

Terms of Reference for Investigation of a Complaint under BCS's Discrimination and Harassment Policy

September 3, 2018

1. Background

1.1. On Saturday, July 7th, 2018 in response to an email regarding a meeting around the upcoming National Team Camp, the BCS President and several members of staff and consultants received an email from the Complainant with allegations against a Respondent staff member of:

- a) "verbal and mental abuse";
 - b) "abuse of power";
 - c) "personal public embarrassment";
 - d) "Innapropriate [sic] behaviour between coach and female athletes";
- and

That BCS failed to:

- e) take seriously previous (verbal) reports of the behaviour listed above and as a result, failed to provide a "safe working environment" for the Complainant.

1.2. On Wednesday, August 22nd, 2018, the BCS President received an email with a formal Complaint from the Complainants Counsel.

1.3. The Board of Directors of BCS tasked (via formal motion and email voting) Stephen Norris and Cody Sorensen to oversee the process of the execution of the BCS Discrimination and Harassment Policy, such that an 'arms length/unbiased' examination of the circumstances concerning this complaint could be undertaken.

1. Investigation Objective & Scope

1.1. The investigation will investigate to determine whether there is any evidence to substantiate the allegations contained in the initial complaint (as amended, if applicable).

2. Investigation Team Composition

2.1. In accordance with its Discrimination and Harassment Policy, BCS has appointed Hill Advisory Services to investigate the complaint.

3. Methodology & Standards

- 3.1. The investigator will review all allegations and relevant documents.
- 3.2. The investigator will conduct the investigation in accordance with due process, giving each party sufficient information, an opportunity to be represented by a representative of their choice and the opportunity to give evidence.
- 3.3. The investigator will conduct interviews with the Complainant and Respondent as well as those persons identified in specific allegations or others deemed necessary as witnesses to events. Such interviews may be conducted via video-conferencing, in person or by whatever means the investigator deems appropriate.
- 3.4. The burden of proof, or the onus of proof, rests with the accuser.
- 3.5. The standard of proof required is a civil law principle based on the balance of probabilities, that is; by a preponderance of the evidence, can it be reasonably concluded that such allegations are founded.

1. Report

The investigator will prepare an investigative report that includes the findings of the investigation. Findings will be based on evidence and facts.

2. Variance

These terms of reference may be varied, as required, in order to ensure a robust investigation in accordance with the BCS DHP. If such variance should occur, BCS President or the Investigator shall inform the Parties.

APPENDIX C

HARASSMENT/DISCRIMINATION COMPLAINT – EVIDENCE COMPILATION

HUMPHRIES V HAYS HUMPHRIES V LEBIHAN HUMPHRIES V STOREY

Complainant: Ms Kaillie Humphries

Respondents: Mr Todd Hays
Mr Chris LeBihan
Ms Sarah Storey

TERMS OF REFERENCE:

This investigation was initiated as a result of a complaint submitted to Bobsleigh Canada Skeleton (BCS) by one of its members, Ms Kaillie Humphries. The request for investigation work was first received in August 2018. Counsel for Ms Humphries submitted a written complaint on August 22, 2018. An interview was held with Ms Humphries on March 8, April 13 and 17, 2019.

Mr Hays submitted a written response on September 27, 2018. An interview was held with Mr Hays on July 2, 2019.

Counsel for Mr LeBihan submitted a written response on December 4, 2018. An interview was held with Mr LeBihan on June 28, 2019.

Counsel for Ms Storey submitted a written response on December 4, 2018. An interview was held with Ms Storey on June 28, 2019.

The essence of Ms Humphries' complaint alleges that Mr Hays has harassed/discriminated against her by: verbally and mentally abusing her, shunning her, yelling at her, punishing her with a removal of services, screaming at her and intimidating her during a video review session, treating her differently than male athletes, "losing it" with her with respect to a question about snow pants, which included screaming at her, attacking her personally and professionally while raising his voice with respect to a conflict about massage time allotment, touching and rubbing her shoulder, which was unwelcome, favouring other athletes, and yelling at her during a conversation about favouritism.

The essence of Ms Humphries' complaint alleges that Mr LeBihan has harassed her by: failing to keep her safe from Mr Hays' verbal and mental abuse, trying to make a massage therapist stop treating her, which was a form of punishment, and falsely claiming he had not been made aware of concerns Ms Humphries had with Mr Hays.

The essence of Ms Humphries' complaint alleges that Ms Storey has harassed her by: failing to keep her safe from Mr Hays' verbal and mental abuse, telling her "he's not going anywhere" in reference to Mr Hays, after she had informed Ms Storey of her concerns, and falsely claiming she had not been made aware of concerns Ms Humphries had with Mr Hays.

To substantiate these allegations, Ms Humphries focused on incidents and the events surrounding them regarding Mr Hays, Mr LeBihan and Ms Storey. For the purposes of clarity and flow, Hill Advisory Services has chosen to represent the concerns categorized as follows:

1. Relationships and confidentiality
2. Opening/general statements
3. Lost temper/screaming
4. Track pants conflict
5. Conflict related to massage
6. Conflict reported
7. Frequency of yelling
8. Physical impact
9. Approach the next day/touch
10. Evidence confirmation
11. Withdrawal of massage
12. Protected grouping
13. Opening ceremonies/drunken
14. Meeting with Ms Storey
15. Previously reported incidents
16. End of season survey/debriefs
17. Ottawa May 2018/psychologist request
18. Impacts to health
19. Conflict in weight room - Fall 2017 (favouritism concerns)
20. Flirtation/favouritism
21. Previous allegations
22. Meeting with supports/decision to isolate from Mr Hays
23. Support tweet
24. Deny/diminish concerns raised

25. Responsibilities
26. Evidence confirmations
27. Conclusion statements

In accordance with the Principles of Natural Justice, Mr Hays, Mr LeBihan and Ms Storey were provided with a copy of Ms Humphries' complaint prior to being interviewed. In addition, a total of 5 witnesses were interviewed. One witness declined to participate in the investigation (Ms. Christine DeBruin). Re-direct interviews with Ms Humphries, Mr Hays, Mr LeBihan and Ms Storey were not required. Prior to the beginning of all interviews, all were told that the information provided by them during the interview was to be treated confidentially. This confidentiality would be protected within the confines of BCS' jurisdiction and in accordance to relevant Policies. Witnesses were told that any further action on behalf of Ms Humphries, Mr Hays, Mr LeBihan or Ms Storey that resulted in a review by a subsequent tribunal or adjudicating authority would not ensure protection of this confidentiality.

THE PRINCIPLES OF EVIDENCE:

These principles of evidence were followed throughout the investigative process:

1. The onus of proof, or the burden of proof rests with the complainant.
2. The standard of proof required is a civil law principle based on a balance of probabilities, that is: by a preponderance of the evidence, can it be reasonably concluded that such allegations are founded.
3. The corroboration of various events, either by witnesses or documentation is pertinent. The assertions of one party over another cannot be accepted as fact simply because that party says it is so.
4. The issue of credibility of witnesses themselves is pertinent. Since many cases may not have corroborative witnesses, some of the evidence may be on the determination of whom is most credible in their evidence.

BACKGROUND:

Ms Humphries has been in the Bobsleigh Canada Skeleton (BCS) organization since 2002. From 2007 until last season Ms Humphries was a pilot on a bobsleigh team. Ms Humphries was a world champion in 2012 and 2013 and an Olympic gold medalist in 2010 and 2014. Ms Humphries earned the bronze medal at the 2018 Olympics. Ms Humphries has achieved four or five crystal globe trophies; which is the World Cup title. From 2007 until currently there has only been one year that Ms Humphries has not been on the podium in the World Cup standings. In 2014 Ms Humphries received the Lou Marsh Award as top Canadian

athlete. Ms Humphries lobbied for inclusion and has participated in gender-neutral 4-man events, including being the only female to ever participate in a 4-man championship event.

Mr Todd Hays is a former bobsledder and Olympian. Mr Hays had the honour of representing the United States in three Olympic Games and earned an Olympic Silver Medal in 2002. Mr Hays began his coaching career in 2010 and was named head coach of the Canadian Bobsleigh Team in September 2017. Mr Hays has experienced great success as a coach with the athletes on the teams he had coached earning six Olympic medals, seven World Championship medals and 1 European Championship medal.

Mr Chris LeBihan is a High Performance Director with BCS.

Ms Sarah Storey is President of BCS and a member of the Board of Directors of BCS.

RELEVANT POLICY:

Discrimination: Any distinction, whether intentional or not but based on prohibited grounds, which has the effect of imposing burdens, obligations or disadvantages on an individual that are not imposed on others or has the effect of withholding or limiting access to opportunities, benefits and advantages to others.

Harassment: Harassment is a form of discrimination. Harassment is prohibited by the Canadian Charter of Rights and Freedoms and by human rights legislation in every province and territory of Canada. In its more extreme forms, harassment, in particular sexual harassment can be an offence under Canada's Criminal Code,

Definitions of Harassment

Harassment is improper behaviour related to one or more prohibited grounds that are offensive and which the person knew or ought to reasonably have known would be inappropriate or unwelcome. The behaviour can be verbal or physical and can occur on a one-time repeated or continuous basis. The person does not have to intend to harass for the behaviour to be harassment.

Harassment can take many forms but generally involves conduct, comment or display that is insulting, intimidating, humiliating, hurtful, demeaning, belittling, malicious, degrading or otherwise cause offence, discomfort or personal humiliation or embarrassment to a person or a group of persons.

COACHES CODE OF CONDUCT

Bobsleigh CANADA Skeleton is committed to the professionalism of coaching at all levels. The Association encourages all coaches, salaried or volunteer, who work with any member of BCS to be a member of the Coaches of Canada. Regardless of membership, all coaches, salaried or volunteer, working with any member of BCS will be bound by the Bobsleigh CANADA Skeleton Coaches Code of Conduct, and the Coaches of Canada Code of Conduct and the Code of Ethics. (www.coachesofcanada.com)

The athlete/coach relationship is a privileged one. Coaches play a critical role in the personal and athletic development of Bobsleigh and Skeleton athletes. They must understand and respect the inherent power that exists in the relationship and must be extremely careful not to abuse it. Coaches must also realize that they are conduits through which the values and goals of the Bobsleigh and Skeleton community in Canada are channelled. Thus, how an athlete regards Bobsleigh and Skeleton is dependent on the behaviour of the coach. The Coaches Code of Conduct has been developed to aid coaches in achieving a level of behaviour that will allow them to assist athletes in realizing personal goals and advance to the highest levels of competition in the sports of Bobsleigh and Skeleton.

Coaches shall use their best efforts to:

1. Treat everyone fairly in all aspects of their work regardless of gender, place of origin, color, sexual orientation, religion, political belief or economic status.
2. Direct comments or criticism at the performance rather than the athlete.
3. Consistently display high personal standards and project a favourable image of Bobsleigh and Skeleton and of coaching.
 - Refrain from public criticism of athletes or fellow coaches; especially when speaking to the media, recruiting athletes or at competitive events.
 - Refrain from the use of profane, insulting, harassing or offensive language in the conduct of his/her duties.
 - Refrain from the abuse of alcohol or tobacco when representing BCS.
4. Ensure that the activity being undertaken is suitable for the age, experience, ability and fitness level of the athletes.

5. Educate athletes as to their responsibilities in creating and maintaining safe participation in Bobsleigh and Skeleton. Ensure that all equipment is properly fitted, maintained and in good condition.
6. Recognize and accept when to refer athletes to other coaches or sport specialists. Allow athletes' goals to take precedence over their own.
7. Regularly seek ways of increasing professional development and self-awareness.
8. Treat opponents and officials with due respect, both in victory and defeat and encourage athletes to act accordingly. Actively encourage athletes to uphold the rules of Bobsleigh and Skeleton and the spirit of such rules.
9. Communicate and co-operate with the athlete's parents or legal guardians, involving them in management decisions pertaining to their child's development.
10. Be aware of the academic pressures placed on student-athletes and conduct practices and games in a manner so as to allow academic success.

Coaches shall also use their best efforts:

1. Ensure the safety of the athletes with whom they work.
2. At no time become intimately and/or sexually involved with their athletes.
3. Respect athlete's dignity; verbal or physical behaviours that constitute harassment or abuse are unacceptable.
4. Never advocate or condone the use of drugs or other banned performance enhancing substances.

Definition of Harassment:

Harassment takes many forms but can generally be defined as behaviour including comments and/ or conduct which is insulting, intimidating, humiliating, hurtful, malicious, degrading or otherwise offensive to an individual or groups or individuals or which creates an uncomfortable environment. The Bobsleigh CANADA Skeleton Discrimination and Harassment Policy may be found at <http://www.bobsleighcanadaskeleton.ca/PoliciesAndProcedures.aspx>.

Harassment may include:

- written or verbal abuse or threats;
- sexually oriented comments;
- racial or ethnic slurs;
- unwelcome remarks, jokes, innuendoes, or taunting about a person's body, attire, age, marital status, ethnic or racial origin, religion etc.;
- displaying of sexually explicit, racist or other offensive or derogatory material;
- sexual, racial, ethnic or religious graffiti;
- practical jokes which cause awkwardness or embarrassment, endanger a person's safety, or negatively affect performance;
- unwelcome sexual remarks, invitations or requests whether indirect or explicit, or intimidation;
- leering (suggestive staring), or other obscene or offensive gestures;
- condescension, paternalism or patronizing behaviour which undermines self-respect or adversely affects performance or working conditions;
- physical conduct such as touching, kissing, patting, pinching, etc.;
- vandalism;
- physical assault.

EVIDENCE SUBMITTED AND CONSIDERED:

- Initial information received from BCS
- Written submission received from Counsel for Ms Humphries
- Written submission received from Mr Hays
- Written submission received from Counsel for Mr LeBihan
- Written submission received from Counsel for Ms Storey
- All signed statements compiled by Hill Advisory Services Inc

THE SUMMARY:

1. Relationships and confidentiality

Witnesses stated they had a range of relationships with Ms Humphries, Mr Hays, Mr LeBihan and Ms Storey. No evidence was presented to indicate a confidentiality breach.

In the investigator's opinion there has been no breach to confidentiality in this case. In the investigator's opinion there is no evidence presented that would necessitate that the weight of a witness' evidence should be lowered.

2. Opening/general statements

The essence of Ms Humphries' complaint alleges that Mr Hays has harassed/discriminated against her by: verbally and mentally abusing her, shunning her, yelling at her, and punishing her with a removal of services.

The essence of Ms Humphries' complaint alleges that Mr LeBihan has harassed her by: failing to keep her safe from Mr Hays' verbal and mental abuse.

The essence of Ms Humphries' complaint alleges that Ms Storey has harassed her by: failing to keep her safe from Mr Hays' verbal and mental abuse.

Mr Hays denied the allegations.

Mr LeBihan denied the allegations.

Ms Storey denied the allegations.

One witness stated he knew of conflict between Ms Humphries and Mr Hays. The witness stated he tried to avoid Mr Hays.

In the investigator's opinion Ms Humphries presented generalized statements in this section of the report, without specific incidents to support them. The specific allegations will be dealt with in the relevant sections of this report.

3. Lost temper/screaming

The essence of Ms Humphries' complaint alleges that Mr Hays has harassed/discriminated against her by: screaming at her and intimidating her during a video review session, and treating her differently than male athletes.

Ms Humphries stated, "The situation was likely based on my sex given my knowledge of how male athletes have been treated drastically different than myself... Certainly, if Mr Hays has treated the male athletes differently, there is a basis for discrimination on the prohibited grounds."

Mr Hays denied the allegations.

None of the witnesses stated that Mr Hays yelled or was abusive during the meeting in question.

One of the witnesses stated that Mr Hays had raised his voice or yelled in general from a normal level of 2-3/10 to 7-8/10. The witness stated that Mr Hays could come across as intimidating due to his physical size. The witness stated he had witnessed Mr Hays lose his temper, in general.

Two witnesses stated they had never heard Mr Hays yell.

One witness stated she did not witness any expression of temper or abusive behaviour from Mr Hays, and that she did not find him intimidating.

One witness stated Ms Humphries and Mr Hays never saw eye to eye. The witness stated Ms Humphries was defensive and caustic in her responses to Mr Hays.

In the investigator's opinion the evidence has not substantiated that Mr Hays screamed at Ms Humphries and intimidated her during a video review session.

In the investigator's opinion Ms Humphries has not met her burden of proof with the allegation that Mr Hays treated her differently than male athletes with this issue. In the investigator's opinion Ms Humphries' rationale for this element of her complaint is theoretical, in that she indicated she felt the treatment was "likely based on my sex" and stated, "if" Mr Hays treated male athletes different in similar circumstances there would be a basis for a complaint of discrimination. In the investigator's opinion the evidence has not substantiated the allegation.

4. Track pants conflict

The essence of Ms Humphries' complaint alleges that Mr Hays has harassed/discriminated against her by: "losing it" with her with respect to a question about snow pants, which included screaming at her.

Mr Hays denied the allegations.

None of the witnesses stated they witnessed the conversation directly, although one witness stated he heard both Ms Humphries and Mr Hays were "shouting" at each other.

In the investigator's opinion the evidence has not substantiated that Mr Hays "lost it" with Ms Humphries with respect to a question about snow pants, which included screaming at her.

5. Conflict related to massage

The essence of Ms Humphries' complaint alleges that Mr Hays has harassed/discriminated against her by: attacking her personally and professionally while raising his voice with respect to a conflict about massage time allotment.

Mr Hays confirmed that Ms Humphries and he had a conversation regarding massage time, however he denied the allegations.

Two witnesses stated they knew there was conflict between Ms Humphries and Mr Hays with respect to massage time, though they did not recall the details.

In the investigator's opinion the evidence has not substantiated that Mr Hays attacked Ms Humphries personally and professionally while raising his voice with respect to a conflict about massage time allotment.

6. Conflict reported

Ms Humphries has not listed a specific allegation in this section with respect to one of the named respondents and the relevant policy. It is included as context.

The allegations that Mr LeBihan and Ms Storey knew about the conflicts with Mr Hays and failed to act will be addressed at point 15 of this report and at the conclusion.

7. Frequency of yelling

Ms Humphries has not listed a new, specific allegation in this section with respect to one of the named respondents and the relevant policy. It is included as context.

The allegations with respect to Mr Hays raising his voice and/or yelling at Ms Humphries are dealt with at section 3 of this report.

8. Physical impact

Ms Humphries has not listed a specific allegation in this section with respect to one of the named respondents and the relevant policy. It is included as context.

9. Approach the next day/touch

The essence of Ms Humphries' complaint alleges that Mr Hays has harassed/discriminated against her by: touching and rubbing her shoulder, which was unwelcome.

Mr Hays denied the allegations.

One witness stated Mr Hays was "always putting his arms around athletes to try and calm them down" and stated that Ms Humphries told him once that Mr Hays touched her in a way she did not like. The witness did not see the alleged event.

In the investigator's opinion the evidence does not substantiate the allegation that Mr Hays touched Ms Humphries and rubbed her shoulder, which was unwelcome.

10. Evidence confirmation

Ms Humphries has not listed a specific allegation in this section with respect to one of the named respondents and the relevant policy. It is included as context.

11. Withdrawal of massage

The essence of Ms Humphries' complaint alleges that Mr LeBihan has harassed her by: trying to make a massage therapist stop treating her, which was a form of punishment.

Mr LeBihan denied the allegations.

One witness stated he did not recall telling Ms Humphries that "someone threatened him if he did not stop treating her". The witness submitted an email to Mr LeBihan that he wrote which reflected his recollection of the relevant events. The email did not refer to being told to stop treating Ms Humphries.

In the investigator's opinion the evidence has not substantiated that Mr LeBihan tried to make a massage therapist stop treating her as a form of punishment.

12. Protected grouping

Ms Humphries has not listed a new, specific allegation in this section with respect to one of the named respondents and the relevant policy. It is included as context.

13. Opening ceremonies/drank

Ms Humphries alleged that Mr Hays was intoxicated and behaved contrary to the Coaches' Code of Conduct during the opening ceremonies of the PyeongChang Olympic games.

Mr Hays denied the allegations.

Ms Storey stated she spoke to witnesses present and found "there was no merit to these allegations."

In the investigator's opinion Ms Humphries did not present an allegation related to the BCS harassment policy. In the investigator's opinion the evidence substantiates that Ms Humphries brought concerns related to Mr Hays and a potential breach to the Code of Conduct to the attention of BCS and BCS conducted some enquiry related to the allegation and deemed there was no foundation to the complaint. In the investigator's opinion this issue is outside the scope of this investigation.

14. Meeting with Ms Storey

The essence of Ms Humphries' complaint alleges that Ms Storey has harassed her by: telling her "he's not going anywhere" in reference to Mr Hays, after she had informed Ms Storey of her concerns.

In a written submission Counsel for Ms Storey stated she had been made aware of the conflict between Ms Humphries and Mr Hays however, "...at no time in her communications with Storey did Humphries make any allegations or set out any facts suggesting improper conduct that would amount to discrimination or harassment or breach of BCS policies. Until her Complaint at issue, Humphries had never reported instances of harassment or discrimination on the part of Hays."

Mr LeBihan stated he had multiple conversations with Ms Humphries throughout the 2017-18 off-season and competitive season, including in person meetings and many email correspondences "...but not once was she specific about having any concerns with Mr Hays during our verbal or written communications."

In a follow-up interview Ms Humphries stated, "...she told Ms Storey and Mr LeBihan that she felt unsafe around Mr Hays, that he was very confrontational, that he conducted personal attacks against her, and that he treated her differently than others. Ms Humphries stated she told them that Mr Hays was trying to tell her how to think and feel. Ms Humphries stated she did not use the words "harassment" or "discrimination" but she felt that she did a good job, throughout the season, of telling Ms. Storey how she was being abused mentally.

It is the investigator's opinion that the evidence substantiated that Ms Humphries expressed concerns and spoke about conflict with Mr Hays with Ms Storey and others. In the investigator's opinion the evidence has not substantiated that Ms Humphries stated she was being harassed by Mr Hays or that he was discriminating against her, within the context of the BCS policies.

In the investigator's opinion the evidence in this report does not substantiate that the only logical and reasonable conclusion Mr LeBihan and Ms Storey could have come to (given the information regarding conflict shared with them) was that there was a potential complaint being made with respect to the relevant policies.

15. Previously reported incidents

The essence of Ms Humphries' complaint alleges that Mr LeBihan has harassed her by: falsely claiming he had not been made aware of concerns Ms Humphries had with Mr Hays.

The essence of Ms Humphries' complaint alleges that Ms Storey has harassed her by: falsely claiming she had not been made aware of concerns Ms Humphries had with Mr Hays.

In a written submission Counsel for Ms Storey stated, "...anonymous surveys and interviews with staff and athlete members that Storey personally conducted in her capacity as President of BCS revealed no allegations of harassing, discriminatory or abusive behaviour on the part of Hays."

In a written submission Counsel for Ms Storey stated, "The Complainant made numerous wild allegations against Hays, including allegations of inebriety, favoritism, and prior impropriety. Storey investigated each of these allegations and concluded that they were unsubstantiated."

In a written submission Counsel for Mr Le Bihan stated, "At all times, Le Bihan exercised good judgment and acted in the best interests of Humphries. Humphries cannot impute knowledge to Le Bihan, having never brought her complaints to his attention or alleged any facts establishing or implying harassment or discrimination. Therefore, it follows that Humphries cannot fault Le Bihan for failing to initiate any responsive action under the Policy."

Ms Humphries stated she believed that the information she gave Ms Storey and Mr LeBihan would have allowed them to reasonably come to the conclusion that she was being

harassed or discriminated against, even though she did not use those specific words. Ms Humphries stated at no point did BCS point her to the relevant policies or procedures. Ms Humphries stated she was only pointed to them after the fact. Ms Humphries stated, "It was their job to inform me of the policy and procedure and they failed to do so. My complaint was only taken seriously because the BCS leadership would be held accountable by the other people that I included when I filed my complaints. They could not sweep it under the rug, like they had done with other complaints."

In the investigator's opinion the evidence does substantiate that Ms Humphries had concerns related to her interactions with Mr Hays and that she shared that information with the leadership of BCS, including Mr LeBihan and Ms Storey. It is noted that evidence was presented that Ms Storey took action upon hearing of a number of concerns that Ms Humphries had, and that she found that a number of the concerns did not have merit.

In the investigator's opinion the evidence in this report does not substantiate that the only logical and reasonable conclusion Mr LeBihan and Ms Storey could have come to (given the information regarding conflict shared with them) was that there was a potential complaint being made with respect to the relevant policies. It is noted that conflict can and does occur in many workplaces, and is satisfactorily resolved, without the use of a formal complaint or investigation. In the investigator's opinion the burden of filing a formal complaint therefore, belongs rightfully and reasonably with the complainant (in this case Ms Humphries) and not with Ms Storey, Mr LeBihan or any others.

16. End of season survey/debriefs

Ms Humphries has not listed a new, specific allegation in this section with respect to one of the named respondents and the relevant policy. It is included as context.

17. Ottawa May 2018/psychologist request

Ms Humphries has not listed a new, specific allegation in this section with respect to one of the named respondents and the relevant policy. It is included as context.

18. Impacts to health

Ms Humphries has not listed a new, specific allegation in this section with respect to one of the named respondents and the relevant policy. It is included as context.

19. Conflict in weight room - Fall 2017 (favouritism concerns)

The essence of Ms Humphries' complaint alleges that Mr Hays has harassed/discriminated against her by: yelling at her during a conversation about favouritism.

Mr Hays denied the allegations.

One witness stated he saw Ms Humphries and Mr Hays having a "long conversation" and that "at some point she was crying" but he was not paying strict attention and did not overhear their conversation.

One witness indicated in this report that Mr Hays did raise his voice in general.

Two witnesses stated in this report that they had never heard Mr Hays yell.

In the investigator's opinion the evidence has not substantiated that Mr Hays yelled at Ms Humphries during a conversation about favouritism.

20. Flirtation/favouritism

The essence of Ms Humphries' complaint alleges that Mr Hays has harassed/discriminated against her by: favouring other athletes.

Mr Hays denied the allegations.

In the investigator's opinion Ms Humphries has not met her burden of proof with the allegation relating to favouritism, specifically, how any examples of treatment that was not equal could have been a potential breach to the relevant policies.

21. Previous allegations

Ms Humphries has not listed a new, specific allegation in this section with respect to one of the named respondents and the relevant policy. It is included as context.

22. Meeting with supports/decision to isolate from Mr Hays

Ms Humphries has not listed a new, specific allegation in this section with respect to one of the named respondents and the relevant policy. It is included as context.

23. Support tweet

Ms Humphries has not listed a new, specific allegation in this section with respect to one of the named respondents and the relevant policy. It is included as context.

24. Deny/diminish concerns raised

Ms Humphries has not listed a new, specific allegation in this section with respect to one of the named respondents and the relevant policy. It is included as context.

25. Responsibilities

Ms Humphries has not listed a new, specific allegation in this section with respect to one of the named respondents and the relevant policy. It is included as context.

26. Evidence confirmations

Ms Humphries has not listed a new, specific allegation in this section with respect to one of the named respondents and the relevant policy. It is included as context.

27. Conclusion statements

Ms Humphries has not listed a new, specific allegation in this section with respect to one of the named respondents and the relevant policy. It is included as context.

CONCLUSION:

In the investigator's opinion the evidence **has not substantiated** that Mr Hays: screamed at Ms Humphries and intimidated her during a video review session, treated her differently than male athletes, "lost it" with Ms Humphries with respect to a question about snow pants, which included screaming at her, attacked Ms Humphries personally and professionally while raising his voice with respect to a conflict about massage time allotment, touched Ms Humphries and rubbed her shoulder, which was unwelcome, or yelled at Ms Humphries during a conversation about favouritism.

In the investigator's opinion the evidence **has not substantiated** that Mr LeBihan: tried to make a massage therapist stop treating her as a form of punishment.

In the investigator's opinion the following elements are **outside the scope** of this investigation: concerns related to Mr Hays and a potential Code of Conduct breach - section # 13 of this report.

In the investigator's opinion Ms Humphries has **failed to meet her burden of proof** with respect to the following elements of this investigation: that Mr Hays treated her differently than male athletes - section # 3, and the allegations relating to favouritism - section #20.

In the investigator's opinion the evidence **substantiated** that Ms Humphries expressed concerns and spoke about conflict with Mr Hays with Ms Storey, Mr LeBihan and others, however, in the investigator's opinion the evidence **has not substantiated** that Ms Humphries stated she was being harassed by Mr Hays or that he was discriminating against her, within the context of the BCS policies.

In the investigator's opinion the evidence in this report **does not substantiate** that the only logical and reasonable conclusion Mr LeBihan and Ms Storey could have come to (given the information regarding conflict shared with them) was that there was a potential complaint being made with respect to the relevant policies.

It is noted that evidence was presented that Ms Storey took action upon hearing of a number of concerns that Ms Humphries had, and that she found that a number of the concerns did not have merit.

It is noted that conflict can and does occur in many workplaces, and is satisfactorily resolved, without the use of a formal complaint or investigation. In the investigator's opinion the burden of filing a formal complaint therefore, belongs rightfully and reasonably with the complainant (in this case Ms Humphries) and not with Ms Storey, Mr LeBihan or any others.

In the investigator's opinion there has been no breach to relevant policy.

**HILL ADVISORY SERVICES INC
12 SEPTEMBER 2019**

APPENDIX D



Discrimination and Harassment Policy

Preamble

1. Bobsleigh CANADA Skeleton (BCS) is committed to creating and maintaining a sport and work environment in which all individuals are treated with respect and dignity. Each individual has the right to participate and work in an environment that promotes equal opportunities and prohibits discriminatory practices.

Aim

2. BCS is committed to providing an environment free of discrimination and harassment on the basis of race, nationality or ethnic origin, colour, religion, sex, sexual orientation, marital status, family status or disability.

General Policy

3. In keeping with this policy, BCS encourages the reporting of all incidents of harassment regardless of who the harasser may be and is committed to a process that is widely published in the bobsleigh/ skeleton community, available to all participants and easy to follow and implement.
4. Notwithstanding this policy, any person who experiences harassment continues to have the right to seek assistance from the provincial human rights commission.
5. Participants: This policy applies to all persons engaged in any volunteer or paid capacity with the Association or otherwise under the jurisdiction of the Association. Participants include athletes, coaches, support personnel, officials, employees, directors, members and volunteers.
6. Person in Authority: A person in authority is any BCS participant in a position of authority over, or trusted by a person who may be experiencing discrimination or harassment, and can include such persons as team leaders, coaches, trainers, medical or paramedical personnel, volunteers and supervisors.
7. Discrimination: Any distinction, whether intentional or not but based on prohibited grounds, which has the effect of imposing burdens, obligations or disadvantages on an individual that are not imposed on others or has the effect of withholding or limiting access to opportunities, benefits and advantages to others.
8. Harassment: Harassment is a form of discrimination. Harassment is prohibited by the *Canadian Charter of Rights and Freedoms* and by human rights legislation in every province and territory of Canada. In its more extreme forms, harassment, in particular sexual harassment can be an offence under Canada's *Criminal Code*,



Definitions of Harassment

9. Harassment is improper behaviour related to one or more prohibited grounds that are offensive and which the person knew or ought to reasonably have known would be inappropriate or unwelcome. The behaviour can be verbal or physical and can occur on a one-time repeated or continuous basis. The person does not have to intend to harass for the behaviour to be harassment.
10. Harassment can take many forms but generally involves conduct, comment or display that is insulting, intimidating, humiliating, hurtful, demeaning, belittling, malicious, degrading or otherwise cause offence, discomfort or personal humiliation or embarrassment to a person or a group of persons.

Examples of harassment include:

- a. Hostile verbal and non-verbal communications;
 - b. Unwelcome remarks, jokes, innuendo or teasing linked to a prohibited grounds such as a person's looks, body, attire, race, age, religion, sex or sexual orientation;
 - c. Condescending, paternalistic or patronizing behaviour linked to prohibited grounds of discrimination which undermines self-esteem, diminishes performance or adversely affects working conditions;
 - d. Practical jokes that cause awkwardness or embarrassment, endanger a person's safety or negatively affects performance;
 - e. Any form of hazing;
 - f. Use of terminology that reinforces stereotypes based on prohibited grounds of discrimination
 - g. Acts of retaliation designed to punish an individual who has reported discrimination or harassment;
 - h. Threats of retaliation designed to dissuade an individual from reporting discrimination or harassment;
 - i. Racial or ethnic slurs.
11. Discipline in training is an indispensable part of high performance sport and should not be confused with discrimination or harassment. However it is of vital importance that those in authority:
 - a. Set and communicate non-discriminatory performance standards, selection criteria, rules and regulations to all participants;
 - b. Be consistent in corrective or punitive action without discrimination or harassment based on prohibitive grounds;
 - c. Use non-discriminatory terminology;
 - d. Address individuals by names and avoid the use of derogatory slang or offensive terms.



12. In this policy sexual harassment means unwelcome sexual remarks or advances, requests for sexual favours or other verbal or physical conduct of a sexual nature when:
 - a. Submitting to or rejecting the conduct is used as the basis for making decisions which affect the individual;
 - b. Refusal to comply with a sexual-oriented request results in actual denial of an opportunity, or an expressed or implied threat of denial of opportunity for such refusal;
 - c. Such conduct has the purpose or effect of interfering with an individual's performance;
 - d. Such conduct creates an intimidating, hostile or offensive environment.

13. Sexual harassment may occur in the form of such conduct by males toward females, between males, between females or by females towards males. Some examples of behaviour which may be sexual harassment include:
 - a. Sexually degrading words to describe a person;
 - b. Criminal conduct such as stalking and physical or sexual assault or abuse;
 - c. The display of visual material which is offensive;
 - d. Unwelcome sexual flirtations, sexual remarks, advances, requests or invitations whether direct or explicit;
 - e. Unwanted inquiries or comments about an individual's sex life or sexual orientation;
 - f. Derogatory or degrading remarks about a person's sexuality or sexual orientation.

Responsibilities of the People in Charge

14. Prevention and intervention are key to achieving a sport and work environment free of discrimination and harassment. The BCS must represent a positive role model. BCS participants should:
 - a. Communicate the BCS's objective to create and maintain a sport and work environment free of harassment and discrimination and with a view to discouraging harassment;
 - b. Exercise good judgment and initiate appropriate action under this policy, if they become aware that discrimination or harassment may have occurred;
 - c. Follow-up consultation with BCS management if discrimination or harassment is suspected or rumoured, appreciating that individuals who experience discrimination or harassment are often reluctant to report it.

15. The Executive, Board Members, the Managing Director are expected to contribute positively to the development of an environment in which harassment does not occur.

The Executive Committee is responsible for:

- a. Ensuring that investigation of formal complaints of harassment is conducted in a sensitive, responsible and timely manner;



- b. Imposing appropriate disciplinary or corrective measures when a complaint of harassment has been substantiated, regardless of the position or authority of the offender;
- c. Supporting and assisting any employee or member of the BCS who experiences harassment by someone who is not an employee or member of the BCS;
- d. Ensuring that this policy is posted on the web-site and the information is contained in a Handbook;
- e. Appointing case review panels and appeal bodies and providing the resources and support they need to fulfill their responsibilities under this policy;
- f. Maintaining records as required under this policy.

Coach/ Athlete Sexual Relations

16. BCS takes the view that intimate sexual relations between coaches and adult athletes, while not against the law, can have harmful effects on the individual athlete involved, on other athletes and coaches and on BCS's public image.

BCS therefore takes the position that such relationships are unacceptable for coaches coaching or assisting in any way with a BCS National or Development Team. Should a sexual relationship develop between an athlete and a coach, BCS will investigate, in accordance with this policy and take action, where appropriate which could include reassignment or if this is not feasible or appropriate, a request for resignation or dismissal from employment.

Disciplinary Action

17. Employees, members, volunteers or registrants of BCS against whom a complaint of harassment is substantiated may be subject to discipline, according to the severity of the substantiated conduct, up to and including dismissal from employment, termination of membership or registration or a life time suspension from all bobsleigh/ skeleton activities depending on the nature of the conduct.

Confidentiality

18. BCS understands that it can be extremely difficult to come forward with a complaint of harassment and that it can be devastating to be wrongly accused of harassment. BCS recognizes the interests of both the complainant and the respondent and, to the extent practicable and appropriate under the circumstances will maintain confidentiality through the process. However, if required by law to disclose information, BCS will do so.

Complaint Procedures

19. For the purpose of this section of the policy a person who experiences discrimination or harassment is referred to as the "*complainant*" even where no formal complaint is filed.
20. All Bobsleigh CANADA Skeleton participants are encouraged to report suspected discrimination or harassment. Such reports may be made to the Managing Director or the President or to any other person in authority. All such reports shall be brought promptly to the attention of the Managing Director or the President by whoever receives the report.



Assistance to Complainants

21. A complainant may request the assistance of the Managing Director in understanding these policy guidelines. The Managing Director shall inform the complainant of:
 - a. The options to pursue an informal resolution of his/ her complaint;
 - b. The right to make a formal written complaint under this policy when an informal resolution is inappropriate or not feasible;
 - c. The availability of support provided by BCS;
 - d. The confidentiality provisions of this policy;
 - e. The right to be represented by a person of choice at any stage in the complaint process including legal counsel at the complainant's own expense;
 - f. The right to withdraw from any further action in connection with the complaint at any stage (even though BCS might continue to investigate the complaint);
 - g. Other avenues including the right to file a complaint with a human rights commission or where appropriate, to contact the police to have them lay a formal charge under the Criminal Code.

The Complaint

22. Although anyone may report discrimination or harassment, only persons affected by the alleged discrimination or harassment or by the President on behalf of Bobsleigh CANADA Skeleton may make a complaint.
23. A complaint shall be in writing and signed by the complainant or by the President if the complaint is brought on behalf of Bobsleigh CANADA Skeleton or to any other member of the Executive Committee of BCS if the complaint involves the President.
24. The complaint should include particulars of the discrimination or harassment, including details of the incident or incidents, including dates, times, locations, description of action, account of dialogue, the name of the perpetrator(s) and any witnesses or names of other individuals who may also have experienced discrimination or harassment. The complaint should detail any corrective action taken to date.
25. The parties to a complaint are Bobsleigh CANADA Skeleton, the respondent(s) and the complainant(s).

Processing the Complaint

26. The person responsible for processing the complaint (hereinafter the "*Bobsleigh CANADA Skeleton Official*") shall be the President of Bobsleigh CANADA Skeleton, or where a complaint involves conduct by the President, an alternate appointed by BCS Executive Committee.



27. The President (or alternate) may delegate part or all of the President's (or alternate's) responsibilities under these guidelines except to a person against whom the complaint has been made.

Complaint Investigation

28. The Bobsleigh CANADA Skeleton Official may decide not to deal with a complaint:
 - a. If in the opinion of the Bobsleigh CANADA Skeleton Official the facts alleged in the complaint would be insufficient, if proven, to establish discrimination or harassment under the Bobsleigh CANADA Skeleton Policy or
 - b. If in the opinion of the Bobsleigh CANADA Skeleton Official, the investigation of the complaint would not advance the purpose of the Bobsleigh CANADA Skeleton Policy in the circumstances, because of a significant delay between the alleged events and the time of the complaint.
29. In all other cases the Bobsleigh CANADA Skeleton Official shall investigate the complaint or appoint and provide terms of reference to an investigator who shall investigate the complaint and make findings of fact.
30. Before the investigation begins Bobsleigh CANADA Skeleton Official shall advise each respondent of the complaint and shall provide each complainant and respondent a copy of the written complaint, the Bobsleigh CANADA Skeleton Policy and these guidelines, and the investigation terms of reference, if any.
31. Before the investigation report is issued, each respondent shall have a reasonable opportunity to respond to the allegations. If a respondent declines to do so, or does not respond within the time frame provided, the investigator's report may nonetheless be issued.
32. All participants, including the respondent's must cooperate fully in any investigation under these guidelines.
33. The Bobsleigh CANADA Skeleton Official may consult with the investigator during the course of the investigation, may review the investigation report in draft and may provide additional terms of reference to, or request clarification from the investigator.

Assistance to Respondents

34. A respondent may request assistance of Bobsleigh CANADA Skeleton in understanding these guidelines. Bobsleigh CANADA Skeleton shall refer the respondent to counseling upon request, costs will be incurred by the respondent, and may explore the possibility of alternative forms of dispute resolution with the respondent.
35. Should a respondent choose to retain legal counsel at any stage of a complaint or appeal, it shall be at the respondent's own expense.



Determination Following Investigation

1. The Bobsleigh CANADA Skeleton Official shall determine whether discrimination or harassment has been established in light of the findings of fact contained in the investigation report and if so, the nature and particulars of the discrimination or harassment.

Settlement

2. A complaint may be settled at any stage. A resolution agreement should be in writing and signed by all parties.

Mediation

3. Bobsleigh CANADA Skeleton may provide a mediator, if the Bobsleigh CANADA Skeleton Official views mediation as appropriate and if the complainant and respondent are willing to enter a mediation agreement.

Disciplinary Sanctions

4. When determining appropriate disciplinary action and corrective measures the Bobsleigh CANADA Skeleton Official may consider factors including, but not limited to:
 - a. The nature of the discrimination or harassment;
 - b. Whether the harassment involved any physical contact;
 - c. Whether the discrimination or harassment was an isolated incident or part of an ongoing pattern;
 - d. The nature of the relationship between the complainant and the respondent;
 - e. Whether the respondent has been involved in previous discrimination or harassment incidents;
 - f. Whether the respondent admitted responsibility;
 - g. Whether the respondent retaliated against the complainant.
5. In recommending disciplinary sanctions the Bobsleigh CANADA Skeleton Official may consider the following options, singly or in combination, depending on the severity of the harassment:
 - a. A verbal apology;
 - b. A written apology;
 - c. A fine or levy;
 - d. Removal of certain privileges of membership or employment;
 - e. Temporary suspension with or without pay;
 - f. Termination of employment or contract; or
 - g. Expulsion from membership; or
 - h. Any other remedy as may be appropriate.
 - i. Within seven (7) days of receipt of the report from the Bobsleigh CANADA Skeleton Official, the Executive Committee shall consider the recommendations of the Bobsleigh CANADA Skeleton Official and make a decision as to the appropriate sanction that shall be contained in the final report.



- j. The complainant will be informed of the outcome of the proceedings and of any discipline or other action taken by the Executive Committee

Grounds for Appeal by Respondent(s)

- a. A respondent(s) may appeal to the Executive Committee, the Bobsleigh CANADA Skeleton Official's determination only on the following grounds:
 - i. That the investigation was conducted in an unfair or biased manner contrary to the rules of natural justice;
 - ii. That the findings of fact contained in the investigation report are insufficient to support a determination that discrimination or harassment has been established.
- b. In an appeal by the respondent, the complainant shall be entitled to participate.
- c. There shall be no appeal from any finding of fact contained in the investigation report.

Grounds for Appeal by Complainants

- a. A complainant may appeal to the Executive Committee, the Bobsleigh CANADA Skeleton Official's determination only on the following grounds:
 - i. That the investigation was conducted in an unfair or biased manner contrary to the rules of natural justice;
 - ii. That the findings of fact contained in the investigation report ought to have resulted in a determination that discrimination or harassment has been established.
- b. In an appeal by the respondent, the complainant shall be entitled to participate.
- c. If the complainant is not satisfied with the outcome of the investigation or appeal, the complainant will be reminded of the continuing right to file a complaint with the provincial Human Rights Commission.

Notice of Appeal

- a. The notice of appeal must be made in writing to Bobsleigh CANADA Skeleton within fourteen (14) days of the appellant receiving notice of the Bobsleigh CANADA Skeleton's decision with respect to sanctions, and must state the specific grounds for the appeal.
- b. A copy of the notice of appeal shall be promptly provided to the President of Bobsleigh CANADA Skeleton, if they are not involved as a participant in the case and the Bobsleigh CANADA Skeleton Official involved with the case and to every person entitled to participate as a respondent to the appeal.
- c. No member of the Executive Committee or the Board of Directors who had any involvement in the complaint or who otherwise is in conflict of interest, shall participate in the deliberations or decisions in the appeal.
- d. The Appeal will be heard in compliance with the Bobsleigh CANADA Skeleton Appeal Policy.



- e. The Appeal Committee shall present its findings in a report to the Executive Committee within ten (10) days.
- f. The Executive Committee shall have the right to accept, reject or vary the recommendations of the Appeal Committee and issue a written report that shall be the final decision of BCS.
- g. A copy of the written report shall be provided, without delay to the complainant and respondent and shall be retained in the files together with the Bobsleigh CANADA Skeleton Official's report and documentation.

Confidentiality

56. To the extent possible, reports, complaints, witness statements and other documents produced under these guidelines shall be held in confidence by Bobsleigh CANADA Skeleton. However Bobsleigh CANADA Skeleton may make no absolute guarantees of confidentiality. Circumstances in which information may be shared include:

- a. When criminal conduct may be involved;
- b. When It is felt to be necessary to protect others from harassment or discrimination;
- c. When required to ensure fairness or natural justices in the procedures contemplated by these guidelines;
- d. In the course of an investigation by a law enforcement agency;
- e. To protect the interests of Bobsleigh CANADA Skeleton;
- f. When required by law.